AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

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James D. McLaughlin
Director
Regulatory & Trust Affairs
Phone: 202-663-5324
Fax: 202-828-4548
jmclaugh@aba.com

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VIA E-MAIL

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room, Mailstop 1-5
Washington, D.C. 20219
Docket No. 03-16

Re: Proposal to Amend 12 CFR Parts 7 and 34
Applicability of State Laws to National Banks
68 *Federal Register* 46119, July 31, 2003

Dear Sir or Madam:

The American Bankers Association ("ABA")[1] is responding to the proposal of the Office of the Comptroller of the Currency ("OCC") to amend Parts 7 and 34 of its rules to (1) clarify the types of state laws that apply to a national bank's substantive lending and deposit-taking activities, and (2) establish a standard for lending (both real estate and non-real estate) that would prohibit reliance predominantly on the foreclosure value of the borrower's collateral, rather than the borrower's repayment ability.

The proposal is part of OCC's efforts to clarify for national banks, particularly those with customers in multiple states, the extent to which state laws, and in particular, predatory lending laws, apply to their lending and deposit-taking activities. According to the proposal, without further clarification national banks "face uncertain compliance risks, and substantial additional compliance burdens and expense that materially impact their ability to offer particular products and services." ABA strongly supports the proposal because we believe that as national banks extend their operations to more and more states, the requirements imposed by a plethora of differing state laws impose substantial burdens on their ability to engage in their federally authorized activities.

[1] The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

Although some state organizations have characterized OCC's proposal as preempting virtually all state banking and financial services laws for national banks and their operating subsidiaries, the proposal would have this effect only with respect to national bank ***real estate lending activities***, which would remain subject to vigorous oversight and enforcement by OCC. By contrast, the application of state law to all other national bank activities would remain subject to traditional preemption conflicts analysis as most recently enunciated by the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson.*[2] In addition, all non-real estate lending activities would remain subject to the notice and comment process under Section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[3] for state laws regarding community reinvestment, consumer protection, fair lending, and the establishment of intrastate branches.[4]

ABA POSITION

ABA strongly urges OCC to adopt a final rule that states expressly that federal law occupies the entire field of national bank real estate lending, pursuant to its statutory authority under 12 U.S.C. § 371. Concerns have been raised that field preemption would eliminate for consumers state law protections against predatory lending practices by national banks and their operating subsidiaries. First, OCC's proposal would impose a high standard of ethical dealing for all lending by national banks and their operating subsidiaries. Second, there has been little demonstration that national banks or their operating subsidiaries are, in fact, engaged in such practices. Rather, even the State Attorneys General have conceded that "predatory lending abuses are largely confined to the subprime mortgage lending market and non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries."[5]

Moreover, concerns have also been raised that OCC will not be able to enforce its new standard because it lacks the resources available to the states. This argument is without merit because, as stated above, national banks and their operating subsidiaries have not demonstrably engaged in predatory lending practices. Currently, OCC employs approximately 1,900 examiners to cover 2,100 national banks, with the largest institutions having their own in-house examiners. Surely, this level of staff is sufficient to uncover predatory lending practices, especially in a group of institutions that are not alleged to be engaging in such practices.

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[2] 517 U.S. 25 (1996).
[3] Pub. L. 103-328, 108 Stat. 2338 (1994).
[4] 12 U.S.C. § 36(f).
[5] Brief for Amicus Curiae State Attorneys General, *National Home Equity Mortgage Association v. OTS,* Civil Action No. 02-2506 (GK) (D.D.C. 2003) at 10-11.

ABA believes that consumers are best served by preserving national standards for real estate lending by national banks, coupled with vigorous enforcement of fair dealing and high ethical standards for national bank lending relationships with consumers. OCC's actions will, we believe, ensure both that home loans remain available to low-income consumers and that national banks and their operating subsidiaries do not engage in predatory or unfair and deceptive practices.

ABA further supports OCC's efforts to clarify the types of state laws that courts have determined to be preempted with respect to national bank deposit-taking and non-real estate lending activities. The burden of complying with differing state laws increases constantly and cannot be viewed as anything less than significant interference with national banks' federally authorized activities. The proposal will remove the legal uncertainty generated each time a state legislature acts, and each time a national bank considers whether or not to do business in another state.

PROPOSED AMENDMENTS

1. Application of State Law to National Bank Lending and Deposit-Taking Activities

Real estate lending activities. With respect to national banks' real estate lending activities, the proposal first seeks comment on two alternatives to amend Part 34, either to:

1. Expand to fourteen types, the current list of five types of state laws that are expressly preempted under 12 C.F.R. § 34.4(a); *or*
2. Expressly state that federal law occupies the entire field of national bank real estate lending, pursuant to OCC's statutory authority under 12 U.S.C. § 371.

In addition, the proposal would also explicitly add a list of the types of state laws that generally are not preempted because they do not impact the substance of a national bank's real estate lending business. Those laws are: contracts, torts, criminal, certain homestead laws, debt collection, acquisition and transfer or real property,[6] taxation, and zoning.

All other national bank activities. The proposal would add three new sections to 12 C.F.R. Part 7, Subpart D—Preemption, following the format of the proposed Part 34 amendment. These three sections address deposit-taking, non-real estate

[6] We note that some commenters have argued that adoption of field preemption could mean that national banks that engage in real estate brokerage or management activities in the future would not be subject to state laws governing the sale or lease of real estate or state licensing of real estate brokers or other salespersons. The proposed § 34 amendments address real estate lending only—not any other types of real estate activities. In addition, the list of state laws not generally preempted includes the "acquisition and transfer of real property."

lending, and other authorized activities of national banks, and would list the types of relevant state laws that are preempted with respect to the particular activities. Each section would also include a listing of types of state laws that generally are not preempted. Unlike the proposed amendments to real estate lending activities, questions about the applicability of state laws under these three sections would continue to be analyzed using the *Barnett* preemption analysis and would remain subject to notice and comment under Section 114 of the Riegle-Neal Act, if applicable.

2. New Lending Standard

Finally, the proposal would add to 12 C.F.R. §§ 34.3 and 7.4003(b) the following lending standard that would apply both to real estate and non-real estate lending:

> A national bank shall not make a loan described in this part based predominantly on the foreclosure value of the borrower's collateral, without regard to the borrower's repayment ability, including the borrower's current and expected income, current obligations, employment status, and other relevant financial resources.

This uniform standard is the latest of OCC's actions to ensure that national banks and their operating subsidiaries do not engage in either predatory lending practices or unfair and deceptive trade practices.

ANALYSIS

1. Preemption Analysis

Courts have enunciated various principles to determine when a state law is preempted, but fundamentally it is a question of Congressional intent. The legislature's intent to preempt may be either explicit or implicit. If the intent is explicit, the inquiry is ended unless there are questions about the scope of preemption. Alternatively, preemption may be implicit, with the necessary legislative intent divined from a determination that the federal government has "occupied the field" or created a scheme of federal regulation so pervasive that there is no room left for state regulation.[7]

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[7] *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Although states are not without any authority to impose regulations upon national banks, the areas in which they are permitted to regulate are typically limited to 'contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal and tort law . . . Consumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks."[7] *American Bankers Ass'n v. Lockyer* at 30*,* No. CIV. S-02-1138 FCD JFM (December 2002) (citing *Bank of America v. City & County of San Francisco*, 309 F. 3rd 551 (9th Cir. 2002)).Because of this '"history of significant federal presence' in national banking, the [usual] presumption against preemption of state law is inapplicable."[7] [7] *Bank of America,* 309 F.3rd 551, 559 (citing *United States v. Locks*, 529 U.S. 89, 108 (2000)).

As discussed below, ABA believes that in enacting and modifying Section 371, Congress intended that federal law should occupy the field of real estate lending.

Real estate lending activities. National banks were first given the authority to lend on the security of real estate in Section 24 of the Federal Reserve Act of 1913, codified at 12 U.S.C. § 371. (References hereinafter will be to Section 371.) Section 371 contained a limited grant of authority for a national bank to lend on the security of "improved and unencumbered farm land, situated within its Federal reserve district [sic]."[8] In addition to this geographic limitation, the Federal Reserve Act imposed additional limits on the term and amount of each loan and an aggregate lending limit.

Since 1913, Congress has amended Section 371 numerous times 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, "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,"[9] Congress replaced these "rigid statutory limitations"[10] with 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.[11]

In 1991, without explanation, Congress removed the term "rule" from Section 371 and enacted an additional provision requiring national banks (and other insured depository institutions) to conduct real estate lending pursuant to "uniform standards" adopted at the federal level by regulation of OCC and the other federal banking agencies.[12]

Thus, the legislative history of Section 371 demonstrates that for nearly 70 years Congress was directly involved in expanding the scope of national banks' real estate lending authority until 1982, when Congress delegated to OCC comprehensive authority to regulate those powers. Congress' active participation in the scope of national bank real estate lending authority followed by its action to unconditionally

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[8] Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).
[9] S. Rep. No. 97-536, at 27 (1982).
[10] *Id*.
[11] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, 96 Stat. 1469, 1510-11 (1982).
[12] Section 304 of the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. 1828(o).

delegate its authority to OCC clearly demonstrates Congress' intent that OCC, with its greater flexibility and knowledge of current banking and real estate markets, should stand in its place. Congress could have conditioned its delegation on compliance with state laws or consultation with state authorities. That it did not necessarily leads to the conclusion that Congress intended that OCC should occupy the field and be the sole authority with respect to national banks' real estate lending powers.

The fact that the only amendment since 1982 was to require that, in the wake of the savings and loan failures of the late 1980's and early 1990's, all insured depository institutions conduct real estate lending activities pursuant to uniform federal standards adopted by OCC and the other federal banking agencies, further evidences Congress' intent that national banks should not be subject to state laws governing real estate lending standards.

Based on the legislative history and scope of Section 371, as well as the other federal enforcement mechanisms that restrict predatory lending practices, ABA believes there can be no question that federal law pervasively occupies the field with respect to national banks' federally granted real estate lending powers. Accordingly, we strongly urge OCC in its final rule amending Part 34 to expressly state that federal law occupies the entire field of national bank real estate lending, pursuant to its statutory authority under 12 U.S.C. § 371.

All other national bank activities. ABA agrees with the need to clarify for national banks operating in more than one state, the applicability of various state laws to their banking activities. As stated above, the burden of complying with differing state laws increases constantly and cannot be viewed as anything less than significant interference with national banks' federally authorized activities. The types of states laws that OCC has listed have been determined to be preempted by numerous courts, and new issues will be tested using traditional preemption analysis. Accordingly, ABA supports the proposed amendments to Part 7.

2. Lending Standard

The proposed lending standard is intended to ensure that national banks and their operating subsidiaries do not engage in predatory lending or unfair and deceptive trade practices under the Federal Trade Commission Act ("FTC Act").[13] In those states without predatory lending statutes, it will become the standard for national banks. In those states that have already enacted various forms of predatory lending statutes, it will, for national banks and their operating subsidiaries, replace those differing, and sometimes overly broad, prohibitions with a single rule that ensures both a high standard of fair and ethical dealing with customers and that home loans remain available to low-income consumers.

[13] 15 U.S.C. §§ 41-58 as amended.

OCC has clearly demonstrated its commitment to fair dealing through the development of comprehensive supervisory standards to prevent national banks from engaging in predatory lending practices, both directly and indirectly, as well as through its strong enforcement efforts. OCC took the lead among the bank regulators in strongly asserting its authority to enforce unfair and deceptive trade practices under the FTC Act. Using that authority, as well as its traditional safety and soundness authority, the agency has taken strong enforcement efforts against abusive lending practices, such as payday lending. Moreover, OCC has developed the most comprehensive guidance to prevent predatory lending practices of any of the federal banking agencies.[14] OCC has also determined that abusive lending practices will necessarily be taken into account when determining a national bank's Community Reinvestment Act rating.

Accordingly, ABA supports the lending standard set forth in the proposal. We ask, however, that OCC state explicitly in the regulation text that the standard applies at the time the lending decision is made. We believe this clarification would avoid any potential confusion that could arise in a litigation context.

Conclusion

For all of the foregoing reasons, ABA supports the proposal to clarify for national banks the application of state laws to their various activities. ABA strongly urges OCC to adopt a final rule that states expressly that federal law occupies the entire field of national bank real estate lending, pursuant to its statutory authority under 12 U.S.C. § 371.

If you have any questions, please feel free to contact me.

Sincerely,

James D. McLaughlin

[14] *See,* OCC Advisory Letters 2002 and 2003 (February 21, 2003).