

conflict with a Federal power vested in national banks. Types of state laws that have been addressed by the OCC or the courts include:

- Licensing laws. State statutes that require national banks to obtain a license or to register with the state before exercising a Federally-granted authority have been found to be preempted.<sup>41</sup>
- Filing requirements. State statutes that require national banks to make filings with, or report to, states conflict with the OCC's exclusive visitatorial powers over national banks.<sup>42</sup>
- Terms of real estate loans. The OCC's current regulations in subpart A of part 34 address real estate lending generally. Section 34.4(a) expressly preempts state laws concerning five areas of fixed-rate mortgage lending. Section 34.4(a)(1) preempts state laws concerning loan-to-value ratios. Section 34.4(a)(2) preempts state laws concerning the schedule for repayment of principal and interest. In this regard,

the key elements of any repayment schedule are: (1) the timing of the expected payments, and (2) the amount of expected payments.<sup>43</sup> Section 34.4(a)(3) preempts state laws concerning the term to maturity of real estate loans.<sup>44</sup> Subpart B of part 34, governing adjustable rate mortgages (ARMs), states that national banks may engage in ARM lending without regard to any state law limitation.<sup>45</sup>

- Advertising. Courts have consistently held that state laws limiting the ability of a national bank to advertise are preempted.<sup>46</sup>

- Permissible rates of interest. Federal law establishes that national banks may charge interest (both the rate and amount<sup>47</sup>) permitted by the state where the bank is located without regard to the laws of the state where the borrower is located.<sup>48</sup>

- Permissible fees and non-interest charges. Section 7.4002 of the OCC's rules outlines the framework for national banks' ability to impose non-interest fees and charges; courts have consistently held that state laws limiting the ability of national banks to charge such fees are preempted.<sup>49</sup>

- Management of credit accounts. The OCC has taken the position that state laws that interfere with a national bank's Federally-granted power to lend and to engage in activities incidental to its lending operations are preempted. For example, in our view, a state law that imposed restrictions or requirements that, under the *Barnett* standards, interfere with or burden a

national bank's communication with its credit card holders, management of credit accounts, or terms of offers of credit was preempted. A Federal district court in California recently upheld this position.<sup>50</sup>

- Due-on-sale clauses. Section 34.5 of the OCC's rules and 12 U.S.C. 1701j-3 preempt state restrictions on due-on-sale clauses.

- Leaseholds as acceptable security. The provision set out in proposed § 34.4(a)(14) preempting state laws governing covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan is a restatement of the provision in current § 34.4(a)(5).

- Mandated statements and disclosures. State attempts to require national banks to make disclosures in connection with specified credit card repayment terms have been held preempted as an impermissible interference with the ability to extend credit.<sup>51</sup> OCC regulations already address the applicability of state law to national bank activities in some of these areas,<sup>52</sup> but to date, unlike the Office of Thrift Supervision (OTS),<sup>53</sup> we have not adopted regulations that more broadly codify the application of principles of preemption according to major groupings of activities, such as lending, deposit-taking, and other authorized bank activities. Our positions in some instances also have not clearly reflected whether we were employing an "occupation of the field" or "conflicts" approach, although our individual preemption decisions have more commonly reflected a "conflict" type approach to preemption analysis. The proposal clarifies the types of state law restrictions and requirements that do, and do not, apply to major types of activities and operations of national banks and, for those types of activities and operations, articulates the standards that determine whether particular types of state law restrictions and requirements are preempted.

## C. Revisions to Part 34—Real Estate Lending

### 1. Current OCC Regulations

Part 34 of our rules implements 12 U.S.C. 371, which authorizes national banks to engage in real estate lending

<sup>41</sup> See *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir. 1990) (the National Bank Act precludes a state regulator from prohibiting a national bank, through either enforcement action or a licensing requirement, from conducting an authorized activity); and *Bank of America Nat'l Trust & Sav. Ass'n v. Lima*, 103 F. Supp. 916 (D. Mass. 1952) (states have no authority to require national banks to obtain a license to engage in an activity permitted to them by Federal law). See also *Wells Fargo Bank, N.A. v. Boutris*, 252 F. Supp. 2d 1065, 1074 (E.D. Cal. 2003) (*Wells Fargo Bank II*) (bank becoming a state licensee does not affect its right to conduct Federally permissible banking activities authorized by the OCC); *Nat'l City Bank of Indiana v. Boutris*, Civ. No. S-03-0655-CEB JFM at 14 (May 7, 2003) (when banking activities are governed by Federal preemption, Federal law applies even where an instrumentality of a national bank has needlessly subjected itself to state licensing law); Letter dated May 15, 2001 from Julie L. Williams to Messrs. Thomas Plant and Daniel Morton (66 FR 28593, May 23, 2001) (regarding state license requirement in the sale of motor vehicles); Letter dated Mar. 7, 2000, from Julie L. Williams to Thomas P. Vartanian (65 FR 15037, Mar. 20, 2000) (regarding Pennsylvania auctioneer licensing law); OCC Interpretive Letter No. 866 (Oct. 8, 1999) (regarding state laws requiring national bank to obtain license before soliciting or engaging in proposed fiduciary arrangements); OCC Interpretive Letter No. 749 (Sept. 13, 1996) (regarding state law requiring national banks to be licensed to sell annuities); and OCC Interpretive Letter No. 644 (Mar. 24, 1994) (regarding state registration and fee requirements imposed on mortgage lenders). While several precedents cited address activities other than real estate lending, the principles articulated in the precedents apply to all national bank activities, including making real estate loans.

<sup>42</sup> See OCC Interpretive Letter No. 616 (Feb. 26, 1993) (state statute requiring national banks to report quarterly to state banking commissioner would be preempted based upon OCC's exclusive visitatorial powers); and OCC Interpretive Letter No. 614 (Jan. 15, 1993) (state statutes requiring national banks to keep records and file notifications and data with the state would be preempted because they purport to grant the state visitatorial powers over national banks); See, e.g., *Guthrie*, 199 U.S. 148 (discussing OCC's exclusive visitatorial powers).

<sup>43</sup> See Section III. A. 1. of the National City Order, in which we concluded that state laws governing balloon payments, negative amortization, limitations on advance payments, late fees, prepayment fees, and default rates of interest were preempted because they concerned the schedule for repayment of principal and interest in contravention of 12 CFR 34.4(a)(2).

<sup>44</sup> See *id.* at Section III. A. 2., in which we concluded that state laws governing acceleration of indebtedness and rights to cure a default were preempted because they concerned the term to maturity in contravention of 12 CFR 34.4(a)(3).

<sup>45</sup> See 12 CFR 34.21(a).

<sup>46</sup> See *Franklin Nat'l Bank*, 347 U.S. 373 (state law restricting national bank's ability to advertise its services held preempted); *Bank One, Utah*, 190 F.3d 844 (state law limiting the placement of advertising on ATMs held preempted). See also OCC Interpretive Letter No. 789 (June 27, 1997) (a state law that prohibited the use of a bank's name on ATMs unless the bank put the names of all other banks whose customers may use the ATM was preempted).

<sup>47</sup> See 12 U.S.C. 1735f-7a; *Wells Fargo Bank II*, 2003 WL 21277203.

<sup>48</sup> See 12 U.S.C. 85; 12 CFR 7.4001. See, e.g., *Marquette Nat'l Bank*, 439 U.S. 299; *Tiffany*, 85 U.S. 409 (construing 12 U.S.C. 85). See also Section III. B. of the National City Order.

<sup>49</sup> See *Bank of America*, 309 F.3d 551, *Wells Fargo Bank, Texas*, 321 F.3d 488, and *Metrobank*, 193 F. Supp. 2d 1156. See also Section III. C. of the National City Order.

<sup>50</sup> See *Lockyer*, 239 F. Supp. 2d 1000.

<sup>51</sup> See *id.*

<sup>52</sup> See, e.g., 12 CFR 7.4001 (interest); 7.4002 (fees); 7.4006 (operating subsidiaries); 9.7 (fiduciary activities); 34.4 (real estate lending generally); 34.5 (due-on-sale clauses); 34.21 (adjustable-rate mortgage lending); and 34.23 (prepayment fees).

<sup>53</sup> See 12 CFR 557.11-.13; 12 CFR 560.2; and 12 CFR 545.2.