

subject to “such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.” Under subpart A of part 34 (which sets forth the general authority for national banks to engage in real estate transactions), state laws concerning five enumerated areas already are explicitly preempted in their application to national banks and their operating subsidiaries. 12 CFR 34.1(b) and 34.4(a). Section 34.4(b) then states that 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.

2. Codification of Preemption

Pursuant to our authority under section 371, the proposal amends § 34.4(a) and (b) to provide a more complete statement of the types of state law restrictions and requirements that do, and do not, apply to real estate lending activities of national banks. However, as recognized by the Supreme Court, Federal law may preempt state law expressly (by an express statement of preemption in the law) or implicitly (because the Federal law is so complete that it “occupies the field” or because the state law conflicts with a Federal power). Although the regulation proposed today would address state laws by *type*, for reasons discussed below, we invite comment on whether our regulations, like those of the OTS,⁵⁴ should state explicitly that Federal law occupies the entire field of national banks’ real estate lending activities.⁵⁵

Section 371 provides a broad grant of authority to national banks to engage in real estate lending. The only qualification in the statute is that these Federal powers are subject “to section 1828(o) of this title [which requires the adoption of uniform Federal safety and soundness standards governing real estate lending] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.”⁵⁶ On its face, section 371 does not condition the grant of authority to national banks to engage in real estate lending upon engaging in that activity only to the extent that a state permits it.

The breadth of the Federal power and the OCC’s rulemaking authority created by section 371 can be understood by

comparing the text and structure of that section to that of 12 U.S.C. 92, a statute similar in both respects and one that vests comparably broad rulemaking authority in the OCC. In *Barnett*, the Supreme Court analyzed the extent to which section 92 leaves room for state regulation of the activities the statute authorizes, and is thus instructive for purposes of analyzing section 371. 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.⁵⁷

The Court noted that “[i]n defining the pre-emptive scope of statutes and regulations granting a power to national banks, [prior U.S. Supreme Court decisions] take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.”⁵⁸ The Supreme 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.”⁵⁹

This analysis of section 92 by the Supreme Court is instructive in addressing section 371 as well. Like section 92, section 371 creates a broad power for national banks. By its terms, section 371 also is not a limited permission, that is, it does not authorize national banks to engage in real estate lending only to the extent state law allows.⁶⁰ Moreover, section 371 differs from section 92 in two respects that are even more telling. First, section 371 refers expressly and exclusively to the OCC as the entity possessing authority to set *restrictions and requirements* that apply to national banks’ real estate lending activities. Second, unlike the activity to which section 92 pertains—the sale of insurance—which historically has been predominantly regulated at the state level, national bank real estate lending authority has been extensively regulated at the Federal level since the power first was codified.

Beginning with the enactment of the Federal Reserve Act of 1913, national banks’ real estate lending authority has been governed by the express terms of

section 371. As originally enacted in 1913, section 371 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.”⁶¹ 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”⁶² in favor of a broad provision authorizing national banks to “make, arrange, purchase or sell loans or extensions of credit secured by liens on interests 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.”⁶³ 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.”⁶⁴ In 1991, Congress removed the term “rule” from this phrase 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.⁶⁵ 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 Congress has delegated broad rulemaking authority to the Comptroller. The two versions of section 371—namely, the lengthy and prescriptive approach prior to 1982 and the more recent statement of broad authority qualified only by reference to Federal law—may be seen as evolving articulations of the same idea.

⁶¹ Federal Reserve Act, ch. 6, section 24, 38 Stat. 251, 273 (1913).

⁶² S. Rep. No. 97–536, at 27 (1982).

⁶³ Garn-St Germain Depository Institutions Act of 1982, Public Law 97–320, § 403, 96 Stat. 1469, 1510–11 (1982).

⁶⁴ S. Rep. No. 97–536, at 27 (1982).

⁶⁵ See section 304 of the Federal Deposit Insurance Corporation Improvement Act, codified at 12 U.S.C. 1828(o). These standards governing national banks’ real estate lending are set forth in subpart D of part 34.

⁵⁴ See 12 CFR 560.2.

⁵⁵ This issue was raised by National City in its request concerning the GFLA. As explained in the National City Order, we deferred expressing any views on the field preemption issue until we could seek comment in connection with a rulemaking rather than a decision confined to the law of a single state.

⁵⁶ 12 U.S.C. 371(a).

⁵⁷ *Barnett*, 517 U.S. at 32.

⁵⁸ *Id.* at 33.

⁵⁹ *Id.* at 34.

⁶⁰ See *id.* at 31–32.