

Prior to 1982, the field of national bank real estate lending was pervasively regulated by the detailed statutory provisions of section 371. After the 1982 amendment, Congress left open the possibility that the OCC would occupy the field by regulation. The statute granted the Federal power and directed that not just "requirements" for the exercise of the power, but any "restrictions" on the power, would come from the OCC. In no respect does the statute express or imply that the power granted is limited, to some variable degree, by application of fifty different state laws.

Although this authority arguably enables the OCC to occupy the field of regulation of national banks' real estate lending, thus far we have not exercised the full authority inherent in section 371. Instead, in § 34.4(a) we have provided that certain types of state requirements and restrictions are not applicable to national banks and have elected to address whether other types of laws are preempted based on the existence of a conflict between a particular state or local law and national banks' Federal power under section 371. Since section 371 conditions the exercise by a national bank of its Federal power to engage in real estate lending only on compliance with Federal law, however, our regulation is more conservative than what the statute arguably allows.

The regulation we propose today further implements our authority under section 371 to identify types of state law restrictions concerning real estate lending that are, and are not, applicable to national banks. We have chosen to identify additional types of state laws that, in various respects, obstruct or condition national banks' exercise of real estate lending powers granted under section 371. As noted above, many of these types of laws have previously been addressed in OCC interpretations or Federal court decisions. We note, however, that our authority under section 371 is not necessarily limited to specifying types of law restrictions that are applicable or inapplicable, nor does section 371 appear to necessitate that the state laws specified be only those that in some manner obstruct or condition national banks' exercise of their powers under section 371. Thus, we invite comment on whether our regulation should state expressly that Federal law occupies the entire field of national bank real estate lending.

### 3. Federal Safeguards

Preemption of state laws governing national banks' real estate lending does

not mean that that activity would be unregulated. On the contrary, national banks' real estate lending is pervasively regulated under Federal standards and subject to comprehensive supervision.

This Federal framework includes standards governing, and oversight of, national banks' real estate lending activities to prevent abusive or predatory lending. In addition to the many Federal statutory standards that apply to national banks, the OCC recently issued comprehensive supervisory standards to address predatory and abusive lending practices. See OCC Advisory Letter 2003-2, "Guidelines for National Banks To Guard Against Predatory and Abusive Lending Practices" (Feb. 21, 2003) and OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (Feb. 21, 2003). The OCC standards on predatory lending make clear that national banks should adopt—and vigorously adhere to—policies and procedures to prevent predatory lending practices in direct lending and in transactions involving brokered and purchased loans.

Significantly, AL 2003-2 provides that bank policies and procedures on direct lending should reflect the degree of care that is appropriate to the risk of a particular transaction. In some cases, this will entail making the determination that a loan is reasonably likely to meet the borrower's individual financial circumstances and needs. AL 2003-2 also emphasizes that if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices to determine whether they violate specific provisions of the Federal laws, including the Homeowners Equity Protection Act of 1994 (HOEPA), the Fair Housing Act, or the Equal Credit Opportunity Act. The OCC also will evaluate whether such practices involve unfair or deceptive practices in violation of the Federal Trade Commission Act (FTC Act). Indeed several practices cited in AL 2003-2, such as equity stripping, loan flipping, and the refinancing of special subsidized mortgage loans that originally contained terms favorable to the borrower, can be found to be unfair practices that violate the FTC Act.

The OCC's second advisory, AL 2003-3, addresses concerns that have been raised about the link between predatory lending and non-regulated lending intermediaries, and the risk that a national bank could indirectly and inadvertently facilitate predatory lending through the purchase of loans and mortgage-backed securities and in

connection with broker transactions. Pursuant to our standards, a national bank needs to perform adequate due diligence prior to entering into any relationships with loan brokers, third party loan originators, and the issuers of mortgage-backed securities, to ensure that the bank does not do business with companies that fail to employ appropriate safeguards against predatory lending in connection with loans they arrange, sell, or pool for securitization. AL 2003-3 also advises national banks to take specific steps to address the risk of fraud and deception in brokered loan transactions relating to broker-imposed fees and other broker compensation vehicles.

Evidence that national banks are engaged in predatory lending practices is scant. Based on the dearth of such information—from third parties, our consumer complaint database, and our supervisory activities—we have no reason to believe that national banks are engaged in such practices to any discernible degree. This observation is consistent with an extensive study of predatory lending conducted by HUD and the Treasury Department,<sup>66</sup> and with comments submitted in connection with an OTS rulemaking concerning preemption of state lending standards by 46 State Attorneys General.<sup>67</sup>

More recently, a coalition of State Attorneys General repeated the same view in a brief filed earlier this year in connection with a challenge to that OTS rulemaking.<sup>68</sup> In supporting the OTS's

<sup>66</sup> A Treasury-HUD joint report issued in 2000 found that predatory lending practices in the subprime market are less likely to occur in lending by—

Banks, thrifts, and credit unions that are subject to extensive oversight and regulation. \* \* \* The subprime mortgage and finance companies that dominate mortgage lending in many low-income and minority communities, while subject to the same consumer protection laws, are not subject to as much federal oversight as their prime market counterparts—who are largely federally-supervised banks, thrifts, and credit unions. The absence of such accountability may create an environment where predatory practices flourish because they are unlikely to be detected.

Departments of Housing and Urban Development and the Treasury, "Curbing Predatory Home Mortgage Lending: A Joint Report" 17-18 (June 2000) (Treasury-HUD Joint Report).

In addition, the report found that a significant source of abusive lending practices is non-regulated mortgage brokers and similar intermediaries who, because they "do not actually take on the credit risk of making the loan, . . . may be less concerned about the loan's ultimate repayment, and more concerned with the fee income they earn from the transaction." *Id.* at 40.

<sup>67</sup> Cited in *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02-2506 (GK) (D.D.C. 2003) at 26.

<sup>68</sup> The case involves a revised regulation issued by the OTS to implement the Alternative Mortgage Transaction Parity Act (AMTPA). The revised