

decision to distinguish between supervised depository institutions and unsupervised housing creditors and to retain preemption of state laws with respect to the former but not for the latter, the State Attorneys General stated:

Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.

Brief for Amicus Curiae State Attorneys General, *National Home Equity Mortgage Association v. OTS*, Civil Action No. 02–2506 (GK) (D.D.C.) at 10–11 (emphasis added).

Against this background, the OCC's approach to predatory lending, embodied in the anti-predatory lending standards discussed above, implemented through the OCC's comprehensive supervision of national banks, minimizes the potential for harm from predatory or abusive lending without reducing the credit available to subprime borrowers. By focusing on lending practices rather than banning specific lending products, this approach reduces the likelihood of predatory lending rather than the availability of credit to subprime borrowers.

Notwithstanding the foregoing, there are certain principles that should be fundamental to all real estate lending by national banks. First is the principle that national banks should not make loans when they lack a reasonable basis to believe that the borrower has the capacity to repay the loan. This standard addresses a central characteristic of predatory lending, namely, lending based on the foreclosure value of the collateral rather than on the borrower's ability to make the scheduled payments under the terms of the loan, based on consideration of the borrower's current and expected income, current obligations, employment status, and other relevant financial resources. In such a situation, the lender is effectively relying on its ability to seize the equity in the borrower's collateral—often the borrower's home—to satisfy the outstanding debt.⁶⁹

regulation distinguishes between Federally-supervised thrift institutions and non-bank mortgage lenders, making non-bank mortgage lenders subject to state law restrictions on prepayment penalties and late fees. *See id.*

⁶⁹ *See, e.g.,* Treasury-HUD Joint Report, *supra* note 66. The report notes that while factors such as the overall size of the loan, the borrower's credit history, and the value of the collateral also play into

To prevent this, the proposal would prohibit a national bank from making a loan based predominantly on the foreclosure value of the borrower's collateral. Such practices are inconsistent with safe and sound banking and antithetical to the OCC's expectations concerning the prudence and integrity with which national banks do business. The proposal would establish a uniform, national standard, applicable to all national banks and their operating subsidiaries that, consistent with existing OCC guidance,⁷⁰ would prohibit this essential characteristic of predatory lending.

A second principle is that national banks should treat all their customers fairly and honestly. National banks' lending activities also are subject to provisions of section 5 of the FTC Act that prohibit unfair or deceptive practices in connection with real estate lending (as well as other activities authorized for national banks).⁷¹ Section 5 serves as a standard to ensure that national banks conduct all their activities free from unfair or deceptive practices.

Practices may be found to be deceptive and thereby unlawful under section 5 of the FTC Act if three factors are present.⁷² First, practices will be deceptive if there is a representation, omission, act, or practice that is likely

the decision, "[a] creditor's decision on whether to originate a mortgage loan should be guided by his/her assessment of the borrower's ability to repay the loan from liquid sources (e.g., income and non-housing assets)." *Id.* at 76. The report goes on to note that "[t]here is widespread concern * * * that some unscrupulous creditors are making loans to borrowers who clearly cannot afford to repay them." *Id.* The report notes further that the results of predatory lending are "loans with onerous terms and conditions that the borrower often cannot repay, leading to foreclosure or bankruptcy." *Id.* at 17.

⁷⁰ *See* AL 2003–2, which, as explained above, provides supervisory guidance concerning predatory and abusive lending practices. AL 2003–2 contains a recommendation that national banks establish specific policies and procedures for underwriting to ensure that the appropriate determination has been made that each borrower has the capacity to repay his or her loan. *See id.* at 7–8.

⁷¹ *See* 15 U.S.C. 45(a)(1). *See also* AL 2003–2. Courts recently have confirmed the application of the FTC Act to national banks. *See, e.g., Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 1002 (D.Minn. 2001); *Roberts v. Fleet Bank*, 2001 WL 1486226, *2 (E.D.Pa. 2001). The Federal Deposit Insurance Corporation (FDIC) and the Board of Governors of the Federal Reserve System recently issued statements recognizing the application of section 5 of the FTC Act to the state banks within each agency's respective jurisdiction. *See* FIL–57–2002, issued by the FDIC May 30, 2002; Letter from Chairman Greenspan to the Hon. John J. LaFalce, May 30, 2002.

⁷² These principles are derived from the Policy Statement on Deception, issued by the Federal Trade Commission on October 14, 1983.

to mislead. Practices that can be misleading or deceptive include false oral and written representations; misleading claims about costs or benefits of services or products; use of bait-and-switch techniques; and failure to provide promised services or products.

Second, a practice may be found to be deceptive if the act or practice would be deceptive from the perspective of a reasonable consumer. In this context, a reasonable consumer is a member of the group targeted by the acts or practices in question. The totality of the circumstances and the net impression that is made will be evaluated in making this determination. Failure to provide information also may be a deceptive act or practice and will be evaluated from the perspective of whether a reasonable consumer is likely to have been misled by the omission. In this regard, a consumer's reaction to an act or practice may be reasonable even if it is not the only reaction that a consumer might have.

Third, in order for a practice to be found to be deceptive, it must be material. A material misrepresentation or practice is one that is likely to affect a consumer's choice or conduct concerning a product or service. Consumer injury is likely if inaccurate or omitted information is important to the consumer's decision. Generally, information, or omission of information, about costs, benefits, purpose, and efficacy (including significant limitations) related to the product or service would be material.

A practice may be found to be unfair and thereby unlawful under section 5 of the FTC Act if the following factors are present.⁷³ First, the practice causes substantial consumer injury. Generally, monetary harm, such as when a consumer pays a fee or interest charge, or incurs other similar costs to obtain a bank product or service as a result of an unfair practice, is deemed to involve substantial injury. Second, the injury is not outweighed by benefits to the consumer or to competition. To be unfair, a practice must be injurious in its net effects. Third, the injury caused by the practice is one that consumers could not reasonably have avoided. Consumer harm caused by a practice that is coercive or that otherwise effectively inhibits the consumer from making an informed choice would be considered not reasonably avoidable.

Credit practices commonly referred to as predatory, such as loan "flipping,"

⁷³ These principles are derived from the Policy Statement on Unfairness, issued by the Federal Trade Commission on December 17, 1980.