

general standards that would be appropriate to apply to national bank real estate lending activities that would further these objectives.

State laws that are preempted.

Pursuant to section 371, we propose to amend § 34.4(a) to specify more completely the types of state law restrictions and requirements that are not applicable to national banks. This list, promulgated under our authority under section 371 to prescribe the types of restrictions and requirements to which national banks' real estate lending activities shall be subject, reflects our experience with types of state laws that obstruct, in whole or in part, or condition, national banks' exercise of real estate lending powers granted under Federal law. The list is not intended to be exhaustive. Other types of state laws that similarly affect the exercise of national banks' real estate lending powers may be identified. Under the regulation, those would be addressed by the OCC on a case-by-case basis.

State laws that are not preempted.

Section 34.4(b) also provides that certain types of state laws are not preempted and would be applicable to national banks to the extent that they do not materially affect the real estate lending powers of national banks or are otherwise consistent with national banks' Federal authority to engage in real estate lending.⁸⁴ These types of laws generally pertain to contracts, debt collection, acquisition and transfer of property, taxation, zoning, crimes, torts,⁸⁵ and homestead rights. In addition, any other law that the OCC determines to interfere to only an insignificant extent with national banks' real estate lending powers or is otherwise consistent with national banks' authority to engage in real estate lending would not be preempted under the proposal.⁸⁶ In general, these would

be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that surrounds and supports the conduct of that business. In general, the types of laws that are not preempted are those that promote national banks' ability to conduct business, rather than obstruct national banks' exercise of their real estate lending powers.

D. Revisions to Part 7—Deposit-Taking, Other Lending, and Bank Activities

1. Background

Preemption issues arising in the context of national bank deposit-taking, other lending activities, and bank activities, while involving the application of different sources of Federal authority than that of real estate lending, nevertheless need similar rules that address more completely the types of state law restrictions and requirements that are, and are not, applicable to national banks and the standard employed to produce that result. Here, the proposal again focuses on state laws that obstruct, in whole or in part, or condition, national banks' exercise of powers granted under Federal law.⁸⁷

This result recognizes the Federal source of national bank powers and the inherent design of the national banking system as a nationwide system of Federally-empowered banks operating under Federal standards, as discussed in section B., above.

Consistent with the purpose of establishing a national banking system subject to uniform standards, Congress has vested the OCC with broad authority to facilitate the safe and sound exercise by national banks of their Federal powers. For example, 12 U.S.C. 93a vests the OCC with the authority to "prescribe rules and regulations to carry

out the responsibilities of the office * * *," except "to the extent that authority to issue such rules and regulations has been *expressly* and *exclusively* granted to another regulatory agency."⁸⁸ Clearly, one of the "responsibilities of the office" is to administer the National Bank Act to enable national banks to employ the powers vested in them by Congress, free of obstacles to their ability to fully exercise those powers, and governed under the framework of Federal regulation and national standards envisioned by Congress in its design of the national banking system. The OCC fulfills this responsibility in part by setting the Federal standards under which national banks operate and clarifying when state standards do, and do not, affect their operations.

In this regard, we believe it is appropriate to provide greater certainty and clarity to national banks concerning the extent to which state laws governing deposit-taking, non-real estate lending, and other authorized bank activities are applicable to national banks. The proposed amendments thereby further the OCC's responsibility to administer the National Bank Act by allowing national banks to conduct these activities, free of the specified types of state-imposed obstacles to their ability to fully exercise their powers in these areas. The amendments also further the ability of national banks to operate pursuant to the framework of national standards envisioned by Congress and enhance the safe and sound exercise by national banks of their Federal authority to conduct the business of banking by promoting efficiency of national bank activities.

2. Description of the Proposed Amendments to Part 7

The proposal adds three new sections to part 7, § 7.4007 regarding deposit-taking activities, § 7.4008 regarding non-real estate lending activities, and § 7.4009 regarding other authorized national bank activities. The structure of the amendments is the same for §§ 7.4007 and 7.4008 and is similar for § 7.4009. For §§ 7.4007 and 7.4008, the proposed rule first sets out a statement of the authority to engage in the activity. Second, the rule notes that state laws that obstruct, in whole or in part, or condition, a national bank's exercise of powers granted under Federal law are not applicable, and lists several types of state laws that are preempted. Finally,

⁸⁴ As set forth above in note 36, there are instances where Federal law specifically requires the application of state law to national banks, such as in 12 U.S.C. 92a(a). The language used in the regulation "unless otherwise made applicable . . . by Federal law" refers to this type of situation. Federal statutes such as TILA that contain clauses that preserve state law from preemption by that statute do not make those state laws applicable to national banks; in fact, such state laws may still be preempted by other Federal law such as the National Bank Act. See, e.g., *Bank One, Utah*, 190 F.3d at 850; and *Bank of America*, 309 F.3d at 565.

⁸⁵ See *Bank of America*, 309 F.3d at 559 ("[S]tates retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.").

⁸⁶ We note that the label a state attaches to its laws will not affect the analysis of whether that law is preempted. We will analyze the substance of any state law to determine whether the state law has only an incidental impact on the Federal powers.

For instance, laws related to the transfer of real property may contain provisions that give borrowers the right to "cure" a default upon acceleration of a loan if the lender has not foreclosed on the property securing the loan. Viewed one way, this could be seen as part of the state laws governing foreclosure, which historically have been within a state's purview. However, as we concluded in the National City Order, to the extent that this type of law also limits the ability of a national bank to adjust the terms of a loan once there has been a default, it would be a state law limitation "concerning * * * (2) The schedule for repayment of principal and interest; [or] (3) The term to maturity of the loan." 12 CFR 34.4(a). In such a situation, we would look to the effect of the state statute. If the primary effect of the state law is to regulate in the areas listed in our regulation, the state law would be preempted.

⁸⁷ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (state law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."); *Barnett*, 517 U.S. at 33-34.

⁸⁸ 12 U.S.C. 93a (emphasis added). Section 93a also contains exceptions to our rulemaking authority in areas unrelated to deposit-taking or lending.