

that, accordingly, the OCC should conclude that the Georgia law does not apply to it. For the reasons summarized here and described in detail later in this Determination and Order, the OCC has concluded that the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law. Therefore, we are issuing an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia.

In brief, the reasons supporting our Determination and Order are as follows:

- National banks' authority to engage in real estate lending activities derives exclusively from Federal law. Under applicable Federal preemption principles, based on the Supremacy Clause of the U.S. Constitution and articulated by the U.S. Supreme Court, a state law may not modify a Congressional grant of power to national banks by limiting, conditioning, or otherwise impermissibly affecting a national bank's exercise of that power.

- The Federal statute that authorizes national banks' real estate lending activities, 12 U.S.C. 371, precludes application of many provisions of the GFLA to national banks. First, by its terms, the statute grants real estate lending power unconditioned by the application of any state's law. As it said in *Barnett Bank of Marion County, N.A. v. Nelson*,² the Supreme Court ordinarily finds that state law conditions on the exercise of national bank powers are preempted if Congress has not expressly directed the application of state law. Second, the text of the statute specifically gives the OCC authority to determine the "restrictions and requirements" that apply to national banks' real estate lending activities. The exclusion of state authority in this regard is consistent with the history of the statute, which has, since its inception, imposed only Federal limits and conditions on national banks' real estate lending activities.

- National banks' real estate lending standards are subject to a comprehensive Federal regulatory framework that addresses the types of abusive and predatory practices that the GFLA seeks to prohibit. In addition, the OCC has recently issued detailed guidance applicable to national banks' mortgage originations, use of mortgage brokers, and purchases of loans from others. This guidance targets abusive and predatory practices and will be administered by the OCC as part of its

comprehensive supervision of national banks, in addition to the already-applicable Federal restrictions on high-cost real estate lending, Federal consumer protections and disclosure requirements that apply to all home mortgage lending, and Federal standards that require national banks to base lending decisions on the borrower's ability to repay and not the foreclosure value of the collateral.

- The OCC regulations implementing 12 U.S.C. 371 currently provide that certain types of state laws do not apply to national banks. For instance, part 34 of our rules says expressly that state laws concerning the schedule for the repayment of principal and interest and state laws concerning the term to maturity of a loan do not apply to national banks. Thus, Federal law, comprised of the statute and OCC regulations, already preempts the GFLA provisions that modify a national bank's real estate lending authority by imposing limits or restrictions that concern the schedule for repayment of principal and interest or the term to maturity of a loan.

- Section 371 and our rules also preempt the GFLA provisions that, pursuant to the *Barnett* standards and the growing body of lower Federal court case law applying those standards, impose conditions on, or otherwise impermissibly affect, a national bank's exercise of its real estate lending powers. Thus, provisions of the GFLA that prescriptively prohibit or limit practices that are lawful under Federal law (but, in many cases, subject to Federal standards directed at eliminating abusive or predatory practices) also do not apply to national banks.

- Some provisions of the GFLA purport to limit the interest a national bank may charge for certain types of loans. As the Supreme Court has recently reaffirmed, the rate of interest that is permissible for national banks is determined exclusively by Federal law, at 12 U.S.C. 85. Section 85 permits national banks to charge the most favorable rate permitted by the laws of the state in which the bank is located, regardless of where the borrower is located. Under this standard, National City uses the most favored lender rates of *Indiana*, not Georgia, and thus is not subject to limits on the rates of interest imposed by the GFLA. (Moreover, national banks located in Georgia are not subject to the GFLA provisions concerning interest. The Office of Thrift Supervision (OTS) has previously determined that the GFLA does not apply to Federal savings associations. By virtue of the parity provision in the

GFLA, that law also would not apply to a Georgia state savings association. Thus, for purposes of section 85, a Georgia state savings association is the most favored lender with respect to the types of loans covered by the GFLA, and, accordingly, a national bank located in Georgia is similarly not subject to limits on the rate of interest it may charge for loans within the scope of the GFLA.)

- Other provisions of the GFLA purport to limit the non-interest fees a national bank may charge in connection with certain types of loans. These provisions are preempted because they are inconsistent with national banks' well recognized authority to establish non-interest fees pursuant to the national bank powers provisions of 12 U.S.C. 24(Seventh) and the OCC's rules that govern national bank fees.

- The GFLA is also preempted with respect to national bank operating subsidiaries. Federal law authorizes national banks to conduct through operating subsidiaries activities that are permissible for the bank itself. Activities conducted through operating subsidiaries are subject to the same terms and conditions as apply to the parent bank and, pursuant to OCC regulations, are subject to state law only to the extent that the parent bank is subject to state law.

This Determination and Order provides that the GFLA does not apply to National City. Because our conclusions rest on an analysis of the legal effects of the GFLA under Constitutional preemption principles, they would not differ with respect to any other national bank or national bank operating subsidiary engaged in real estate lending activities in Georgia. The scope of our Order providing that the GFLA is preempted therefore includes any national bank or national bank operating subsidiary that is engaged in real estate lending activities in Georgia.

Finally, although National City has asked us to address whether Federal law occupies the field of real estate lending regulation, such that no state real estate lending law applies to national banks or their operating subsidiaries, our Determination and Order does not take up that issue. National City's request asked us to review only one state's law, the GFLA. A conclusion that Federal law occupies the field of real estate lending regulation would have implications beyond the applicability of the Georgia law. For that reason, we believe it is appropriate to consider the question of occupation of the field, as that theory may apply in the case of real estate lending, in a rulemaking. Contemporaneously with the issuance

² 517 U.S. 25 (1996).