

accordance with the procedures mandated by the OCC's Operating Subsidiary Rule and approved by the OCC, the operating subsidiary is a Federally-authorized means by which a national bank may conduct Federally-authorized activities.

e. Anti-predatory lending standards applicable to national banks. Recently, the OCC issued comprehensive supervisory standards to address predatory and abusive lending practices.¹⁸ 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 purchase 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 re-financing 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.

B. National City's Preemption Request

On January 29, 2003, National City submitted to the OCC a request for a determination or order under 12 U.S.C. 24(Seventh), 12 U.S.C. 371, 12 U.S.C. 85, and the OCC's implementing regulations, that the GFLA does not apply to National City.¹⁹ National City originates and funds home equity loans and lines of credit on a nationwide basis. It also originates and funds first and second mortgage loans throughout the United States for the purpose of financing and refinancing the acquisition and construction of real property containing one to four family residential dwellings. National City receives loan applications from third party mortgage brokers, and those mortgage brokers perform many services resulting in the origination of the loans and lines of credit issued by National City.

In its request, National City asked the OCC to determine that 12 U.S.C. 24(Seventh) and 12 U.S.C. 371 preempt the GFLA with respect to the bank and its operating subsidiaries. National City asserts that the structure of section 371 and § 34.3, together with the express preemption delineated in § 34.4(a), evidence a presumption that state law does not apply to the real estate lending activities of national banks and their operating subsidiaries unless the OCC determines under § 34.4(b) that a particular state law is not preempted. In other words, in “considering whether state laws apply” for purposes of issuing an order under section 371, National City asserted that the OCC could either issue an order confirming that the law is not applicable or providing that it will be applicable after applying the “recognized principles of preemption” referred to in § 34.4(b). Thus, National City argued that section 371, in effect, authorizes the OCC to “occupy the field” of real estate lending regulation

for national banks, and that, through its regulations, including § 34.4(a) and (b), the OCC has done so.

For purposes of determining whether any of the GFLA provisions not otherwise preempted under § 34.4(a) apply to National City, National City analyzed the degree to which the GFLA, in the words of *Barnett*, “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁰ In this regard, National City asserted that various GFLA provisions place impermissible limits on the exercise of national banks' real estate lending powers under 12 U.S.C. 371.

In addition to its arguments under section 371 and the OCC's implementing regulations, National City asserts that the GFLA places impermissible limits on the exercise of national banks' authority to lend money generally under 12 U.S.C. 24(Seventh) and to charge fees for lending products or services pursuant to 12 CFR 7.4002.

Finally, National City contends that the GFLA has the effect of restricting its ability to use third party mortgage brokers and compensate them for the services they provide.

C. Notice of, and Comments on, National City's Request

On February 26, 2003, the OCC published for comment a Notice of National City's request (the Notice).²¹ The OCC received 76 comments on the Notice. National banks, financial services providers, and trade associations submitted comments in support of the issuance of a preemption determination or order in this matter. Consumer organizations, state officials (including the Governor of Georgia and the Acting Commissioner of the Georgia Department of Banking and Finance), the Conference of State Bank Supervisors, the National Association of Attorneys General, certain members of the Committee on Financial Services of the United States House of Representatives, and one member of the Senate Committee on Banking, Housing, and Urban Affairs submitted comments in opposition.

As an initial matter, several commenters assert that National City's request is moot in light of the recent amendments to the GFLA. Others urged the OCC to rescind its notice until such time as it receives a revised request for preemption that reflects these amendments. Still others assert that, despite the amendments, the

¹⁸ See OCC Advisory Letter 2003–2, “Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices” (Feb. 21, 2003) (AL 2003–2) and OCC Advisory Letter 2003–3, “Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans” (Feb. 21, 2003) (AL 2003–3).

¹⁹ Following the amendments to the GFLA, National City reaffirmed its interest in obtaining such a determination or order.

²⁰ *Barnett*, 517 U.S. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²¹ 68 FR 8959 (Feb. 26, 2003).