

fundamental issues raised in National City's request remain unchanged.

We have reviewed the law as amended and, as discussed in greater detail below, conclude that the issue of whether Georgia may determine how national banks conduct real estate lending activities is not rendered moot, or fundamentally altered, by the changes adopted by the Georgia legislature. In addition, National City continues to assert that the GFLA remains impermissibly burdensome. Thus, we have proceeded with our consideration of National City's request.

National City's assertion that section 371 authorizes the OCC to "occupy the field" of national bank real estate lending generated considerable debate among the commenters over which preemption theory applies to National City's request. As explained further below, "occupation of the field" is one of the three ways in which Congress can preempt state law. In addition to field occupation, Congress can expressly provide in a Federal statute that the statute preempts state law or can adopt a statute that is in irreconcilable conflict with state law.²²

Many commenters favoring preemption argue that the OCC should adopt an "occupation of the field" analysis. Those commenters assert that Congress's intent that Federal law would "occupy the field" of national bank real estate lending is evident in the express language of section 371, its legislative history, and other Federal statutes. Many of these commenters suggest, however, that the OCC apply, either as an addition or alternative to the "occupation of the field" analysis, a "conflicts" analysis under *Barnett*. These commenters assert that the GFLA conflicts with the Federal grant of power to a national bank to engage in real estate lending activities.

Opponents of preemption argue that the statute, its legislative history, and Federal case law provide no support for field preemption. Several of these commenters also cite the preamble of an earlier version of the OCC's regulations implementing section 371, in which the OCC stated that it was clarifying "the limited scope" of the regulation's preemption. Because they believe that field preemption theory is inapplicable here, the opposing commenters assert that the OCC should apply only a *Barnett* "conflicts" analysis to National City's request to determine the extent to which each provision of the GFLA interferes with the exercise of national banks' authority to engage in real estate lending. Under this analysis, the

commenters argue that the GFLA does not prevent or significantly interfere with the exercise of national banks' real estate lending powers.

As discussed in detail below, our construction of section 371 and the results of a *Barnett* conflicts analysis of the GFLA provisions, both demonstrate that the GFLA places impermissible limits on national banks' real estate lending activities and, therefore, is preempted by Federal law. National City's request raises issues about only the laws in one state, however, and, in our view, is therefore not the appropriate vehicle to consider whether Federal law occupies the field of national bank real estate lending because that legal conclusion would have implications for other types of real estate lending laws and for real estate lending laws in all states. Accordingly, this Determination and Order does not address whether Federal law occupies the field of national banks' real estate lending activities. That issue will be considered, however, in a notice of proposed rulemaking that we are releasing simultaneously with this Determination and Order, to amend, among other parts of our rules, the rules in part 34 governing the applicability of state law to national banks' real estate lending activities.

In addition, the commenters debate the meaning of the considerable body of case law that has developed around the application of state law to the exercise of national banks powers. Commenters in favor of preemption note a long line of Supreme Court and lower Federal court precedent "interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."²³ Commenters opposed to preemption argue that the courts have avoided finding preemption in areas of law, such as consumer protection, traditionally occupied by the states. These commenters assert that Congress specifically endorsed this presumptive application of state laws to national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act).²⁴

As discussed in greater detail below, the presumption against preemption of state law is inapplicable when the states attempt to regulate in an area, such as national banking, where there is a history of significant Federal presence.²⁵ Moreover, the Riegle-Neal

Act applies the laws of the host state regarding community reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state only to the extent those laws are not otherwise preempted by Federal law.

Many of the comments concerned potential harm to consumers. Commenters opposed to preemption recite a host of abusive and predatory lending practices perpetrated against vulnerable borrowers, including minorities, the elderly, and the poor. These commenters believe such practices demonstrate the necessity of state predatory lending laws such as the GFLA. Commenters supportive of preemption argue that Federal law already prohibits these types of practices and that multiple, and often conflicting, state and local predatory lending laws will raise the cost of consumer credit, limit access to credit for borrowers with impaired credit histories, and restrict banks' ability to develop and implement new products or product features and customize services to meet consumers' needs.

The OCC shares the view of the commenters that predatory and abusive lending practices are inconsistent with national objectives of encouraging home ownership and community revitalization, and can be devastating to individuals, families, and communities. This does not lead, however, to the conclusion suggested by some commenters that the OCC should have no objection to state predatory lending laws being made applicable to national banks.

First, laws such as the GFLA apply to loans with rates of interest and other features typical of risk-based pricing of subprime loans. These laws generally prohibit certain mortgage loan terms and impose extra compliance obligations when other loan terms and conditions are present. These laws introduce new standards for subprime lending that are untested, sometimes vague, often complex, and, in many cases, different from established and well-understood Federal requirements. They also create new potential liabilities and penalties for any lender that missteps in its efforts to comply with those new standards and restrictions. Thus, these laws materially increase a bank's costs and compliance risks in connection with subprime lending. Given the already generally higher credit risk of lending to subprime borrowers, bank lenders will conclude—

²³ *Barnett*, 517 U.S. at 32.

²⁴ Pub. L. 103–328, 108 Stat. 2338 (1994).

²⁵ See *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002); see

also *American Bankers Ass'n. v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal., 2002); *United States v. Locke*, 529 U.S. 89, 108 (2000).

²² See *infra* notes 40–45 and accompanying text.