

and have concluded—that they simply are unable to effectively cover these increased costs and risks. Accordingly, they reduce their product offerings to avoid subprime mortgage lending, in order to concentrate on making loans for which they can receive acceptable compensation for the risks they undertake. The practical result of these laws, therefore, is to obstruct, or for practical purposes, prevent, national banks from making certain types of real estate loans, causing an overall reduction in credit available to subprime borrowers. This means that non-predatory, risk-priced credit will become more limited, or unavailable, to creditworthy subprime borrowers.<sup>26</sup>

<sup>26</sup> For a more detailed discussion of the reasons why anti-predatory lending laws may impede the flow of legitimate credit to homebuyers and for other economic analysis relevant to evaluating state anti-predatory lending laws, see Office of the Comptroller of the Currency, Global Banking and Financial Analysis Department, "OCC Working Paper: Economic Issues in Predatory Lending" (July 30, 2003) (OCC Paper).

As noted in the OCC Paper, a growing body of evidence indicates that state anti-predatory lending laws are likely to restrict the availability of credit to subprime borrowers. For example, studies of subprime lending activity in North Carolina before and after enactment of that state's anti-predatory lending law have shown a post-enactment decline in subprime mortgage originations of about 15%. See Keith Harvey & Peter Nigro, "Do Predatory Lending Laws Influence Mortgage Lending? An Analysis of the North Carolina Predatory Lending Law," Paper Presented at the Credit Research Conference on Subprime Lending, September 2002 (publication forthcoming in 2003 in a conference volume of the *Journal of Real Estate Research*); Gregory Elliehausen & Michael Staten, "Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law," Credit Research Center Working Paper #66, November 2002.

Other studies also have documented that an unfortunate and unintended consequence of legislation similar to the GFLA adopted in other jurisdictions has been the overall reduction in subprime loans being originated. See Robert E. Litan, "Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending," available at <http://www.aba.com/NR/rdonlyres/000070c7qvaumpwesqozjnk/PredReport20095.pdf>, and studies discussed therein. One study also documented that the impact of this reduction was greater for minority and low-income applicants. See Keith Harvey & Peter Nigro, "How Do Predatory Lending Laws Influence Mortgage Lending in Urban Areas? A Tale of Two Cities," 26 J. Real Est. Res. No. 2 (forthcoming in 2003).

Some proponents of state anti-predatory lending laws have nonetheless argued that these laws inhibit predatory and abusive lending practices without reducing the availability of credit to subprime borrowers. A recently released study concludes that the North Carolina law worked, as intended, to reduce loans with predatory terms without a reduction in access to credit for high-risk borrowers. See Roberto G. Quercia, Michael A. Stegman, & Walter R. Davis, "The Impact of North Carolina's Anti-Predatory Lending Law: A Descriptive Assessment," Center for Community Capitalism, The Frank Hawkins Kenan Institute for Private Enterprise, University of North Carolina at Chapel Hill (June 25, 2003) (the Stegman Study), available at <http://www.kenan-flagler.unc.edu/>

Second, evidence that national banks are engaged in predatory lending practices is scant to non-existent. Based on the absence of such information—from third parties, our consumer complaint database, and our supervisory process—we have no reason to believe that national banks are engaged in such practices to any discernible degree. This observation is consistent with an extensive study of predatory lending conducted by HUD and the Treasury Department,<sup>27</sup> and with comments submitted in connection with an OTS rulemaking concerning preemption of state lending standards by 46 State Attorneys General.<sup>28</sup>

More recently, a coalition of State Attorneys General repeated the same view in a brief filed earlier this year in connection with a challenge to that OTS rulemaking. The case involves a revised regulation issued by the OTS to implement the Alternative Mortgage Transaction Parity Act (AMTPA). The revised regulation seeks to distinguish between federally supervised thrift institutions and non-bank mortgage lenders and makes non-bank mortgage lenders subject to state law restrictions on prepayment penalties and late fees. In supporting the OTS's decision to distinguish between supervised depository institutions and unsupervised housing creditors and to

*News/DetailsNewsPage.cfm?id=466&menu=ki*. However, the data presented in this Study contain variables and uncertainties that may limit the Study's utility for evaluating the effects of state anti-predatory lending laws on the availability of credit to the full range of subprime borrowers. See OCC Paper.

<sup>27</sup> A Treasury-HUD joint report issued in 2000 found that predatory lending practices in the subprime market are less likely to occur in lending by—

Banks, thrifts, and credit unions that are subject to extensive oversight and regulation \* \* \*. The subprime mortgage and finance companies that dominate mortgage lending in many low-income and minority communities, while subject to the same consumer protection laws, are not subject to as much federal oversight as their prime market counterparts—who are largely federally-supervised banks, thrifts, and credit unions. The absence of such accountability may create an environment where predatory practices flourish because they are unlikely to be detected.

Departments of Housing and Urban Development and the Treasury, "Curbing Predatory Home Mortgage Lending: A Joint Report" 17–18 (June 2000) (Treasury-HUD Joint Report), available at <http://www.treas.gov/press/releases/report3076.htm>.

In addition, the report found that a significant source of abusive lending practices is non-regulated mortgage brokers and similar intermediaries who, because they "do not actually take on the credit risk of making the loan, \* \* \* may be less concerned about the loan's ultimate repayment, and more concerned with the fee income they earn from the transaction." *Id.* at 40.

<sup>28</sup> Cited in *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02–2506 (GK) (D.D.C. 2003) at 26.

*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.<sup>29</sup>

According to the State Attorneys General, "OTS looked to where the problems were and was well justified in addressing prepayment penalties and late fee regulation for state housing creditors only, not for supervised thrifts."<sup>30</sup> By not addressing supervised thrifts in its rule change, the OTS was retaining for those institutions preemption of state laws under its existing regulations. In practical effect, the State Attorneys General agreed that in matters of preemption, supervised depository institutions are distinguishable from other housing lenders, and did not take issue with OTS's preemption of state laws where the entity that benefits from the preemption is subject to substantial federal regulation and supervision, which effectively addresses the risk of abusive or predatory practices by those entities.

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. We recognize that certain loan terms and conditions are more likely to be used unfairly or abusively, but that does not mean that all risk-priced loans with those features are, necessarily, predatory. Thus, it is generally necessary to consider the totality of the circumstances to assess whether a loan is predatory and likely to lead to practices such as equity stripping. The OCC's supervisory approach, implemented by trained examiners reviewing on-site the lending practices of national banks, allows for this type of consideration.<sup>31</sup> By focusing

<sup>29</sup> Brief for Amicus Curiae State Attorneys General, *Nat'l Home Equity Mortgage Ass'n*, Civil Action No. 02–2506 (GK) (D.D.C.) at 10–11 (emphasis added).

<sup>30</sup> *Id.* at 11.

<sup>31</sup> Our supervisory track record also demonstrates that where we find abuse, or the potential for abuse, we will take strong action. See, e.g., *In the Matter*