

on lending practices rather than banning specific lending products, this approach reduces the likelihood of predatory lending rather than the availability of credit to subprime borrowers.

Numerous commenters also raised issues concerning the scope of the Determination or Order requested by National City and the appropriate procedure for the OCC to follow in responding to the request. Many of the commenters supporting preemption urge that the determination or order apply to all national banks, not just National City, and to their operating subsidiaries. These commenters note that national banks have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct and that courts have consistently treated the operating subsidiary and the national bank as equivalents. Thus, these commenters argue that the preemption order or determination requested by National City should apply to operating subsidiaries consistent with the OCC's regulations set forth at 12 CFR 7.4006 providing that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Commenters in favor of preemption who assume that the preemption order or determination would apply only to National City's activities in Georgia urge the OCC to issue a rule in conjunction with the determination or order that would apply to all national banks and national bank operating subsidiaries and conclude that all state and local predatory lending laws are preempted.

A number of the commenters opposed to preemption argue that the OCC's response to National City's request should be narrowly tailored and not apply to operating subsidiaries. These commenters believe that the OCC has no legal authority to preempt state laws insofar as they apply to operating subsidiaries of national banks because operating subsidiaries are chartered under state law and must therefore comply with all applicable state laws. One commenter also argues that the OCC may not take the position that § 7.4006 preempts the GFLA with respect to operating subsidiaries

because the OCC did not comply with the Federalism requirements of Executive Order 13132 when it adopted the rule. This commenter also contends that if the OCC grants National City's request, it would create a "decisional rule" applicable to all national banks doing business in Georgia. As such, the commenter believes that Executive Order 13132 also would apply to this proceeding and the OCC should postpone any decision on National City's request until it satisfies its obligations under the Executive Order to consult with state officials.

We recognize that this preemption determination necessarily will affect the practices of lenders in Georgia in addition to National City. As discussed at length below, most of the GFLA provisions already are preempted by Federal law. Accordingly, those provisions are preempted for all national banks and their operating subsidiaries. For the remaining GFLA provisions preempted by operation of this determination and order, it would be incongruous for the law to preempt GFLA provisions for only one institution.³² Therefore, this order will apply to all national banks engaged in real estate lending activities in Georgia.

We also agree with the commenters who argued that, consistent with 12 CFR 7.4006, the GFLA is preempted for national bank operating subsidiaries to the same extent it is preempted for their parent banks.³³ Accordingly, this determination applies equally to national bank operating subsidiaries engaged in real estate lending activities in Georgia. This determination will not, however, affect lenders who are not otherwise subject to the GFLA. Therefore, we decline to adopt the suggestion of some commenters that this order apply to all national banks and national bank operating subsidiaries, regardless of whether they make real estate loans. Those lenders will, however, be subject to the results of the rulemaking commenced today, which proposes to apply the results of our analysis here by expanding the list of the types of state laws that are expressly preempted by Federal law concerning national banks' real estate lending powers.

These and other comments will be addressed in more detail in the following sections, which present an overview of the national banking laws and the Federal court precedents

concerning the applicability of state law to national banks, followed by an analysis of the extent to which provisions of the GFLA are preempted by Federal law.

II. Overview of Federal Preemption of State Laws With Respect to National Banks

In the earliest decades of this country's existence, the Supreme Court recognized that under the Supremacy Clause of the U.S. Constitution—paragraph 2 of Article VI—states "have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations" of an entity created by lawful exercise of Federal authority.³⁴ The entity involved in the landmark case in which these principles were articulated was the Second Bank of the United States. The history of the national banking laws and 140 years of Federal court precedents considering the applicability of state laws to national banks consistently reflect this principle and demonstrate that the exercise by a national bank of a Federally authorized power is ordinarily not subject to state law.

A. Legislative History of the Early National Banking Laws

Congress enacted the National Currency Act (Currency Act) in 1863 and modified it with the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the national economy both during and after the Civil War.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.³⁵ Given this

³⁴ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

³⁵ Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [i.e., the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong. 1st Sess. 1256 (Mar. 23, 1864). While Rep. Hooper did not believe that the legislation was necessarily harmful to the state bank system, he did "look upon the system of State banks as having outlived its usefulness." *Id.* Opponents of the legislation believed that it was intended to "take from the States * * * all authority whatsoever over their own State banks, and to vest that authority * * * in Washington." Cong. Globe, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over

of Provident Nat'l Bank, Tilton, New Hampshire, Consent Order No. 2000-53 (June 28, 2000) (requiring payment by the bank in excess of \$300 million and imposing numerous conditions on the conduct of future business), available at <http://www.occ.treas.gov/ftp/release/2000%2D49b.pdf>. This approach seems to be successful, as explained in the 2000 Treasury-HUD Joint Report, *supra* note 27.

³² This determination depends on an analysis of the GFLA and national bank authority and is therefore not fact-specific to National City.

³³ See *infra* note 110 and accompanying text for a detailed discussion of the commenter's arguments concerning the Federalism order.