

the borrower to the same position as if the default had not occurred and nullifies the acceleration. This provision thus requires the original term of the loan to be reinstated upon curing a default, notwithstanding the possibility that prudent underwriting would suggest a modification of terms (including maturity).

3. GFLA Provisions Preempted Under Recognized Principles of Preemption as Provided by § 34.4(b)

Section 34.4(a) is not a comprehensive list of all of the types of state real estate lending laws that are inapplicable to national banks. Section 34.4(b) acknowledges that the OCC evaluates additional types of state laws on a case-by-case basis. It says:

The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.⁸⁵

The “recognized principles of Federal preemption” derive from the substantial body of Federal precedent considering the applicability of state law to the exercise of national bank powers. Courts and the OCC have consistently held that states may not condition the exercise of permissible Federal powers upon the approval of the states.⁸⁶

Consistent with these precedents, we conclude that the following provisions

of the GFLA are preempted. Even though based on laudable motives, they impermissibly seek to impose requirements that a national bank would have to satisfy before being permitted to exercise powers authorized under Federal law.

- *Restriction on financing of credit insurance and debt suspension and debt cancellation fees.* A creditor of a home loan may not finance credit insurance premiums, debt suspension fees, debt cancellation fees,⁸⁷ or certain other premiums. Premiums or fees paid for certain types of insurance on a monthly basis are permitted.⁸⁸

- *Restriction on refinancings.* Creditors may not knowingly or intentionally refinance a home loan in a transaction defined under the GFLA as “flipping.” “Flipping” occurs when (a) a creditor makes a high-cost home loan to a borrower that refinances an existing home loan that was consummated within the prior five years, and (b) the new loan does not provide a reasonable and tangible net benefit to the borrower considering all of the circumstances. “Flipping” will be presumed to have occurred if the loan refinances a home loan that was: (a) Consummated within the past five years; (b) a special mortgage originated, subsidized, or guaranteed by a state, tribal, or local government or nonprofit organization; and (c) originated at a below-market interest rate or with nonstandard terms beneficial to the borrower. The refinance of a loan originated or purchased by the Georgia Housing and Finance Agency (GHFA) will be presumed not to have been flipped.

- *Borrower counseling required.* A creditor may not make a high-cost home loan unless it receives a certificate from a counselor approved by HUD or the GFHA that the borrower has received counseling on the advisability of the loan transaction.

- *Underwriting standards limited.* A creditor may not make a high-cost home loan unless a reasonable creditor would believe at the time the loan is consummated that the borrower can make scheduled payments based on income, obligations, employment status, and other financial resources. There is a rebuttable presumption that a borrower can make scheduled payments if total debt service does not exceed 50% of gross monthly income.

- *Restrictions on home improvement loans.* A creditor or servicer may not pay a contractor under a home improvement contract from proceeds of a high-cost home loan unless (a) the lender or servicer receives an affidavit from the contractor that work has been completed, and (b) the loan proceeds are disbursed in an instrument payable either to the borrower alone, to the borrower and the contractor, or to a third-party escrow agent.

- *Notice requirements.* A creditor of a high-cost home loan must comply with the GFLA’s notice requirements for originating and foreclosing high-cost home loans. Under these requirements, a creditor must provide a borrower certain notices in the documents that create a debt or pledge collateral and before initiating foreclosure proceedings.

We note, however, that although the foregoing provisions are inapplicable to national banks and their operating subsidiaries, the concerns underlying those provisions are addressed through the OCC’s supervision of national banks and their subsidiaries. As mentioned above, the OCC recently issued Advisory Letters 2003–2 and 2003–3, which contain the most comprehensive supervisory standards ever published by any Federal financial regulatory agency to address predatory and abusive lending practices and detail steps for national banks to take to ensure that they do not engage in such practices. As explained in the Advisory Letters, if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices not only to determine whether they violate specific provisions of law such as HOEPA, the Fair Housing Act, or the Equal Credit Opportunity Act, but also to determine whether they involve unfair or deceptive practices that violate the FTC Act. Indeed, several practices that we identify as abusive in our Advisory Letters—such as equity stripping, loan flipping, and the refinancing of special subsidized mortgage loans that originally contained terms favorable to the borrower—generally can be found to be unfair practices that violate the FTC Act.

⁸⁵ 12 CFR 34.4(b). The OCC proposed to add this provision to part 34 in 1995. At that time, we explained that the purpose of § 34.4(b) was to “clarify that the list of areas [set forth currently in § 34.4(a)] where State law is preempted * * * is not exhaustive.” 60 FR 35353, 35355 (July 7, 1995) (emphasis added.) The final rule adopted the proposed rule with only minor stylistic edits. See 61 FR 11294, 11296 (Mar. 20, 1996). This rulemaking superseded a 1983 revision to part 34, in which the OCC stated that we were clarifying a “limited scope of preemption” by preempting “at this time, only those state laws that govern in those areas” now encompassed in § 34.4(a). 48 FR 40698, 40700 (Sept. 9, 1983) (emphasis added.) Thus, the 1983 rulemaking left room for an expanded preemptive scope in the future and has been superseded by the present text of § 34.4.

⁸⁶ See, e.g., *Barnett*, 517 U.S. at 34–35; *Franklin Nat’l Bank*, 347 U.S. at 378; *Bank of America Nat’l Trust & Sav. Ass’n v. Lima*, 103 F. Supp. 916, 918, 920 (D. Mass. 1952) (exercise of national bank powers is not subject to state approval; states have no authority to require national banks to obtain a license to engage in an activity permitted to them by Federal law). See also Letter dated Mar. 7, 2000, from Julie L. Williams to Thomas P. Vartanian, 65 FR 15037 (Mar. 20, 2000) (Federal law would preempt state statute regulating the conduct of auctions if applied to a national bank’s online auction program); OCC Interpretive Letter No. 866 (Oct. 8, 1999) (state law requirements that purport to preclude national banks from soliciting trust business from customers located in states other than where the bank’s main office is located would be preempted); OCC Interpretive Letter No. 749 (Sept. 13, 1996) (state law requiring national banks to be licensed by the state to sell annuities would be preempted); OCC Interpretive Letter No. 644 (Mar. 24, 1994) (state registration and fee requirements imposed on mortgage lenders would be preempted).

⁸⁷ OCC regulations at 12 CFR part 37 already prohibit contract terms that require a lump sum, single payment for a debt cancellation contract or debt suspension agreement where the debt subject to the contract is a residential real estate loan. See 12 CFR 37.3(c)(2). Part 37 applies to debt cancellation contracts and debt suspension agreements entered into by national banks in connection with extensions of credit they make and provides that those contracts and agreements are not governed by state law. See *id.* § 37.1(c).

⁸⁸ When insurance is financed as part of a home loan, the GFLA restricts the options available to the lender and borrower concerning how the loan proceeds are to be applied. This has the effect of imposing a condition on real estate lending in violation of section 371. The applicability of state laws regarding credit insurance sales, solicitation, and cross-marketing is governed by section 104 of the GLBA. See 15 U.S.C. 6701. The National City request raises no issues pertaining to the preemption of such state laws.