

loan-related fees. Creditors must disclose to borrowers that the loan is high-cost, and borrowers must attend loan counseling before the creditor may make the loan. In addition, the GFLA prohibits pre-payment penalties, balloon payments, negative amortization, increases in the interest rates after default, advance payments from loan proceeds, fees to modify, renew, extend, amend or defer a payment, and accelerating payments at the creditor's or servicer's sole discretion.

National City requests the OCC to issue a determination or order that 12 U.S.C. 24(Seventh), 12 U.S.C. 371 and their implementing regulations preempt the GFLA. A copy of the request appears as an Appendix to this notice. We will publish any final determination or order responding to National City's request in the **Federal Register**.

Regardless of the ultimate conclusion reached regarding preemption of the GFLA or any other similar state or local law, abusive and predatory lending practices that take unfair advantage of borrowers, or have a detrimental effect on communities, may violate a number of *federal* laws, and do conflict with the high standards by which the OCC expects national banks to conduct their operations. Accordingly, concurrent with issuance of this Notice of Request for Preemption Determination or Order, the OCC is issuing two Advisory Letters. Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices," February 21, 2003, and Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans," February 21, 2003. Together these two Advisory Letters set forth standards that should assure that national banks are not directly involved, or indirectly associated with, predatory or abusive lending practices.

#### Issues Presented by National City's Request

National City has asked the OCC to determine that 12 U.S.C. 24(Seventh) and 371 preempt the GFLA. This request requires determining whether "Congress, in enacting the Federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State." *Barnett Bank of Marion County, N.A. v. Nelson, et al.*<sup>3</sup>

Central to the issues raised by National City is 12 U.S.C. 371, which vests in the OCC comprehensive authority to regulate and restrict the real

estate lending activities of national banks. Section 371 provides:

[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

The exercise of the powers granted by section 371 is not conditioned on compliance with any state requirement.<sup>4</sup> Notably, the exercise of powers under that section is subject only to such rules and regulations as the Comptroller may prescribe.

In *Barnett*, the Supreme Court analyzed a similarly structured statute, 12 U.S.C. 92 and the extent to which section 92 leaves room for state regulation of the activities the statute authorizes. There, the Supreme Court stated that:

[section 92's] language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may \* \* \* act as the agent" for insurance sales. 12 U.S.C. 92. It specifically refers to "rules and regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency.<sup>5</sup>

The Court concluded that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."<sup>6</sup>

The Congressional delegation to the Comptroller of authority under section 371 mentions only conditions imposed by the OCC for national banks pursuant to section 1828(o) and "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." It makes no mention of conditions imposed by state law. Citing the judicial maxim of statutory interpretation *expressio unius est exclusio alterius* ("mention of one thing implies exclusion of another"), National City contends that this plain language evidences a Congressional intent to permit only the OCC to impose conditions on national bank real estate lending regulation, leaving no room for state involvement.

<sup>4</sup> Subsequent *Federal* legislation may provide, however, that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross-marketing activities subject to certain types of state restrictions expressly set out in the Gramm-Leach-Bliley Act. See 15 U.S.C. 6701(d)(2)(B). There is no similar Federal legislation subjecting national banks' real estate lending activities to state law standards.

<sup>5</sup> *Barnett*, 517 U.S. at 32.

<sup>6</sup> *Id.* at 34.

The legislative history of section 371 lends support to this construction. National banks' real estate lending activities have consistently been subject to comprehensive Federal regulation ever since the authority to lend on the security of real estate was first granted to them in the Federal Reserve Act of 1913. For many years, national banks' real estate lending authority was governed by the express terms of section 371. As originally enacted in 1913, section 371 contained a limited grant of authority to national banks to lend on the security of "improved and unencumbered farm land, situated within its Federal reserve district."<sup>7</sup> In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, section 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits. In 1982, Congress removed these "rigid statutory limitations"<sup>8</sup> in favor of a broad provision authorizing national banks to "make, arrange, purchase, or sell loans or extensions of credit secured by liens on interest in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation."<sup>9</sup> The purpose of the 1982 amendment was "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market."<sup>10</sup> In 1991, Congress removed the term "rule" from this phrase<sup>11</sup> and enacted an additional requirement, codified at 12 U.S.C. 1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to "uniform standards" adopted at the Federal level by regulation of the OCC and the other Federal banking agencies.<sup>12</sup> Thus, the history of national banks' real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a

<sup>7</sup> Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

<sup>8</sup> S. Rep. No. 97-536, at 27 (1982).

<sup>9</sup> Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, 96 Stat. 1469, 1510-11 (1982).

<sup>10</sup> S. Rep. No. 97-536, at 27 (1982).

<sup>11</sup> This language was changed without explanation.

<sup>12</sup> Section 304 of the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. 1828(o). These standards governing national banks' real estate lending are set forth in subpart D of part 34.

<sup>3</sup> 517 U.S. 25, 30 (1996).