

streamlined approach in which Congress has delegated broad authority to the Comptroller.<sup>13</sup> It may therefore be argued that section 371 evidences an intent for the OCC to occupy the field of regulation of national banks' real estate lending except, of course, where Congress in other legislation has made them subject to additional requirements, e.g. the Truth in Lending Act.<sup>14</sup>

The OCC has implemented section 371 in regulations set forth at 12 CFR part 34. Subpart A of part 34, by its terms, applies to both national banks and their operating subsidiaries.<sup>15</sup> Twelve CFR 34.3 establishes the general rule that a national bank and its operating subsidiaries may engage in real estate lending subject only to the "terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." Twelve CFR 34.4(a) expressly provides that five types of state law limitations are not applicable to real estate loans made by national banks and their operating subsidiaries:

(a) *Specific preemption.* A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to State law limitations concerning:

(1) The amount of a loan in relation to the appraised value of the real estate;

(2) The schedule for the repayment of principal and interest;

(3) The term to maturity of the loan;

(4) The aggregate amount of funds that may be loaned upon the security of real estate; and

(5) The covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

It would appear that a number of GFLA provisions fall within the scope of § 34.4(a). For example, National City argues that a number of GFLA prohibitions, including those on balloon payments, negative amortization, advance payments from the loan proceeds and acceleration at the creditor's or servicer's discretion, are state law limitations concerning the "schedule for the repayment of principal and interest" and are therefore preempted by § 34.4(a)(2).

Twelve CFR 34.4(b) states:

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.<sup>16</sup>

It may be argued that the structure of § 371 and § 34.3, together with the express preemption delineated in § 34.4(a), evidence a presumption that state law does not apply to the real estate lending activities of national banks and their operating subsidiaries unless the OCC determines under § 34.4(b) that a particular state law is not preempted. In other words, in "considering whether state laws apply" for purposes of issuing an order under section 371, the OCC could either issue an order confirming that the law is not applicable or providing that it will be applicable after applying the "recognized principles of preemption" referred to in § 34.4(b). Thus, in effect, National City argues that section 371 authorizes the OCC to "occupy the field" of real estate lending regulation for national banks, and that, through its regulations, including § 34.4(a) and (b), the OCC has done so.

Thus, in order to implement § 34.4(b) to determine whether any of the GFLA provisions not otherwise preempted under § 34.4(a) apply to National City, the OCC examines whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>17</sup> In the present context, the OCC must examine the effect that the state law provisions have on a national bank's exercise of the federally authorized power to engage in real estate lending granted by Federal statutes, including 12 U.S.C. 371.<sup>18</sup> As set out in detail in its request, National City asserts that various GFLA provisions place impermissible limits on the exercise of national banks' real estate lending powers under 12 U.S.C. 371 and place impermissible limits on the exercise of national banks' authority to lend money generally under 12 U.S.C. 24(Seventh) and to charge fees for lending products or services.<sup>19</sup>

National City accordingly requests the OCC to issue a determination or an order under 12 U.S.C. 24(Seventh) and 12 U.S.C. 371 that the identified

provisions of the GFLA do not apply to National City.

## Request for Comments

The OCC solicits comment on the issues raised by the National City request.

Dated: February 13, 2003.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

## Appendix—National City's Request

February 11, 2003.

Julie L. Williams, *First Senior Deputy Comptroller of the Currency and Chief Counsel, Office of the Comptroller of the Currency, 250 E. Street, SW., Washington, DC 20219.*

Re: Request for Preemption Determination or Order.

Dear Ms. Williams: On behalf of National City Bank, National City Bank of Indiana and its operating subsidiaries First Franklin Financial Corporation and National City Mortgage Co. we hereby request the Office of the Comptroller of the Currency ("OCC") to issue a preemption determination or Order under 12 U.S.C. 371 that the Georgia Fair Lending Act ("GFLA") is preempted by federal law and regulations, specifically 12 U.S.C. 24 (Seventh), 371 and 484 and 12 CFR 34.1(b), 34.3, 34.4, 7.4002 and 7.4006 as it relates to a national bank and its operating subsidiaries in the exercise of their federally granted real estate lending powers.

## I. Background

### A. The Requesting Parties

National City Bank and National City Bank of Indiana both are national banks, chartered, regulated, and supervised by the OCC. National City Mortgage Co. and First Franklin Financial Corporation are wholly owned operating subsidiaries of National City Bank of Indiana and are similarly regulated and supervised by the OCC.

National City Bank originates in its own name and funds home equity loans and lines of credit on a nationwide basis. National City Mortgage Co. originates in its own name and funds first and second mortgage loans throughout the United States for the purpose of financing and refinancing the acquisition and construction of real property consisting of one to four family residential dwellings. First Franklin Financial Corporation originates in its own name and funds first and second mortgage loans that enable borrowers to acquire and refinance one to four family residential real property. In this request, National City Bank, National City Mortgage Co. and First Franklin Financial Corporation are collectively referred to as "National City." National City receives loan applications from third party mortgage brokers, and those mortgage brokers perform many services resulting in the origination of the loans and lines of credit by National City in its own name.

### B. The Georgia Fair Lending Act

The GFLA became effective on October 1, 2002. In the enactment of GFLA the Georgia Legislature was attempting to address abuses

<sup>13</sup> We note that in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1946), the Supreme Court considered a statute that had been similarly revised to delegate exclusive authority under it to the Secretary of Agriculture. Even though the statutory revision in question in *Rice* authorized the Secretary "to cooperate with State officials," the Supreme Court found the revision evidence that Congress acted "so unequivocally as to make clear that it intends no regulation except its own." *Id.* at 236.

<sup>14</sup> 15 U.S.C. 1601 *et seq.*

<sup>15</sup> See 12 CFR 34.1(b).

<sup>16</sup> See 12 CFR 24.4(b).

<sup>17</sup> *Barnett*, 517 U.S. at 31, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>18</sup> As explained below, National City also argues that a number of GFLA provisions impair the bank's ability to exercise its general lending authority under 12 U.S.C. 24 (Seventh).

<sup>19</sup> The OCC's regulation at 12 CFR 7.4002 reaffirms that ability to charge a fee for a bank's services.