

it perceived in the marketplace that disadvantaged persons who may have impaired credit or were unfamiliar with real estate lending procedures and terms. There may be a legitimate state purpose for regulation of lending practices which are otherwise unsupervised. However, that purpose has no applicability to national banks and their operating subsidiaries, which are subject to comprehensive regulation and supervision by the OCC as required by federal law.

GFLA restricts national banks and their operating subsidiaries' ability to originate mortgage loans in the state of Georgia, set interest rates, fees and credit terms, establish disclosures and utilize the services of third party mortgage brokers in the origination process. GFLA applies to all consumer-purpose loans and lines of credit secured by borrower-occupied one to four family residential property within the conforming loan limit set by FNMA for a single-family dwelling except reverse mortgages, bridge loans and loans which are also secured by personal property ("Home Loan"). Certain of GFLA's restrictions apply to all Home Loans. Other limitations apply to one or both of the two sub-categories of Home Loans created by GFLA as it was originally enacted: Covered Home Loans and High Cost Home Loans. Whether a Home Loan fits into these categories depends on the loan's interest rate and fees and charges. The fees and charges which cause a Home Loan to be categorized as a Covered Home Loan or High Cost Home Loan include the fees paid to a third party mortgage broker.

GFLA establishes specific and burdensome limitations on mortgage-secured loans and lines of credit that significantly interfere with National City's ability to make these loans. All Home Loans are subject to restrictions on the terms of credit and certain loan related fees, including the prohibition of financing of credit insurance, debt cancellation and suspension coverage, and limiting late charges and prohibiting payoff and release fees. If the loan or line of credit is a Covered Home Loan which refinances a Home Loan which was closed within the previous five years, National City is restricted from originating it unless the refinanced transaction meets standards established by GFLA. If the loan or line of credit is a High Cost Home Loan, GFLA does not permit National City to originate it unless the borrower has received advance counseling with respect to the advisability of the transaction from a third party nonprofit organization. GFLA regulates National City's ability to determine the borrower's ability to repay the High Cost Home Loan. GFLA restricts, and in some cases prohibits, the imposition by National City of certain credit terms or servicing fees on High Cost Home Loans, including: prepayment penalties, balloon payments, advance loan payments, acceleration in the lender's discretion, negative amortization, post-default interest and fees to modify, renew, amend or extend the loan or defer a payment. Any High Cost Home Loan must contain a specific disclosure that it is subject to special rules, including purchaser and assignee liability, under GFLA. Finally, GFLA imposes pre-foreclosure requirements.

GFLA currently creates strict assignee liability for all subsequent holders of a home loan. GFLA provides a private right of action for borrowers against lenders, mortgage brokers, assignees and servicers for injunctive and declaratory relief as well as actual damages, including incidental and consequential damages, statutory damages equal to forfeiture of all interest or twice the interest paid, punitive damages, attorneys' fees and costs. In addition, the Georgia Attorney General, district attorneys, the Commissioner of Banking and Finance and, with respect to the insurance provisions, the Commissioner of Insurance has the jurisdiction to enforce GFLA through their general state regulatory powers and civil process. Criminal penalties are also available.

The uncapped investor liability caused Standard & Poors, Moody's Investor Services and Fitch Ratings to cease rating any security that includes GFLA-governed loans. As of February 4, 2003 Fitch Ratings declined to rate Georgia Home Loans in RMBS pools. Fitch ratings also announced that it was considering the impact of further state and local predatory lending legislation on its ability to rate transactions. As a result, the GFLA impairs National City's ability to securitize or sell their loans on the secondary market.

In light of the recent pronouncements by the securities rating agencies, the Georgia Legislature is considering amendments to GFLA which could limit or eliminate liability for assignees and purchasers, remove the category of Covered Loans and make other substantive changes to the law. These proposed changes, if enacted, will reduce the number of loans categorized as High Cost Home Loans and might provide limited safe harbors for refinancings. However, the proposed amendments would not affect the restrictions on loan fees and terms for Home Loans and High Cost Home Loans and the preconditions for originating a High Cost Home Loan. One proposal would also restrict the refinancing of any Home Loan originated in the previous five years unless the refinancing meets GFLA's standards. Therefore, the proposed amendments do not obviate National City or any other national banking organization's need for a preemption determination.

#### *C. Impact of GFLA on National City's Real Estate Lending in Georgia*

The effect of GFLA is to limit National City's ability to originate and to establish the terms of credit on residential real estate loans and lines of credit, including loans or lines of credit submitted by a third party mortgage broker. GFLA has significantly impaired National City's ability to originate residential real estate loans in Georgia.

In addition to preventing National City from exercising its fundamental powers to engage in residential real estate transactions and to incorporate credit terms that National City feels may be necessary to lend in a safe and sound manner, GFLA has also adversely affected the investor market for Georgia loans. The restrictions imposed by GFLA have lead the Government Sponsored Enterprises ("GSE's") to limit the loans they will purchase from National City and other

originators, and Standard and Poors, Fitch Ratings and Moody's Investor Service have publicly stated they will not allow a GFLA governed loan in a rated structured financial transaction. This is another example of how the GFLA adversely affects National City's ability to sell or securitize loans.<sup>20</sup>

## **II. Reasons Supporting the Requested Preemption of GFLA**

### *A. GFLA Is Preempted by Paramount Federal Law*

National banks and their operating subsidiaries have broad authority to originate and establish the terms and conditions of mortgage loans, subject only to the paramount regulations and orders established by the Office of the Comptroller of the Currency ("OCC").

Federal law may preempt state law (1) where Congress has expressly preempted state law, (2) where Congress has occupied the field the state seeks to regulate, and (3) where state law actually conflicts with federal law. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299–300 (1988). In applying the test put forth by the United States Supreme Court in *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996), 134 L. Ed.2d 237 to the facts here it is clear that Congress provided national banks with a broad grant of powers under 12 U.S.C. 24 (Seventh) and a specifically broad grant of powers for real estate lending pursuant to 12 U.S.C. 371. This grant of power to permit real estate lending is the exact activity which GFLA restricts. The State's prohibitions under GFLA "stand as an obstacle to the accomplishment" of one of the federal statute's purposes, *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).

Twelve U.S.C. § 371 occupies the field of mortgage lending subject only to such regulations and orders as are adopted by the OCC. The Supreme Court has recognized that state law generally should not limit powers granted by Congress—

In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law. *Barnet Bank v. Nelson*, 517 U.S. 25 at 32 (1996). See also *Bank One v. Gutttau*, 190 F.3d 844, 847 (8th Cir. 1999).

The Supreme Court has held that federal law preempts not only state laws that purport to prohibit a national bank from engaging in an activity permissible under federal law but also state laws that condition the exercise by a national bank of a federally authorized activity.

[W]here 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. In *Franklin Nat. Bank*, the Court

<sup>20</sup> We note that other states and localities have passed similar restrictions that also adversely affect National City's real estate lending.