



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 9, 2004

Interpretive Letter #999
August 2004

The Honorable Barney Frank
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Frank:

I am writing in response to your letter of February 11, 2004, concerning the impact of the preemption and visitorial powers rules recently issued by the OCC. Your letter raises a particular concern that these rules will leave consumers vulnerable to predatory lending practices and urges us to delay their effective date pending further dialogue with Congress on this issue. As I am sure you are aware, our rules went into effect, in accordance with their previously established effective date, literally hours after our receipt of your letter. Thus, I welcome this opportunity to provide additional background on their scope and application, which I hope will help to alleviate your central concerns. I know the devastating impact of predatory and abusive lending, and I am absolutely committed to assuring that those practices have no place in the national banking system.

First, the OCC has not exempted national banks and their operating subsidiaries from all state laws. The preemption rule adds provisions to our regulations expressly addressing the applicability of particular types of State laws to national banks' lending and deposit-taking activities. In both areas, the listed types of laws either already are preempted under longstanding, pre-existing OCC regulations, have been found to be preempted in OCC preemption opinions, have been found to be preempted by the courts, or have been determined to be preempted with respect to Federal thrifts by the Federal thrift supervisor, the OTS. Other types of laws, not listed in the regulations, will continue to be evaluated by the OCC and the courts under pre-existing, established judicial standards for Federal preemption.

Second, the rule prohibits national banks from making any consumer loan based predominantly on the foreclosure or liquidation value of a borrower's collateral, rather than on the borrower's ability to repay the loan according to its terms. This anti-predatory lending standard applies uniformly to all consumer lending activities of national banks, regardless of the location from which the bank conducts those activities or where its customers live. I believe this standard addresses the essential characteristic of predatory lending, namely lending practices that effectively swindle a homeowner out of his or her property.

Third, the new rule provides that, in connection with *any* type of lending, national banks may not engage in unfair and deceptive practices within the meaning of Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits "unfair or deceptive acts or practices" in interstate commerce. We added an express reference to Section 5 to our rule in response to commenters who urged us to affirm that this Federal standard applies to national banks. We viewed this addition as particularly appropriate in light of the fact that the OCC pioneered the use of Section 5 as a basis for enforcement actions against banks that have engaged in such conduct. Many practices typical of predatory lending, such as "equity stripping," and "loan flipping," could be characterized as unfair or deceptive under Section 5 and thus would be barred under our new rule.

It is important to emphasize that these new standards apply nationwide to all national banks and national bank operating subsidiaries. They apply strong protections for national bank customers in every State. They complement the detailed anti-predatory lending guidance that the OCC has had in place since last year.¹ Together, the new regulatory provisions and our existing supervisory guidance provide a comprehensive framework governing our supervision of national banks' lending operations to protect against predatory lending practices.

Our regulations and guidance are in addition to the multitude of Federal consumer protection statutes with which national banks and their operating subsidiaries must comply.² As you know, national banks and their operating subsidiaries are highly regulated and closely supervised. The largest national banks have teams of examiners on premises at all times, constantly reviewing their operations. Other banks have regular on-site exams, supplemented by targeted reviews as needed and off-site monitoring. The OCC supervises approximately 2200 national banks, together with their subsidiaries. We have nearly 1700 examiners in the field, hundreds of which are involved in both safety and soundness and compliance supervision. Over

¹ The OCC is the first, and thus far the only, Federal banking agency to issue anti-predatory lending guidance. See Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices," February 18, 2003; Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans," February 18, 2003. This supervisory guidance provides comprehensive direction to ensure that national banks and their operating subsidiaries do not become involved in abusive or predatory mortgage lending practices. It details steps for national banks to take to ensure that they do not engage in such practices. The guidance makes clear that national banks should adopt policies and procedures to prevent predatory lending practices in *both* direct lending *and* in transactions involving brokers and purchased loans. Each of the Advisory Letters expressly covers national banks as well as their operating subsidiaries. The advisories appear on our web site at <http://www.occ.treas.gov/ftp/advisory/2003-2.doc> and <http://www.occ.treas.gov/ftp/advisory/2003-3.doc>. The OCC has also issued standards on unfair and deceptive practices, which appear at <http://www.occ.treas.gov/ftp/advisory/2002-3.doc>.

² Federal consumer protection laws and regulations that apply to national banks and to national bank operating subsidiaries include: the Federal Trade Commission Act; Truth in Lending Act; Home Ownership and Equity Protection Act; Fair Housing Act; Equal Credit Opportunity Act; Real Estate Settlement Procedures Act; Community Reinvestment Act; Truth in Savings Act; Electronic Fund Transfer Act; Expedited Funds Availability Act; Flood Disaster Protection Act; Home Mortgage Disclosure Act; Fair Housing Home Loan Data System; Credit Practices Rule; Fair Credit Reporting Act; Federal privacy laws; and the Fair Debt Collection Practices Act.

100 examiners throughout the country work exclusively on compliance supervision. We have over 300 examiners on site at our largest national banks, engaged in continuous supervision of all aspects of their operations. These resources are supplemented by dozens of attorneys in our district offices and Washington D.C. who work on compliance matters.

Our Customer Assistance Group in Houston, Texas (CAG) supplements these functions. In addition to providing direct assistance to customers to resolve their individual complaints, the CAG collates and disseminates complaint data that help point our examiners toward banks, activities, and products that require further investigation or transaction testing through product sampling. We also obtain additional valuable insight and information from community and consumer groups and from consumer complaint referrals by other Federal and State authorities.

Our approach to predatory lending is a comprehensive, ongoing, and integrated supervisory approach, focused on *preventing predatory practices*, not just punishing those that commit them. Clearly, predatory lending is a problem in this country, but our supervisory experience, the experience of the CAG, views expressed by all 50 State Attorneys General,³ and a recently issued GAO report on predatory lending,⁴ all indicate that national banks and their operating subsidiaries are not where the problem is festering.

If, however, as a result of our examination or supervisory processes, or upon investigation of referrals or complaints, we find abusive practices in a particular institution, we take action to stop them.⁵ Our enforcement record shows that we have been willing and able to protect

³ In *supporting* the Office of Thrift Supervision's decision to retain preemption of state laws for supervised depository institutions and their subsidiaries but *not* for unsupervised housing creditors, the State Attorneys General stated: "Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to *non-depository institutions*. *Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.*" Brief for Amicus Curiae State Attorneys General, *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02-2506 (GK) (D.D.C.) at 10-11 (emphasis added). The Attorneys General continue to be of this view, although they opposed the OCC's preemption rule. In their comment letter submitted to the OCC on the preemption rule, the National Association of Attorneys General stated: "It is true that most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks." National Association of Attorneys General Comment Letter at 10.

⁴ See U.S. General Accounting Office, Report to the Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate, "Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending" (January 2004) at 22 (based on HUD data, only about 18 Federally regulated banks or thrifts concentrated primarily in subprime mortgage lending in 2001); 51 ("[S]everal state attorneys general have written that predatory lending abuses are 'largely confined' to the subprime lending market and to non-depository institutions, not banks or direct bank subsidiaries.")

⁵ Section 8 of the Federal Deposit Insurance Act gives the OCC broad powers to compel compliance with any "law, rule, or regulation." This includes the ability to issue cease and desist orders when the OCC determines that a national bank or its operating subsidiary has violated any applicable Federal law or regulation or any applicable State law or regulation. 12 U.S.C. § 1818(b)(1). In an appropriate case, the cease and desist order may include restitution or a requirement for such other affirmative action as the OCC determines is appropriate. *Id.* at § 1818(b)(6).

customers and to address unfair, deceptive, or abusive practices when those situations occur.⁶ This commitment has resulted in hundreds of millions of dollars of restitution to consumers over the past several years.

Finally, our jurisdiction over national banks and their subsidiaries does not deprive State regulators of a role in protecting consumers in their States,⁷ and we welcome opportunities to work cooperatively with them to further that goal. We have invited State authorities to refer consumer complaints concerning national banks to the OCC, and to bring to our attention concerns that any national bank is engaged in unfair, deceptive, abusive, or predatory practices. We have set up special procedures to coordinate and track referrals from State authorities. Just last week we issued a new Advisory Letter clarifying our expectations concerning how national banks should respond to consumer complaints received directly from State agencies.⁸ The OCC and the States already cooperate extensively in many respects, referring consumer complaints to the appropriate regulator of the entity generating the complaint, and we welcome opportunities to leverage off these existing cooperative processes to maximize their coverage and their impact.

We appreciate this opportunity to explain our position, and would be happy to provide you with any further information you require.

Sincerely,

signed

John D. Hawke, Jr.
Comptroller of the Currency

⁶ A listing of enforcement actions that the OCC has taken recently to remedy abusive lending and marketing practices appears on our website within the “Popular FOIA Requests” section, at <http://www.occ.treas.gov/foia/foiadocs.htm>.

⁷ The National Bank Act provides that, with certain express exceptions, national banks are not subject to “any visitorial powers except as authorized by Federal law” Existing OCC regulations implement the statute by providing that state officials are not authorized to inspect, examine, or regulate national banks, except where another Federal law authorizes them to do so. 12 CF.R. § 7.4000.

⁸ Advisory Letter 2004-2, “Consumer Complaints Referred to National Banks from State Officials,” February 26, 2004.