Testimony of
Independent Community Bankers of America
On

"Congressional Review of OCC Preemption"

before the
Subcommittee on Oversight and Investigations

of the

House Financial Services Committee

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Washington, DC

Madam Chairman, Ranking member Guiterrez, and members of the Committee, my name is Karen Thomas. I am Director of Regulatory Affairs and Senior Regulatory Counsel for the Independent Community Bankers of America ("ICBA"),[1] and I am pleased to appear today on behalf of ICBA to share with you our views on the Office of the Comptroller of the Currency's (OCC) preemption rule.

Earlier this month, OCC finalized two rules designed to clarify its exclusive authority over national banks. The first rule declares that certain state laws that "obstruct, impair, or condition" a national bank's exercise of its lending and deposit-taking activities are preempted. While the final preemption rule sets forth the areas of state law generally preempted as applied to national bank activities, the OCC also reaffirms that there are state laws, such as criminal laws and laws on contract and debt collection, that create the environment in which a national bank operates that will continue to apply to national banks.

A second, companion rule affirms the OCC as the exclusive supervisory authority for national bank activities. While conceding that states have the authority to enforce rules such as fire codes and environmental laws, the agency made clear that any action involving the exercise of a national bank's power granted by the federal government is solely the province of the OCC and not state or local officials.

When proposed, these rules engendered heated controversy and debate—pro and con. We understand that to address criticism that the rules would result in inadequate protection of consumers, the OCC also included two provisions designed to prevent national banks from engaging in predatory lending. Namely, national banks are prohibited from making consumer loans predominantly on the foreclosure or liquidation value of the collateral without regard to the borrower's ability to repay the loan according to its terms. And, national banks may not engage in unfair or deceptive practices within the meaning of Section 5 of the Federal Trade Commission Act.

With issuance of the final rules, the controversy over the rules remains. Strong views and feelings have been expressed on both sides as to the legitimacy and appropriateness of the rule.

Summary of ICBA Position

In October, 2003, ICBA provided its views to OCC on the proposed rule. A copy of our comment letter describing our views in more detail is attached to this testimony.

In general, as expressed in our comment letter, the ICBA believes it would have been preferable for the OCC to continue to analyze how individual state laws impact national banks and to make preemption determinations on a case-by-case basis, rather than adopt a broad general preemption regulation. In our judgment, the importance of the federal-state relationship mandates that whenever preemption is undertaken, it should be carefully

[1] ICBA is the primary voice for the nation's community banks, representing more than 4,600 institutions with 17,000 locations nationwide. For more information, visit www.icba.org.

considered in the context of an individual statute or statutory provision. The merits of preemption will vary from case to case and require that each case be evaluated on the basis on those particular merits. The OCC proposal, though, in our view offered a basis for guidelines or a policy statement on the analysis the agency should undertake in reviewing individual state laws when presented with a preemption issue. Overall, we are concerned that the scope of the OCC rule may not maintain the creative balance that characterizes our unique dual banking system.

The issue is: did the OCC go too far? Our concern is that they may have, but for us it is not a clear-cut case.

Impetus for the Rule

The ICBA understands the impetus for the OCC rule and the desire to bring clarity to the preemption issue. In recent years, the OCC has faced numerous court cases challenging its authority to preempt state laws that might apply to national bank activities. (Through the years, the OCC has had an enviable winning record in preemption cases.) In addition, proliferation of state anti-predatory lending legislation has helped move the issue of preemption to the forefront, most recently with the OCC's preemption of a Georgia anti-predatory lending statute. The final preemption rule is designed to clarify the general applicability of state law to national banks, outline the types of state laws that are preempted (as well as those that generally are not), and provide national banks with a level of certainty in conducting their operations.

Regulatory Burden

Our testimony is in the context of the concern that community bankers in various states have expressed about the growing trend among state legislatures to pass aggressive consumer protection measures that, although well-intended, increase banks' regulatory burden and have negative unintended consequences for consumers and bank customers.

Consequently, ICBA has strongly supported on a number of occasions federal preemption of state laws as they apply to national banks. For example, we have supported the OCC when it preempted individual state laws such as the Georgia anti-predatory lending statute, state laws banning ATM fees, and insurance sales laws that restrict how banks can market and sell insurance.

According to the OCC, it adopted the two rules to assist national banks and their customers because "the imposition of an overlay of state and local standards and requirements on top of the federal standards to which national banks already are subject, imposes excessively costly, and unnecessary, regulatory burden." This statement resounds well with community bankers as they face an ever-growing mountain of regulation.

For example, Georgia bankers faced a serious problem as a result of the state's aggressive law to combat predatory lending. The penalties attached to the loan, not just to the original lender. Secondary market investors stopped buying loans originated in Georgia because they were not willing to take the risk that they might purchase a loan considered

predatory. Consequently, liquidity in the market dried up, and secondary market lending slowed significantly. Following actions by the National Credit Union Administration and the Office of Thrift Supervision to preempt the Georgia law for federal credit unions and federal thrifts, the OCC preempted it for national banks and, as a result of a parity clause in the Georgia law pushed for by Georgia community bankers, state chartered banks were also exempted. Had the Georgia statute not been preempted, Georgia consumers would have been seriously disadvantaged in their ability to secure mortgage loans.

Likewise, state and local laws banning ATM fees have not benefited the consumer. When presented with a state law prohibiting them from charging non-customers a fee for using their ATMs, banks have elected not to permit non-customer use. While consumers had previously had a choice to use their own bank's ATM and not incur a fee, or use another bank's ATM for a small fee, the ATM fee ban resulted in less service and less convenience for consumers. These state and local laws have been declared by the courts to be preempted as to national banks.

Consumer Protection

Consumers deserve to have accurate information about the financial products and services they are buying and to be protected from unscrupulous financial services providers and unfair or misleading practices.

In the context of analyzing whether consumers will be adequately protected under OCC's rule it is important to keep several considerations in mind.

First, OCC's rule expressly affirms that national banks must treat all customers fairly and honestly by stating that a national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act (FTCA). A practice is considered unfair or deceptive if there is a representation, omission, act or practice that is likely to mislead; if it would be deceptive from the perspective of a reasonable consumer; and if it is material in the context of the transaction.

The OCC has previously taken actions under the FTCA against national banks, and affirms it will continue to review unfair and deceptive acts or practices on a case-by-case basis. The parameters in the FTCA ban against unfair and deceptive practices are the very essence of many of the state laws against predatory lending. Therefore, national banks do not operate in a vacuum, and the ICBA agrees that it is appropriate to reaffirm that national banks are subject to the FTCA prohibitions against unfair and deceptive practices.

Second, the new rule has added an anti-predatory lending standard. It is intended to prevent national banks from making a consumer loan where repayment is unlikely and would result in the lender seizing the collateral. The ICBA agrees with the OCC that it is generally inappropriate to base a transaction solely on the value of the collateral that supports it. The final rule has made appropriate accommodation for exceptions to the general rule, such as reverse mortgages.

Finally, it is also important to recognize that national banks are subject to a broad panoply of consumer protection statutes enacted by Congress. Beginning with the adoption of the Truth-in-Lending Act in 1968, national banks must adhere to many consumer protection statutes, including the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Truth in Savings Act and other statutes designed to protect the interests of consumers. Federal banking regulators ensure compliance with these requirements through regular, rigorous examination and supervision.

To stop abusive lending practices, efforts and energy must be focused on the non-depository institutions not subject to regular examination and supervision that are the source of many predatory activities. Saddling the entire lending industry with additional burdens only drives up the costs of credit. Well-intended statutes actually may make the environment more fertile for predators by driving legitimate—and supervised—lenders out of the market and driving marginal borrowers towards predators who already ignore existing laws. Or, as was the case in Georgia, possibly drying up funding sources.

Impact on Dual Banking System

The dual banking system, with bank chartering, supervision and regulation divided between the federal government and the states, has served our nation well for more than 100 years. The ICBA believes that the dual banking system should be protected while also ensuring consumers have access to a full range of competitive banking products regardless of their bank's charter. Over the years, the lines of distinction between state and federally chartered banks have blurred and the differences have diminished. Nevertheless, support for a dual banking system remains vigorous among community bankers who value the productive tension between state and federal regulators. One set of rules issued by one federal banking regulator is viewed as an undue concentration of power by many community bankers.

What we do not know is whether the OCC's preemption rule will disturb the balance of the dual banking system. While only 25 percent or so of bank charters are national charters, national banks hold more than 55 percent of bank industry assets. We must be careful lest one charter, state or national, gains sufficient advantages over the other, and tips the balance in favor of that charter. If sufficient numbers of banks switch charters as a result, the viability of the dual banking system could be in question.

OCC preemption of state laws is one side of the coin. The other side is state actions that impinge on the charter powers of national banks and state actions that undermine appropriate federal supervision and regulation. For example, industrial loan companies, which are chartered in a few states, have the potential to undermine supervision and regulation at the holding company level while breaching further the separation of banking and commerce, as Federal Reserve Chairman Greenspan has warned.

Conclusion

The principle of federal preemption of state law is a long and well-established one. However, where the lines should be drawn is subject to continuing debate. Preemption is

a complex subject that requires a balancing of interests. While many community banks support some preemption, many are also uncomfortable with a policy of blanket preemption. Creating a broad regulation on preemption will not eliminate challenges to the OCC's authority to preempt state law. Indeed, court challenges to the final rule have already begun. We are concerned that a broad preemption may have unintended and unforeseen consequences and would prefer an analysis of the unique elements of particular state laws in particular circumstances before a decision to preempt is made.

October 6, 2003

Office of the Comptroller of the Currency
250 E Street, SW
Public Information Room
Mailstop 1-5
Washington, DC 20219
Attention: Docket No. 03-16

Bank Activities and Operations; Real Estate Lending and Appraisals;
Preemption of State Laws

Dear Sir or Madam:

In recent years, the Office of the Comptroller of the Currency (OCC) has been confronted by court cases challenging its authority to pre-empt various state laws as applied to national bank activities. State legislation against predatory lending has helped move the issue of preemption to the forefront, most recently with the OCC preemption of a Georgia anti-predatory lending statute. As a result, the OCC has proposed a general regulation to establish parameters that will clarify the general applicability of state law to national banks and to outline what state laws are pre-empted. The Independent Community Bankers of America (ICBA)[2] appreciates the opportunity to comment on this proposal.

Generally, the ICBA believes that it would be preferable for the OCC to continue to analyze individual state laws on a case-by-case basis. The need to preserve the dual banking system and the importance of the federal-state relationship mandate that whenever preemption is undertaken, it be carefully considered in the context of an individual statute or statutory provision. The OCC proposal, though, offers a basis for guidelines or a policy statement on how the agency will review individual state laws if presented with a preemption issue. And, given the importance that state law has in real estate transactions and transfers, the ICBA does not believe it would be appropriate for the OCC to state that its regulations "occupy the field." In our judgment, the scope of the OCC proposal would not maintain the creative balance that characterizes our unique dual banking system.

[2] ICBA is the primary voice for the nation's community banks, representing some 4,600 institutions at more than 17,000 locations nationwide. ICBA's members hold more than $526 billion in insured deposits, $728 billion in assets and more than $405 billion in loans for consumers, small businesses and farms. They employ nearly 231,000 citizens in the communities they serve.

Background

As national banks increasingly operate in multiple jurisdictions, the OCC has been asked to address how different state laws apply to national banks. According to the agency, "without further clarification of this issue, national banks, particularly those with customers in multiple states, face uncertain compliance risks and substantial additional compliance burdens and expense." Therefore, the OCC is taking this step to establish a regulation that will provide more comprehensive standards regarding the applicability of state laws to lending, deposit taking, and other authorized activities of national banks.[3]

Congress created the national bank charter in 1863, fully intending to vest authority over these charters with the OCC. The OCC points out that the United States Supreme Court articulated restrictions on state authority over entities created by the federal government as early as 1819, nearly 200 years ago, and "the allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference."

Under the doctrine of federal preemption, a state law is pre-empted in one of three ways: (1) Congress expressly pre-empts state law; (2) Congress establishes a framework of regulation that "occupies the field" and leaves no room for state action; or, (3) state law conflicts with federal law. While the OCC's proposal would outline areas of state law generally pre-empted as applied to national bank activities, the OCC also reaffirms that there are state laws, such as criminal laws and laws on contract and debt collection, that do now and would continue to apply to national banks. Generally, the proposal would provide that state laws do not apply to national banks if they obstruct, in whole or in part, or condition, a national bank's exercise of powers granted under federal law.

It is important to recognize that the U. S. Supreme Court and other courts on frequent occasions have upheld the OCC when the agency has determined that federal law pre-empts state law. For example, courts have overturned attempts by state and local municipalities to restrict ATM fees assessed by national banks. The OCC has also been upheld when it pre-empted state laws attempting to restrict national bank activities involving insurance sales (e.g., West Virginia and Massachusetts[4]). Other state laws that courts have agreed were properly pre-empted by the OCC include laws on state licensing, filing requirements, real estate loan terms, advertising, permissible rates of interest, permissible fees and non-interest charges, management of credit accounts, due-on-sale clauses, leaseholds as acceptable security, and mandated statements and disclosures. Frequently, when the OCC preempts a state law for national banks, the state legislature modifies or repeals the law so that state-chartered banks are not disadvantaged by the preemption.

[3] Earlier this year, the OCC issued a proposal that would reaffirm its exclusive authority to examine national banks.

[4] It is important to note that the OCC did not pre-empt the entire statutory scheme, but only those provisions that would be incompatible with national banks exercising their powers.

General Comments on a Preemption Regulation

Until now, the OCC has approached the preemption of individual state laws on a case-by-case basis. This proposal would establish a broad regulation that affirms steps that the OCC has taken over the years to reaffirm its authority in regulating the activities of national banks. However, the ICBA believes that the OCC should continue to undertake a case-by-case analysis before pre-empting any state law rather than establishing a broad regulation to clarify what laws are pre-empted.

As the OCC points out in the proposal, there would be advantages to establishing a broad regulation. First, it would establish a set of parameters that might avoid involving agency resources in analysis of individual challenges to the authority of national banks. In the area of real estate lending, the concept of a single national standard has a great deal of appeal as real estate lending becomes more national in scope and borrowers have access to creditors from across the United States.

However, while there is an appeal to the efficiency of having a preemption regulation, the ICBA believes the OCC should continue to analyze individual laws on a case-by-case basis. As the OCC points out, the principle of federal preemption of state laws is a long established one. However, where the lines should be drawn is subject to continuing debate, as evidenced by the discussions surrounding the recent Congressional debates over renewal of the Fair Credit Reporting Act's preemption provisions. The ICBA does not believe that creating a broad regulation on preemption for national bank activities will eliminate challenges to the OCC's authority to pre-empt state law, especially since the OCC acknowledges that many state laws will still govern the activities of national banks, such as general laws on contract and criminal laws. The ICBA is also concerned that a broad preemption may have unintended and unforeseen consequences. Therefore, the ICBA recommends that the OCC continue its current course of preemption of individual state laws on a case-by-case basis.

Specific Issues

Real Estate Transactions

Part 34 of current OCC regulations establishes the general authority of a national bank to make real estate loans. According to the OCC, since Congress initially authorized national banks to make real estate loans in 1913, it has gradually expanded that authority until the agency now has broad rulemaking powers concerning national bank real estate lending. This proposal would more completely outline what state laws are pre-empted, although the OCC also requests comment on whether it should determine by regulation that it "occupies the field" for national bank real estate activities, thereby pre-empting *all* state restrictions on national bank real estate lending.[5]

[5] One concern that has been raised is the impact this proposal might have on home equity lending in Texas. Until very recently, Texas state law banned home equity loans, and although now authorized, there are very stringent restrictions on home equity lending. If the proposal is adopted without change, national banks in Texas might be able to offer home equity loans regardless of state law restrictions.

As noted above, the ICBA believes that the OCC should continue to analyze individual state laws on a case-by-case basis. Therefore, it would be inappropriate to provide that the OCC "occupies the field" on real estate lending for national banks. It is important to recognize that real estate transactions are essentially creatures of state law. In the proposal, the OCC affirms that national banks will continue to be subject to state law in a variety of contexts, notably contracts and criminal law. State law will continue to govern many of the elements of every real estate transactions, such as the filing of liens, recording fees, home inspections and foreclosure. Therefore, it would be inappropriate for the OCC to assert that it "occupies the field" in real estate lending as applied to national banks.

Principles Governing National Bank Real Estate Lending.

Some have suggested that OCC preemption would leave real estate lending by national banks "unregulated," a charge the OCC strongly denies. Rather, the OCC asserts that national banks are subject to a variety of federal laws and regulations that govern lending activities, as well as being subject to comprehensive supervision. For example, the OCC recently affirmed its authority to enforce FTC rules on unfair and deceptive practices against national banks. National banks are also subject to restrictions in the Truth-in-Lending Act and RESPA. The OCC recently issued two advisories that reaffirm these restrictions and offer guidance to help national banks avoid predatory practices (AL 2003-2 and AL 2003-3 issued February 21, 2003), although the OCC has frequently stated that, "evidence that national banks are engaged in predatory lending practices is scant." If the OCC intends to occupy the field in the area of real estate lending, it will be critically important that the agency devotes sufficient resources to ensure that these laws and regulations are properly enforced if the OCC is to avoid criticism of the preemption.

Collateral Value. To be sure that there is no question that national bank real estate lending is subject to regulation and supervision even if state laws are pre-empted, the OCC would reaffirm two principles that govern national bank real estate lending activities. First, real estate loans should not be based predominantly on the value of collateral without regard to the borrower's ability to repay, a principle that this proposal would codify.

As noted, the OCC issued guidance earlier this year to help national banks avoid predatory practices in real estate lending or real estate loan purchases. According to Comptroller of the Currency John Hawke, the "guidance provides a framework to deal effectively with predatory lending without setting up a rigid system that creates burdens and obstacles for lenders to serve low-income customers." The OCC has often reaffirmed that it is practices used in the context of an individual loan and not particular loan features or products that make a loan predatory.

The ICBA believes that the OCC should recognize that this is also true when a loan is based on the value of the collateral. The ICBA agrees with the OCC that is generally inappropriate to base a transaction solely on the value of the collateral that supports it. However, it is also important to provide for exceptions from the restriction. Community bankers may make a loan to an individual with questionable or unverifiable income, such as those who are self-employed or starting a new business, based on the collateral offered; a hard ban on lending based on the underlying collateral would

disadvantage these borrowers or any other borrowers with erratic cash flows. Reverse mortgages, which are becoming increasingly popular, might also be difficult to make if the proposal banned lending based on collateral value. And, where a borrower is selling one home and purchasing a second before the first has sold, the collateral value may be critical to allowing the bank to make the second loan while the mortgage on the first home is still outstanding. Therefore, the ICBA encourages the OCC to clearly allow for exceptions and not codify a firm prohibition.

The ICBA is also concerned about any guidance or regulation that sets forth a specific requirement that requires analysis of a borrower's ability to repay the loan. General loan underwriting guidelines and rules on safety and soundness incorporate the concept. However, specific codification of this notion could have unintended consequences. Once such a concept is clearly established in a regulation, it creates a new burden on banks to document compliance and raises the bar on documentation demands. Examiners will want to confirm that this element was explicitly included in the loan underwriting analysis, mandating more extensive documentation. Even if the OCC does not emphasize the need for such documentation in their examination process, banks are going to need to document compliance to minimize the legal risk associated with lawsuits for failing to conduct this analysis. Lack of a clear definition of what constitutes "ability to repay" further compounds this risk, and further eliminates any potential judgment factor on the part of lending officers. Ultimately, though, it would be ironic if the OCC were to implement a provision that created unnecessary burden with no demonstration of commensurate benefit at a time when the agencies are conducting an extensive review of regulations to assess regulatory burden under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).

Treating Customers Fairly. The second principle that the proposal would reaffirm is that national banks should treat all customers fairly and honestly. This standard, codified in the FTC rule against unfair and deceptive practices, serves as a bar against practices such as loan flipping and home equity stripping.

A practice is considered unfair or deceptive if there is a representation, omission, act or practice that is likely to mislead; if it would be deceptive from the perspective of a reasonable consumer; and if it is material in the context of the transaction. Such a practice would violate the FTC regulation if there were substantial consumer injury; the injury is not outweighed by benefits to the consumer; and the injury caused by the practice is not one the consumer could reasonably have avoided. The OCC prefers to approach unfair and deceptive practices on a case-by-case basis and the proposal would not change that.

The ICBA agrees that it is appropriate to reaffirm that national banks are subject to the FTC prohibitions against unfair and deceptive practices. Even though the OCC has often stressed that there is little evidence to suggest that banks engage in predatory practices,[6] the ICBA believes that it is appropriate to reaffirm these standards for national

[6] See, e.g., Remarks by the Comptroller of the Currency before Women in Housing and Finance, Washington, DC, September 9, 2003; Statement of the Comptroller of the Currency, July 31, 2003, regarding National City Preemption Order and Determination; OCC Press Release, February 21, 2003.

banks. It reaffirms that the industry strives to maintain the highest level of integrity in lending practices. The ICBA also strongly agrees with the OCC that it is best to approach these situations on an individual case-by-case analysis, since each transaction will be different and analysis of whether a practice is unfair or deceptive will depend on the unique circumstances surrounding an individual transaction, just as the analysis of whether a loan is predatory depends on the unique set of circumstances of a particular transaction. However, the ICBA also believes that it is critical that the agency ensures the standard is applied consistently within regions and across regions, and that it is vitally important any standard be applied consistently with other banking regulators to avoid the appearance of favoritism and to avoid regulatory arbitrage.

State Laws Pre-empted. The proposal would more specifically outline the types of state laws that the OCC regulation would pre-empt. The list is not intended to be exhaustive and could be expanded. Currently, the proposal lists the following areas of state laws that would be pre-empted for national bank real estate lending:

- Licensing, registration, filings or reports by creditors
- Requirements on credit enhancements such as private mortgage insurance
- Loan-to-value ratios
- Terms of credit, including interest rates, repayment schedules, minimum payments, and term to maturity
- The aggregate amount of funds that may be loaned upon the security of real estate
- Escrow accounts, impound accounts and similar arrangements
- Security property, including leaseholds
- Access to, and use of, credit reports
- Mandated statements, disclosure and advertising
- Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages
- Disbursements and repayments
- Rates of interest
- Due-on-sale clauses
- Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan

Although the ICBA believes that preemption should be carried out on a case-by-case basis, as is done now, the items on this list are likely areas for preemption. If the OCC agrees with the ICBA that it should continue to review state laws on a case-by-case basis, this list would be appropriate for guidelines on what areas of state law generally would be considered pre-empted.

State Laws NOT Pre-empted. Generally, state laws in the following areas would not be pre-empted under the proposal: contracts, torts, criminal law, debt collection, acquisition and transfer of real property, taxation or zoning.[7] However, merely classifying a statute as criminal law, for example, or including a criminal penalty will not automatically exempt the statute from federal preemption. Rather, the OCC would

[7] According to the OCC, these laws generally establish the context in which national banks operate but do not directly infringe on national bank activities.

consider the substance of the state statute in determining whether it is pre-empted. The ICBA believes this list is generally appropriate and that it is appropriate for the OCC to continue to review individual state laws for preemption.

Deposit-Taking, Other Lending and Bank Activities

Since preemption issues are not restricted to real estate lending, the OCC proposal would also address preemption of state laws in other areas.

For deposit-taking activities, the proposal would specifically pre-empt state statutes on abandoned and dormant accounts;[8] checking accounts, mandated statements and disclosure requirements; funds availability; savings accounts orders of withdrawal; state licensing or registration requirements and special purpose savings services. Laws that would *not* be pre-empted are those dealing generally with contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation or zoning. If the OCC determines that a general preemption is appropriate, the ICBA concurs with this list. However, if the OCC agrees with the ICBA that case-by-case analysis should be undertaken, then this list would be appropriate for guidelines or an OCC policy statement addressing preemption of these types of state laws.

For non-real estate lending, the proposal would pre-empt the same types of state statutes as it would for real estate lending activities, i.e., state statutes on licensing, registration, creditor reports; credit enhancements such as insurance; loan-to-value ratios; credit terms, including repayment terms; escrow accounts; security property, including leaseholds; access to and use of credit reports; mandated statements, disclosures or advertising; disbursements and repayments; and interest rates. As with the proposal for real estate lending, the proposal would establish a safety-and-soundness based anti-predatory lending standard that would require that loans not be made primarily on the value of the collateral without regard for the applicant's ability to repay. It would also emphasize that loans would be subject to the FTC rules against unfair and deceptive practices. The ICBA does not object to these parameters.

Operating Subsidiaries

Under the Gramm-Leach-Bliley Act, an "operating subsidiary" of a national bank is defined as a subsidiary that only engages in activities that the national bank could undertake. The OCC has taken the position that any preemption of state laws that would apply to a national bank also apply to national bank operating subsidiaries. This is similar to the position taken by the Office of Thrift Supervision (OTS) with regard to subsidiaries of federal thrifts. Recently, a court in California upheld an OCC action pre-empting California law for the activities of a mortgage subsidiary of a national bank.

Currently, a court case in Connecticut, supported by 35 state attorneys general and 43 state banking commissioners, has challenged this position. The Connecticut case addresses whether a mortgage subsidiary of a national bank is subject to state licensing laws. Connecticut contends that the mortgage subsidiary must abide by Connecticut laws

[8] The proposal would not pre-empt general laws on unclaimed property and the requirement to turn that property over to state authorities. The regulation would pre-empt statutes that define when an account is deemed abandoned or dormant.

on licensing and registration for mortgage lenders. The OCC contends that, as an operating subsidiary of a national bank, the company is exempt.

While the ICBA does not disagree with the position that any state law that would be pre-empted for the parent bank would be pre-empted for an operating subsidiary, we are concerned that a general preemption for operating subsidiaries is overly broad, regardless of preemption for the parent. Our concerns are allayed somewhat since operating subsidiaries of national banks are restricted to the same types of activities permitted for the bank itself. While we continue to believe that a case-by-case approach would be best, if the agency decides to move forward with a broader regulation, the ICBA recommends that the final rule make very clear that this preemption is limited to operating subsidiaries as distinct from other types of subsidiaries of a national bank. It should also be made especially clear that that the preemption exists only because it would apply where the bank, instead of the subsidiary, was conducting the activity.

Conclusion

The ICBA believes that it would be appropriate for the OCC to continue to approach matters of federal preemption of state law on a case-by-case basis, especially since these are sensitive issues and since each statute is unique and should be considered carefully. A broad regulation establishing the parameters of preemption does not avoid challenges to OCC authority; believing a regulation will settle the issue may be illusory.

The ICBA is also concerned that a broad preemption such as that contemplated by this proposal may have negative implications for the dual banking system. Instead of a broad preemption regulation, the ICBA urges the OCC to adopt the proposal as guidelines or a statement of policy for how it will review state laws regarding federal preemption. However, if the agency decides to adopt a regulation, then the ICBA believes that the parameters set out in the proposal for which state laws will be pre-empted as applied to national banks are appropriate.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact Robert Rowe, ICBA's regulatory counsel, at 202-659-8111 or at robert.rowe@icba.org.

Sincerely,

C. R. Cloutier

C. R. Cloutier
Chairman