DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

Agency Information Collection; Activity Under OMB Review; Report of Extension of Credit to Political Candidates—Form 183

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, the Bureau of Transportation Statistics invites the general public, industry and other governmental parties to comment on the continuing need for and usefulness of BTS collecting reports from air carriers on the aggregated indebtedness balance of a political candidate or party for Federal office. The reports are required when the aggregated indebtedness is over $5,000 on the last day of a month.

DATES: Written comments should be submitted by April 28, 2003.

ADDRESSES: Comments should be directed to: Office of Airline Information, K–14, Room 4125, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590–0001, FAX NO. 366–3383 or e-mail *bernard.stankus@bts.gov*.

Comments: Comments should identify the associated OMB approval # 2138–0016. Persons wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on OMB # 2138–0016. The postcard will be date/time stamped and returned.

FOR FURTHER INFORMATION CONTACT: Bernie Stankus, Office of Airline Information, K–14, Room 4125, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4387.

SUPPLEMENTARY INFORMATION:

OMB Approval No.: 2138–0016.

Title: Report of Extension of Credit to Political Candidates—Form 183 14 CFR part 374a.

Form No.: 183.

Type Of Review: Extension of a currently approved collection.

Respondents: Certificated air carriers.

Number of Respondents: 2 (Monthly Average).

Number of Responses: 24.

Estimated Time per Response: 1 hour.

Total Annual Burden: 24 hours.

Needs and Uses: The Department uses this form as the means to fulfill its obligation under the Federal Election Campaign Act of 1971 (the Act). The Act's legislative history indicates that one of its statutory goals is to prevent candidates for Federal political office from incurring large amounts of unsecured debt with regulated transportation companies (*e.g.* airlines). This information collection allows the Department to monitor and disclose the amount of unsecured credit extended by airlines to candidates for Federal office. All certificated air carriers are required to submit this information.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501 note), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both Respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Issued in Washington, DC, on February 14, 2003.

Donald W. Bright,

Assistant Director, Airline Information, Bureau of Transportation Statistics.

[FR Doc. 03–4555 Filed 2–25–03; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 03–04]

Notice of Request for Preemption Determination or Order

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing for comment a request by National City Bank, N.A., National City Bank of Indiana, N.A., and their operating subsidiaries, National City Mortgage Company and First Franklin Financial Company (referred to collectively in this notice as National City) for a determination or order under 12 U.S.C. 24(Seventh), 12 U.S.C. 371 and the OCC's implementing regulations, that the Georgia Fair Lending Act does not apply to National City. The purpose of this notice is to afford interested persons and affected parties an opportunity to submit comments before the OCC issues any determination or order responding to this request.

DATES: Comments must be received on or before March 28, 2003.

ADDRESSES: Please direct your comments to: Office of the Comptroller of the Currency, 250 E Street, SW., Public Information Room, Mailstop 1–5, Attention: Docket No. 03–04, Washington, DC 20219, fax number (202) 874–4448, or Internet address: *regs.comments@occ.treas.gov*. Due to delays in paper mail delivery in the Washington area, commenters are encouraged to submit their comments by fax or e-mail. Comments may be inspected and photocopied at the OCC's Public Reference Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect or photocopy the comments by calling (202) 874–5043.

FOR FURTHER INFORMATION CONTACT: Michele Meyer, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION: The Georgia Fair Lending Act (GFLA) [1] became effective October 1, 2002. The GFLA restricts the ability of creditors or servicers to charge certain fees and engage in certain practices for three categories of loans defined by the GFLA: ''home loans,'' ''covered home loans,'' and ''high-cost home loans.'' The characterization of a loan within each of these categories depends on the annual percentage rate and the amount of points and fees charged.[2] All ''home loans'' are subject to certain restrictions on the terms of credit and loan-related fees, including prohibitions on the financing of credit insurance, debt cancellation coverage or suspension coverage, and limitations on late fees and payoff statement fees.

In addition to the restrictions on ''home loans,'' ''covered home loans'' are subject to restrictions on the number of times a loan may be refinanced and the circumstances in which a refinancing may occur. For example, the GFLA prohibits a creditor from refinancing an existing home loan that is less than five years old with a ''covered home loan'' that does not provide a reasonable ''tangible net benefit'' to the borrower considering all the circumstances.

''High-cost home loans'' are subject to the restrictions on ''home loans'' and ''covered home loans,'' as well as numerous disclosure requirements and restrictions on the terms of credit and

[1] The GFLA is to be codified as GA Code. Ann. §§ 7–6A–1 *et seq*.

[2] *See* GFLA § 7–6A–2.

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 the 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.*[3]

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.[4] 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.[5]

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.''[6]

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.

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.''[7] 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''[8] 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.''[9] 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.''[10] In 1991, Congress removed the term ''rule'' from this phrase[11] 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.[12] Thus, the history of national banks' real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a

[3] 517 U.S. 25, 30 (1996).

[4] 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.

[5] *Barnett,* 517 U.S. at 32.

[6] *Id.* at 34.

[7] Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

[8] S. Rep. No. 97–536, at 27 (1982).

[9] Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97–320, § 403, 96 Stat. 1469, 1510–11 (1982).

[10] S. Rep. No. 97–536, at 27 (1982).

[11] This language was changed without explanation.

[12] 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.

streamlined approach in which Congress has delegated broad authority to the Comptroller.[13] 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.[14]

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.[15] 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.[16]

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.'' [17] 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.[18] 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.[19]

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

[13] 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.

[14] 15 U.S.C. 1601 *et seq.*

[15] *See* 12 CFR 34.1(b).

[16] *See* 12 CFR 24.4(b).

[17] *Barnett,* 517 U.S. at 31, *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

[18] 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).

[19] The OCC's regulation at 12 CFR 7.4002 reaffirms that ability to charge a fee for a bank's services.

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.[20]

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. Guttau, 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

[20] We note that other states and localities have passed similar restrictions that also adversely affect National City's real estate lending.

made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions because the federal power-granting statute there in question contained 'no indication that Congress [so] intended* * * as it has done by express language in several other instances.' Barnett, 517 U.S. at 34 (citations omitted; emphasis in original).

As was the case in *Barnett,* Congress placed no restrictions in 12 U.S.C. 371 on the ability to conduct real estate lending activities other than by rules and/or regulations as may be promulgated by the OCC. The OCC has done so by promulgating 12 CFR 34, which by its terms reserves no right to the states to regulate in the area of real estate lending by a national bank or its operating subsidiary. National City is of the opinion as supported by the Supreme Court's decision in *Barnett* that the federal statute governing the power of a national bank to lend creates a scheme of federal law and regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

Therefore, a conflict between GFLA and federal law need not be complete in order for federal law to have preemptive effect. If, as here, the state law (GFLA) places limits on an unrestricted grant of authority under federal law, the state law (GFLA) is preempted.

B. The Preemption Analysis Applicable to National Banks Applies With Equal Force to National Bank Operating Subsidiaries

In section 121 of the Gramm Leach Bliley Act (''GLBA''), Congress expressly acknowledged that national banks may own subsidiaries that engage ''solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks.'' 12 U.S.C. 24 a(g)(3).

Consistent with section 121, the OCC regulations state that ''[a]n operating subsidiary conducts activities authorized under [12 CFR 5.34] pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. 12 CFR 5.34(e)(3); See also 12 CFR 7.4006.

National City's operating subsidiaries are conducting mortgage lending and servicing activities as permitted for a national bank pursuant to 12 U.S.C. 24(Seventh), 12 U.S.C. 371, and 12 CFR 5.34(e)(5)(v). As such, they are subject to federal law and States do not have the right to limit the powers over a national bank or its operating subsidiaries in the conduct of these real estate lending activities, except where such authority is specifically granted by federal law, which is not the case here. Like the Bank, the operating subsidiaries are examined on a continuous basis by OCC examiners specifically assigned to, and in most cases physically present at, the facilities of the Banks and their operating subsidiaries.

C. National Bank Real Estate Powers and Part 34 of the Comptroller's Regulations

The National Bank Act's underlying objective is to create a uniformly regulated national banking system. The National Bank Act is a comprehensive statute which governs not only the internal workings of national banks, but also their powers, and virtually all aspects of their regulation is the exclusive responsibility of the OCC. See OCC Unpublished Interpretive Letter dated September 5, 1989 (holding that a Wisconsin statute imposing notification filing and fee requirements on lenders making certain consumer loans was preempted for national banks); OCC Advisory Letter 2002–9. In section 24 (Seventh) of the National Bank Act, 12 U.S.C. 24(Seventh) Congress granted national banks the power to exercise, ''by its board of directors or duly authorized officers or agents, * * * all such incidental powers as shall be necessary to carry out the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * [and] by loaning money on personal security;* * *'' Congress further specifically authorized national banks to engage in real estate lending beginning with the Act of September 7, 1916. From 1916 to 1982, in the statutory predecessors to the present 12 U.S.C. 371, Congress gradually broadened the scope of national bank authority to make real estate loans, culminating in the enactment of the Garn-St. Germain Depository Institutions Act of 1982 (Garn-St. Germain''). Prior to Garn-St. Germain, 12 U.S.C. 371 contained specific provisions establishing maximum loan to value ratios, amortization requirements, maximum loan maturity and aggregate limits on the amount of real estate loans a national bank could make or purchase. In Garn-St. Germain, Congress removed these limitations entirely, and gave national banks unlimited power to engage in real estate lending subject only to the regulations and orders established by the OCC. Thus, the history of national bank power to engage in real estate lending demonstrates Congressional intent to occupy the field, and to replace Congressional control over the terms of national banks' real estate lending with a complete delegation of control to the OCC as the ultimate arbiter of the national bank's exercise of those powers. Further, section 371 is an illustration of the familiar maxim of statutory construction: *expressio unius est exclusio alterius;* in that the specificity of the grant of authority to engage in real estate lending leaves no room for state law or regulation.

Currently, section 371 provides as follows:

Authorization to make real estate loans; orders, rules and regulations of Comptroller of the Currency. Any national banking association may make, arrange, purchase or sell loans or extension of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act [12 USCS 1828(o)] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.[21]

[21] 12 U.S.C. § 1828(o) authorized the OCC to establish uniform regulations for real estate secured extensions of credit. In adopting such regulations, the OCC is required to consider: the risk posed to the deposit insurance funds by real estate lending; the need for safe and sound operation of the insured institutions; and the availability of credit. The OCC is authorized to permit differing standards among the types of real estate-secured loans, as warranted by federal law, the risk to the federal deposit insurance fund, and based on considerations of institutional safety and soundness. Thus, Congress has instructed the OCC to exercise its supervisory authority over real estate lending in support of mandates found in federal law alone.

The OCC fully implemented the authority granted by Garn-St. Germain in 1983 by amending or removing the interpretive rulings regarding real estate lending that had their origins in earlier versions of 12 U.S.C. 371 and promulgated Part 34, which comprehensively defines real estate lending by national banks. Part 34 recognizes that the forms and terms of national bank lending must be determined by the management of national banks themselves, to enable the banks to have the necessary flexibility to respond to market conditions. OCC regulatory authority insures that national banks do so prudently and in a safe and sound manner. Part 34 also clarifies the scope of federal preemption of state laws that could impact real estate lending activities by national banks.

The pertinent regulations provide:

§ 34.3 General rule

A national bank may make, arrange, purchase or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate, subject to terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order.

§ 34.4 Applicability of State law

(a) Specific preemption. National banks 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 appraisal 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.

(b) General standards. The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other real estate lending activities of national banks.

The provisions of GFLA which fall within the scope of 12 CFR 34.4(a)'s specific state law preemptions fall without need for further analysis. Other provisions of GFLA can be analyzed under 12 CFR 34.4(b). OCC regulations specifically provide that the provisions of 12 CFR 34.4 are applicable to both national banks and their operating subsidiaries. See 12 CFR 34.1(b).

1. Provisions of GFLA Which Are Preempted Under 12 CFR 34.4(a)

Taken together, the provisions of 12 CFR 34.4(a)(1)–(4) which remove any limits on loan to value ratios, amortization requirements, maturity requirements and aggregate loan limits preempt state laws

which impair a national bank or its operating subsidiary's ability to make *any* real estate-secured loan. Three aspects of GFLA run afoul of this preemption; the restrictions on a national bank's ability to refinance certain Home Loans made in the previous five years; the prohibition on making a High Cost Home Loan unless the borrower has first received counseling from a third party regarding the advisability of the transaction; and the prohibition on making a High Cost Home Loan unless the borrower meets GFLA's standards as to his or her ability to repay the loan. These restrictions not only impair National City's ability to determine the aggregate amount of loans it will originate in Georgia, they also impact loan to value ratios, amortization requirements and determination of loan maturity.

GFLA's prohibition of balloon payments, negative amortization and advance payments from the loan proceeds are specifically preempted under 12 CFR 34.4(a)(2), and 12 CFR 34.4(a)(3) preempts GFLA's prohibition of a loan term that prevents the lender from accelerating a High Cost Home Loan in the exercise of its discretion. See OCC Unpublished Interpretive Letter dated December 8, 1983 (preempting a Massachusetts law restricting balloon and demand payment terms) and OCC Unpublished Interpretive Letter dated May 9, 1988 (national banks are not required to amortize real estate loans and contrary state laws are preempted). The OCC has also held that all state law disclosure requirements for real estate secured loans are preempted. See OCC Unpublished Interpretive Letter dated March 30, 1988.

2. Provisions of GFLA Which Are Preempted Under 12 CFR 34.4(b)

The five areas delineated in 12 CFR 34.4(a) are not the exclusive areas where federal law preempts state laws affecting national bank real estate lending activities. 61 FR 11294 (March 20, 1996). Those provisions of the GFLA that are not already preempted under 12 CFR 34.4(a) are preempted under 12 CFR 34.4(b) *either* because they are inconsistent with the comprehensive authority granted to the OCC under section 371 to regulate the real estate lending activities of national banks *or* applying the conflict analysis in *Barnett.* With regard to the latter analysis, the provisions of GFLA which prohibit the financing of credit insurance, debt cancellation or suspension coverage, limit late payment charges and prohibit payoff and release fees for Home Loans and restrict or prohibit prepayment penalties, post-default interest and fees for modification, extension or deferral of payments for High Cost Home Loans would seem to ''stand as an obstacle to the accomplishment'' of one of the federal statute's purpose—that being the authorization to make real estate loans subject only to such restrictions and regulations as the OCC may prescribe. See *Barnett* 517 U.S. 25, at 31; and 12 U.S.C. § 1828(o). These provisions are an impermissible attempt by the state of Georgia to condition the exercise of national bank lending powers which are authorized by federal law. *Bank of America, National Trust & Sav. Asso.* v. *Lima,* 103 F. Supp. 916 (D. Mass. 1952). GFLA's compliance provisions include the potential threat of litigation including uncapped damages and the application of the foreclosure provisions. These aspects of GFLA not only have more than an incidental chilling affect on the operations of national banks and their operating subsidiaries, but the compliance scheme, which includes enforcement by state regulators, directly conflicts with the exclusive grant of visitorial power to the OCC in 12 U.S.C. 484. See OCC Advisory Letter 2002–9.

D. Preemption of GFLA's Restrictions on the Use of Mortgage Brokers in the Loan Origination Process

12 U.S.C. 24 (Seventh) and 12 CFR 7.1004 permit a national bank to use third party services in the organization process; this is restricted by the limitations contained in GFLA as a whole and through its impact on broker compensation.

Section 24(Seventh) specifically authorizes national banks to make loans. Section 24(Seventh) also authorizes national banks to engage in the more general ''business of banking'' and activities incidental thereto. The Supreme Court has expressly held that the ''business of banking'' is not limited to the enumerated powers in section 24(Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Corp.,* 513 U.S. 251, 258, n.2 (1995). An activity will be deemed ''incidental'' to the business of banking if it is ''convenient or useful in connection with the performance of'' a power authorized under federal law. *Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427, 432 (1st Cir. 1972).

The authority of national banks under section 24(Seventh) permits a national bank to use the services of agents and other third parties in connection with a bank's lending business. Federal banking regulations specifically provide that a national bank may ''use the services of, and compensate persons not employed by, the bank for originating loans''. 12 CFR 7.1004(a). Likewise, the regulations permit national banks to utilize the services of third parties to disburse loan proceeds. 12 CFR 7.1003(b). These agents may undertake these activities at sites that are neither the main office nor a branch office of the bank provided the requirements of those regulations are satisfied. 12 CFR 7.1003(b), 7.1004(b). This authority applies equally to an operating subsidiary of a national bank. 12 CFR 7.1004(b).

Therefore, the provisions of GFLA which have the effect of denying national banks and their operating subsidiaries from being able to use third party mortgage brokers and compensating them for the services they provide as permitted by federal law must be preempted.

For the foregoing reasons, National City requests that the OCC issue a determination, and/or an order pursuant to 12 U.S.C. 371, that GFLA is preempted as it applies to a national bank and its operating subsidiaries, and further restate the long held position of the OCC with respect to the permitted use of third parties to facilitate the making of real estate loans in Georgia and elsewhere.

Very truly yours,

Thomas A. Plant.

TAP/gs

[FR Doc. 03–4507 Filed 2–25–03; 8:45 am]

BILLING CODE 4813–33–P

DEPARTMENT OF THE TREASURY

Financial Management Service

Privacy Act of 1974; System of Records

AGENCY: Financial Management Service, Treasury.

ACTION: Notice of alterations to three Department of the Treasury, Financial Management Service (FMS), Privacy Act Systems of Records.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), the Department of the Treasury, Financial Management Service (FMS), gives notice of proposed alterations to three of its existing systems of records, as follows: ''Treasury/FMS .002—Payment Issue Records for Regular Recurring Benefit Payments,'' ''Treasury/FMS .014—Debt Collection Operations System,'' and Treasury/FMS .016—Payment Records for Other Than Regular Recurring Benefit Payments.''

DATES: Comments must be received no later than March 28, 2003. The proposed systems of records will be effective April 7, 2003 unless FMS receives comments which would result in a contrary determination.

ADDRESSES: Comments must be submitted to the Debt Management Services, Financial Management Service, 401 14th Street, SW., Room 448B, Washington, DC 20227, or by electronic mail to *gerald.isenberg@fms.treas.gov*. Comments received will be available for inspection at the same address between the hours of 9 a.m. and 4 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Gerry Isenberg, Financial Management Service, Debt Management Services, (202) 874–7131.

SUPPLEMENTARY INFORMATION: The Financial Management Service (FMS) is the money manager for the Federal Government. As such, FMS disburses over 900 million payments totaling more than $1.2 trillion in social security and veterans' benefits, income tax refunds, and other federal payments. In addition, FMS operates several programs to facilitate collection or resolution of delinquent debts owed to the Federal Government and states, including past due support being enforced by states. In the operation of its