

1212 New York Avenue, NW, Suite 525, Washington, DC 20005 • (202) 898-1661 • Fax: (202) 371-9744 • www.nationalfairhousing.org

October 6, 2003

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mailstop 1-5
Washington, DC 20219
regs.comments@occ.treas.gov

Attn: Docket No. 03-16

To Whom It May Concern:

On behalf of the National Fair Housing Alliance and its 100 members nationwide, I am writing to object to the proposed rule (Docket No. 03-16) to amend parts 7 and 34 of OCC's regulations. This rule would preempt certain state laws for national banks and their operating subsidiaries. If the OCC decides to proceed with its proposal to preempt state laws, I would like to request that the OCC specifically add "laws prohibiting discrimination" to the list of non-preempted laws listed in § 34.4(b).

The National Fair Housing Alliance (NFHA), a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals, was founded in 1988 to lead the battle against housing discrimination, including discrimination in the financing of housing. NFHA works to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. The federal Fair Housing Act bars discrimination in housing, including discrimination in the financing of housing, for seven protected classes: race, color, national origin, disability, familial status (i.e. children), sex, and religion. Likewise, the Equal Credit Opportunity Act prohibits discrimination by lenders on the basis of race, color, religion, national origin, sex, marital status, age, and the receipt of income from public assistance.

Do Not Preempt State Laws

The National Fair Housing Alliance does not support the preemption of state laws as proposed. States and localities have been at the forefront of civil rights and consumer rights legislation. With the ability to drill down into their communities, states and localities identify issues of discrimination and inequality that exist and establish laws to right those wrongs. The federal Fair Housing Act, passed in 1968 after the assassination of Rev. Dr. Martin Luther King, Jr., came about after state and local fair housing laws or provisions had already been established. Similarly, the 1974 and 1988 amendments to the law that extended protections to discrimination based on sex, familial status, and disability, occurred only after states and cities including

The National Fair Housing Alliance (NFHA) is the voice of fair housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education, outreach, membership services, public policy initiatives, advocacy and enforcement.





Kentucky, Massachusetts, Ohio, California, and New York City advocated for the inclusion of some or all of these additional protections. These states already had laws covering some of these groups. These protections, which the Congress also deemed vital to include in its amended federal Fair Housing Acts.

Without state innovations, people with disabilities and families with children might still be left out of federal protection to this day. In fact, these two groups account for the second and third highest rates of discrimination complaints nationwide: 27 percent (people with disabilities) and 15 percent (families with children).¹ These groups clearly merit and need federal protection, although they were excluded from the original fair housing legislation. States and localities should retain the ability to provide additional protections where they see fit. New York City's Human Rights Law, for example, also prohibits housing discrimination based on sexual orientation, age, alienage and citizenship status, marital status, and lawful occupation. States and cities nationwide, including California, Wisconsin, Oregon, Washington, and the District of Columbia have additional protections.

If Preemption Proceeds, Include Anti-Discrimination Laws in § 34.4(b)

Housing discrimination remains one of America's most intractable problems despite the passage of the federal Fair Housing Act. Lending discrimination at the local level also continues to exist, despite the passage of the Equal Credit Opportunity Act in 1974. If the OCC decides to proceed with its proposal to preempt state laws, I would like to request that the OCC specifically add "laws prohibiting discrimination" to the list of non-preempted laws listed in § 34.4(b).

The intent of proposed § 34.4 is to preempt the application of any state law to the business activities listed in proposed § 34.4(a), which include terms of credit, the use of credit reports, advertising, and the processing, origination, and servicing, sale or purchase of mortgages. Thus, a claim filed under a state or local fair housing or fair lending law alleging discrimination by a national bank in connection with a real estate mortgage loan will likely be preempted by federal laws and federal regulations enforced by the OCC.

Anti-discrimination laws are the backbone of equal and fair access to housing, credit, and other related business activities in this country. Banks and subsidiaries operating in good faith with the intention of extending their services to communities nationwide have an obligation under the Fair Housing Act and the Equal Credit Opportunity Act not to discriminate. They should likewise have an obligation under additional state protections, which assure that even more people have access to capital and credit.

Banks and their subsidiaries benefit from federal and state anti-discrimination laws, as these laws enable them to reach more people who may otherwise be overlooked or purposefully excluded. State protections, like federal protections, do not require that credit be extended to individuals who cannot afford it – they simply require that all people be given an equal chance to benefit

¹ These statistics are drawn from the *National Fair Housing Alliance 2003 Fair Housing Trends Report*. To view the report, visit www.nationalfairhousing.org.



from the credit system. State protections, like federal protections, should also maintain their ability apply to any policy that constitutes discrimination.

I note in this regard that neither the Fair Housing Act nor the Equal Credit Opportunity Act have ever been interpreted to pre-empt state and local laws prohibiting discrimination by housing lenders. Indeed, the enforcement mechanism set forth in the Fair Housing Act expects state and local laws that are “substantially equivalent” to the Fair Housing Act to be enforced by state and local agencies certified by the Secretary of HUD. See 42 U.S.C. § 3610(f), § 3615, § 3616, and implementing regulations. Neither should the OCC purport to “preempt” state and local anti-discrimination laws as those laws apply to national banks. Such laws should be added to the list of non-pre-emption list in §34.4(b).

Do Not Preempt Effective Predatory Lending Laws

In amending parts 7, regarding consumer protection laws, and 34, regarding real estate lending, the OCC could preempt effective predatory lending laws, which contain provisions that the OCC itself supports.

In its Advisory Letters AL 2003-2 and 2003-3 to national banks and their operating subsidiaries, the OCC stated that abusive flipping, fee packing, and equity stripping are unfair and deceptive and thus violate the FTC Act. The OCC also stated that abusive lending, particularly lending beyond borrowers’ repayment abilities, does not meet credit needs and with therefore adversely affect CRA ratings. Rather than preempt strong state laws that in effect support the OCC’s Advisory Letters, the OCC should promulgate regulations that prohibit the above-mentioned devastating practices.

Do Not Extend Preemption to Operating Subsidiaries

As proposed, the rule would extend preemption to operating subsidiaries of national banks. Operating subsidiaries often include title companies, finance companies, leasing companies, securities firms, etc. These are non-banking firms that are currently licensed and examined at the state level.

We strongly discourage extending preemption to operating subsidiaries. Without examination at the state level, these entities would be difficult to monitor. John Hawke, Jr., the Comptroller of the Currency, stated on September 9, 2003 before a luncheon hosted by Women in Housing and Finance that he did not know the number of operating subsidiaries that currently exist nationwide. If the OCC has no clear picture of a simple statistic such as how many of these entities exist, the OCC’s monitoring of these entities would be imprudent.

In addition, as the financial marketplace continues to expand, more and more entities that are not banks are providing services to communities. Most of them are reputable; nevertheless, they are not national banks and therefore should not benefit from the exemptions that national banks may receive. Relieving the states of their duties to monitor these entities will leave the states powerless to fight discrimination and other violations when necessary.



This country has already witnessed severe equity stripping at the hands of predatory lenders nationwide. Congress and federal agencies, including the OCC, are struggling to catch federal law up to protect Americans against the trickery that continues to occur. Predatory lending, and even subprime lending, are rarely seen at the national bank level. This type of lending, legal and illegal, happens at the subsidiary level. The OCC should not take on the added responsibility of monitoring these entities without the assistance of the states.

On behalf of the National Fair Housing Alliance, I once again urge the OCC to reconsider its proposed rule to preempt state laws for national banks and their subsidiaries. Although this action may be permitted by law, the OCC has a choice not to proceed in this direction as well. If the OCC decides to continue with the preemption for national banks, I urge the OCC to include anti-discrimination laws in the list of exempted laws in listed in § 34.4(b). I also urge the OCC to strengthen its regulations regarding predatory lending to match and exceed its recent Advisory Letters. Finally, I ask that the OCC not extend preemption to operating subsidiaries of national banks.

Thank you for your attention to this matter.

Sincerely,

Shanna L. Smith
President and CEO