September 30, 2003

Office of the Comptroller of the Currency
Attention Docket No. 03-16
Fax (202) 874-4448

Dear Comptroller of the Currency:

I am writing to you from Woodstock Institute in Chicago to express our strong opposition to Docket 03-16, the preemption of state consumer protection statutes for national banks. This preemption removes much of the consumer and fair lending authority previously granted to states by Congress without providing a national policy that effectively protects borrowers from abusive lending practices. Woodstock Institute has a thirty year history of finding ways to bring capital and credit to underserved low-income and minority communities and of protecting those communities from extortionate lending practices.

If the OCC "occupies the field" of real estate lending conducted by national banks, they will have effectively seized portions of the most effective consumer protection mechanisms available to states. Few of these mechanisms are replaced by the new national guidelines. Tort, contract, tax, debt collection, zoning, and property transfer law, should remain the authority of the state, even when they incidentally apply to real estate secured lending. States have a long tradition of effectively protecting their residents from unfair and unethical business practices. For these protections to remain effective, states must be able retain the authority to address consumer related issues, even when they apply to nationally chartered banks.

The OCC's commitment to evaluate evidence of abusive lending practices carried out by national banks provides little comfort. Neither the OCC nor the FTC has the capacity to adequately address all the violations of the Fair Housing Act, the Equal Credit Opportunity Act, and HOEPA that implicate national banks. It is unlikely that either agency will be able to provide the same level of consumer protections currently provided by state regulators.

When abusive lending does occur, the OCC does not assign liability to national banks, their subsidiaries or affiliates, who violate the new national consumer protection regulations. Even in cases where state imposed liability was limited to an amount acceptable to investors in the secondary market (such as Georgia), the OCC has resisted assigning liability to national banks.

While this absence of liability has always been the hallmark of a national bank charter, national banks have at least been subject to state consumer protection regulations. Without the capacity to enforce these regulations or assigning liability to prevent abusive lending from taking place, consumers should have little confidence in national banks as a franchise.

Regardless of enforcement issues, many of the new national guidelines provide little protection against even the most basic abusive practices. For example, the new national guidelines would also require national banks to make loans based predominately on cash flow, instead of the foreclosed value of the borrower's collateral. While this type of regulation is a step in the right direction, cash flow is a crude test of a borrower's ability to pay. This underwriting method does not account for the damaging cost of high fees and undisclosed or unreasonable penalties. These fees and penalties continue to be unrestricted and subject to only the minimal disclosure standards of HOEPA. To pretend that this minimal step towards preventing predatory lending constitutes responsible public policy is a charade. The proposed regulation would only achieve the purpose of protecting borrowers from predatory lending if the OCC added to this one crude test all the core principles from its recent anti-predatory Advisory Letters )AL 2003-2 and AL 2003-3). These included abusive flipping of loans, fee packing and equity stripping.

The preemption of state consumer protection statutes for national banks and the accompanying OCC guidelines set a dangerous precedent. With the national legislature slow to respond to new consumer lending issues, the OCC should not encourage the "downward leveling" of protections against abusive lenders. States have been and continue to be on the forefront of financial policy development. Congress has long viewed consumer protection issues as a state responsibility, recognizing regulations as minimum standards which can be strengthened as necessary based on local conditions. By only holding national banks to the minimal standards of federal consumer protection, consumers are left unprotected from abusive lending practices carried out by industry players that, in some instances, control over 60 percent of the market.

The OCC in public statements has been attacking state legislation for restricting the flow of credit and has insisted that current research findings support that view. Such statements constitute a very partisan reading of current research. The Center for Responsible Lending's study (Ernst, Farris and Stein (2002) showed that between 1998 and 2000, the year the North Carolina law went into effect, per capita subprime lending dropped in all states due to an overall slowdown in the subprime and prime lending markets. While subprime lending fell more in North Carolina than in other states, that state's initial level was at a substantially higher level than other states to being with. After the law went into effect, the North Carolina and national lending rates converged significantly, although North Carolina's subprime lending rate remained almost 15 percent higher than the rest of the nation. A much more reliable figure than overall rates is the share of loans made by subprime lenders of all loans. North Carolina scores very high on that rate, a fact which may well explain the public outcry that lead to the law in the first place, and from 1999 to 2000, the state fell only from fifth to sixth among all states in that ranking.

Two other studies, one by the industry funded Credit Research Center at Georgetown 6 University (Elliehasuen and Staten, 2002) , and the other that compared North Carolina's lending patterns with those of four other Southeastern states (Harvey and Nigro 2002) found some drop in subprime lending in North Carolina. There are serious methodological problems with the industry funded study. The authors utilize a data set that an accounting firm collected from only nine members of the American Financial Services Association, a trade group of finance and mortgage companies, many of which do subprime lending. The authors do not explains how or why only nine lenders were chosen by the accounting from the more than 500 members of the association. It is entirely conceivable that the lenders were chose because they made many loans with features that the law ruled predatory. If that is the case, the study results would validate the purpose and the effect of the law. Critics of the law argue that research showing a decline in subprime lending proves the law has the unintended consequence of drying up legitimate lending. But the size of the observed drop in both studies (leaving aside for the moment the major methodological weaknesses of the industry funded study) is consistent with the hypothesis that the law discouraged those subprime loans at the predatory end of the subprime scale.

A 2002 study survey of 280 subprime branch managers and brokers in multiple states by Morgan Stanley, the investment banking firm, went beyond looking at North Caroline by comparing the experiences of lending outlets in different states. The authors found that tougher laws were not having a substantial effect on lending volumes. The study's conclusions, on the contrary, argued that predatory lending laws could even increase the volume of responsible lending:

Predatory lending laws do not appear to have dampened the growth outlook. In fact, 84 percent of our respondents thought changed lending practices were having a neutral to positive impact on volumes…our survey respondents indicate that enhanced disclosures are making borrowers feel more comfortable about the lending process. And lower points and less onerous prepayment penalties help make the economic terms more attractive. Even the toughest new laws, in states like North Carolina for example, do not seem to be affecting branch volumes….

It is hard to believe that a responsible bank regulator would ignore these findings to promulgate regulation that will rob ordinary households of the only effective protections that exist from the robber barons of the contemporary era. One can only conclude that the defense of the predatory lending industry and the narrow, self-protective interests of a Washington bureaucracy have taken precedence over the well-being of average, hardworking American families who invested in their homes for their families and their children's futures.

National regulators should not alter state statutes unless they are inconsistent with federal guidelines, and then only to the extent of the inconsistency. In this case, we believe that the OCC has extended its authority well beyond the scope of the national charter franchise. States have historically maintained control over consumer protections and these protections should remain in place—particularly in the field of real estate. Forfeiting the regulation of the majority of real estate secured transactions, indisputably a local issue, to federal regulators does little to protect borrowers, neighborhoods or states from abusive practices.

For these reasons, we strongly oppose the proposed amendments to Part 7, subpart D, titled "Preemption", including proposed new sections 7.4007, 7.4008, and 7.4009. We also oppose the proposed preemption amendment to Part 34, section 34.4, concerning preemption of laws related to real estate lending.

Sincerely,

Malcolm Bush
President