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## Legal News

### National Banks

#### Chicago-Style Fair Lending Ordinances Do Not Raise Preemption Issues, Hawke Says

State and local laws that require business-hungry banks to sign anti-predatory lending pledges are not subject to preemption by federal law, Comptroller of the Currency John D. Hawke Jr. said July 24.

Hawke, speaking one day after federal thrift regulators said federal law overrides a New Jersey fair lending statute, cited a Chicago ordinance as a "wrongheaded" but usable way to discourage abusive lending practices.

In August 2000, the Chicago City Council passed a measure that bars banks from accepting city deposits unless they sign a pledge not to engage in predatory lending as defined by the city's municipal code.

The pledge also binds bank affiliates. A similar pledge is required in connection with any other kind of contract with the city.

#### OCC Called Aggressive on Preemption

The OCC has drawn fire for what state regulators and other critics call an aggressive use of federal preemption when defending its regulation of the national banking system.

But according to Hawke, although the OCC may conclude that federal law preempts particular state laws or local ordinances, preemption issues are not implicated in Chicago-style measures that give lenders a choice.

"I don't think a preemption issue is raised by a state or municipality setting down the standards as to whom it will choose to do business with," Hawke said during a conference sponsored by the Federalist Society. "The bank can decide whether it wants to observe those conditions or not and the municipality or the state can deal with the consequences of eliminating certain kinds of providers of various sorts of services. I don't see that as raising a preemption issue," Hawke said.


#### Preemption Ruling on Georgia Law Due Soon

In other remarks, Hawke said the OCC will soon issue an opinion on whether federal law preempts the Georgia Fair Lending Act, a controversial statute that battles predatory lending by putting significant restrictions on "high-cost" mortgage loans.

The OCC has asked for comment on the matter, and will issue a final decision "in the very near future," Hawke said.

The Georgia law, while called onerous by the lending community, is less threatening than it

once was. As originally passed, the law made loan purchasers and assignees liable for predatory practices committed by loan originators. Georgia legislators, in response to intense lobbying from bankers, have since amended the law to ease some of those provisions.

Hawke's remarks came one day after the Office of Thrift Supervision released a legal opinion that said the federal Home Owners' Loan Act preempts the New Jersey Home Ownership Security Act of 2002. 

*By R. Christian Bruce*

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# NEWS RELEASE

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Comptroller of the Currency  
Administrator of National Banks

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FOR IMMEDIATE RELEASE  
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## **Comptroller Hawke Urges New Approach to Combating Predatory Lending**

WASHINGTON -- Comptroller of the Currency John D. Hawke, Jr. said today that many well-intentioned efforts to combat predatory lending may be having the unintended result of impeding the flow of credit to creditworthy subprime borrowers.

In the first 18 months following passage of a predatory lending law in North Carolina, he said, it appears that mortgage loan originations to mainstream subprime borrowers dropped 30 percent. By contrast, the same kinds of loans in neighboring states dropped by only 3 percent in the same period.

“It’s no mystery why so many fewer subprime loans are being made – or will be made – in jurisdictions subject to anti-predatory statutes,” Mr. Hawke said. “Studies point to increased compliance costs, especially for banks operating in multiple jurisdictions, increased underwriting expenses, and legal liability issues that have persuaded subprime lenders to curtail that business or take it to places where no such laws exist.”

In addition, he noted that, “In Georgia, New York, and New Jersey, for example, where particularly stringent anti-predatory laws are in effect, both Fannie Mae and Freddie Mac have drastically reduced or even eliminated altogether their purchase of so-called “high cost” and other real estate loans.”

Moreover, he added, the rating agencies have all adopted policies that make it very difficult to pool loans originating in Georgia, New York, or New Jersey unless the issuer provides costly credit enhancements and/or certifications that the pool contains no proscribed loans.

Mr. Hawke said state laws have generally failed because they take an “across-the-board, one-size-fits-all approach that punishes the good as well as the wrongdoers.”

There is widespread recognition – including affirmations by almost all state Attorneys General – that federally regulated financial institutions and their subsidiaries are not part of the problem. Yet most of these laws include such institutions, including those chartered under federal law, within their scope.

Mr. Hawke said a far more effective approach would be to focus on the abusive practitioners and let federal regulators bring to bear their formidable enforcement powers where they find abusive practices among the institutions they supervise.

The Comptroller said the OCC has put out the most comprehensive guidance produced by any of the federal banking agencies – and probably by any banking regulator – describing the kinds of abusive practices that will result in action by the OCC.

“In the past, we haven’t hesitated to use our enforcement authority to combat unsafe, unsound, unfair, or deceptive practices,” Mr. Hawke said. “Indeed, OCC enforcement actions have resulted in restitution totaling hundreds of millions of dollars to consumers. And we have served notice that we will continue to do so in the area of predatory lending.”

In addition to taking action against lenders that engage in unfair or deceptive marketing practices, the OCC has told banks that it is impermissible to make loans that cannot be repaid without recourse to the collateral – especially if that collateral is the borrower’s home.

The Comptroller noted that it is widely acknowledged that predatory lending is a problem that exists almost exclusively outside the banking industry – among mortgage bankers or finance companies. Indeed, a recent court brief filed by a coalition of nearly two dozen state Attorneys General stressed that they had not found predatory lending practices at banks or bank subsidiaries.

“From this perspective, then, I think it can be understood why we believe that national bank preemption of the Georgia Fair Lending Act should not be viewed with alarm,” he said, alluding to the possibility that Georgia’s anti-predatory lending law might be found to be inapplicable to national banks.

George customers of national banks and their subsidiaries will enjoy the substantial protections afforded by the OCC’s supervisory process, Mr. Hawke said.

“Our approach not only protects consumers where abusive practices are found, it also avoids the overbroad and unintended adverse effects of those one-size-fits-all laws – effects that, as we’ve seen, can be almost as harmful as the problem those laws were designed to address,” he added.

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The OCC charters, regulates and examines approximately 2,100 national banks and 52 federal branches of foreign banks in the U.S., accounting for more than 55 percent of the nation’s banking assets. Its mission is to ensure a safe and sound and competitive national banking system that supports the citizens, communities and economy of the United States.