

900 Nineteenth St. NW, Ste. 400
Washington, DC 20006
TEL: (202) 857-3100
FAX: (202) 296-8716
E-MAIL: info@acbankers.org
<http://www.AmericasCommunityBankers.com>

102



June 24, 2002

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552
Attention: Docket No. 2002-17

Re: Alternative Mortgage Transaction Parity Act; Preemption
67 FR 20468 (April 25, 2002)

Dear Sir or Madam:

America's Community Bankers ("ACB")¹ welcomes the opportunity to comment on the proposed rule issued by the Office of Thrift Supervision ("OTS") that would revise the current rule identifying the OTS rules that apply to state housing creditors under the Alternative Mortgage Transaction Parity Act ("Parity Act").² The proposal would revise the rule to no longer identify the agency's rules on prepayment penalties and late charges as applicable to state housing creditors.

ACB Position

ACB strongly urges the OTS to reconsider whether the proposal will accomplish the goals of the agency in its implementation of the Parity Act. ACB does not believe that it will. We believe that enforcement of current regulatory requirements and additional consumer education will be much more effective in combating abusive lenders. The two loan features that the OTS has identified in this proposal are useful tools in helping lenders develop products that serve their communities. They, like many other loan features, possibly can be used abusively, but enforcement and disclosure are the better approach to counteract the abuses.

ACB represents insured depository lenders whose historical primary business focus has been residential mortgage finance. Among the members are state and federal savings associations and savings banks. While we agree with the OTS that the unregulated and supervised state housing creditors should be subject to enforceable laws and regulations when they are providing products

¹ ACB represents the nation's community banks of all charter types and sizes. ACB members, whose aggregate assets exceed \$1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² 67 Fed. Reg. 20468 (April 25, 2002).

and services that are the same or similar to those offered by insured depositories, we are concerned that state chartered savings associations and savings banks will be disadvantaged by this proposal. Since the enactment of the Parity Act, not only has the mortgage market changed significantly, but the regulatory scheme governing state savings associations has also changed. More recently, since 1989, state savings associations have been subject to regular examination and supervision by the OTS. The rules and regulations of the OTS have been amended numerous times to include operational and supervisory rules that govern state savings associations.

The OTS seeks to amend the regulation identifying its regulations that apply to state housing creditors under the Parity Act. The regulations that would no longer apply to state housing creditors are those on prepayment penalties and late charges. ACB is aware that prepayment penalties are frequently on the list of loan terms that may be abusive, and in fact the housing government sponsored enterprises do not purchase loans that have certain types of prepayment penalties. However, both loan features serve a useful purpose for the entity originating the loan as well as the consumer. If a loan has a prepayment penalty, the interest rate may be lower, thus enabling the borrower to afford a loan that he or she may not otherwise be able to afford. As is the case with all loan terms, the key to this loan term is borrower education and disclosure. The OTS admits that providing the option to have loans with prepayment penalties and late fees helps to promote safe and sound operations. We believe that additional enforcement of the laws and regulations governing the operations of state housing creditors and borrower education are more effective in combating abuses than restricting the loan terms for which a federal preemption will apply for certain lenders.

General

As a preliminary matter, ACB members are committed to helping all Americans become and remain homeowners. This is a philosophy and a business strategy that is not only good for communities; it is good for consumers and for business. In contrast, predatory lending practices undermine homeownership and damage communities. ACB pledges to work with the OTS and other policy makers to eliminate predatory lending practices in the most effective way and to provide all credit-worthy borrowers with access to sound loans.

Defining predatory lending is difficult. In establishing a definition, it is essential to recognize the important difference between loan product terms, which are inherently neutral, and predatory lending practices. If a definition does not recognize this difference, it will result in restrictions that limit the availability of credit and the array of products available for all borrowers, while allowing predators to continue their deceptive lending practices in originating loans for unwary and unsuspecting borrowers. The focus of regulation should be on enhancing systems to detect and deter deception and fraud, without restricting the availability of credit for any potential homeowner.

The OTS has a strong role to play through its implementation of the Parity Act. Pursuant to the terms of the law, OTS should work to ensure that both new and current rules that attempt to curb predatory lending are applied equally to federally insured savings associations and state-licensed

and chartered housing lenders that can choose to follow federal, rather than state, law under the Parity Act.

In 1982, Congress enacted the Parity Act as part of broader financial services legislation. According to the findings and purpose of the Parity Act, Congress recognized that "increasingly volatile and dynamic changes in interest rates have seriously impaired" lenders' ability to provide fixed-term, fixed rate credit.³ The purpose of the Parity Act was to permit state-chartered lenders to offer alternative mortgage instruments under a system of uniform federal rules. (Alternative mortgage instruments include variable-rate loans and loans that provide for balloon payments.)

Though interest rates are not as volatile as they were in the 1970s and 1980s, alternative mortgage instruments remain a vital part of housing finance. They allow borrowers and lenders to craft mortgage terms that are adapted to individual situations. As our nation's population becomes ever more mobile and diverse, the need to allow lenders to offer a wide range of mortgage products under uniform rules is as compelling today as it was in 1982.

Except in those states that opted out of the Parity Act, the statute permits state-chartered or licensed housing lenders (state housing creditors) to follow OTS rules, rather than state law, with respect to alternative mortgage instruments. (The Parity Act permits state-chartered banks to follow the rules of the Comptroller of the Currency applicable to national banks and state-chartered credit unions to follow the rules of the National Credit Union Administration.)

It is not, however, sufficient to impose the same regulations on all lenders. Indeed, many lenders assert they must adhere to the same regulations that insured depository institutions must follow. However, not all housing lenders are subject to the same level of supervision as that experienced by insured depository institutions. Many other lenders that provide consumer home mortgage and finance are examined on a complaint-only basis and are not subject to regularly scheduled examinations for safety, soundness, and regulatory compliance. The Parity Act does not directly address this issue; it does not require federal supervision of state housing creditors. State regulators are still responsible. However, in the case of state savings associations, the OTS does provide regular and ongoing examination and supervision.

The Parity Act's purpose was to put state housing creditors on the same footing as federally chartered institutions, not to provide a less restrictive regulatory environment. ACB recommends that OTS work closely with state officials and the Federal Trade Commission to ensure that OTS and other federal regulations apply in fact, as well as in theory, to state-licensed lenders. This will help avoid a situation where state law is preempted but federal regulations are not enforced.

³ 12 U.S.C. 3801(a)(1).

The Proposal

As part of the preamble to the proposal, the OTS solicits comment on several issues. First, the OTS asks whether it has correctly identified the factors it must weigh in determining whether a specific rule should be designated as applicable for state housing creditors. Generally, ACB believes that the OTS has identified the factors it must weigh in making the determination. We suggest that the agency rely on evidence other than anecdotal information to determine the features of a loan that should be designated as applicable for state housing lenders. Further, while certain loan terms may be used by lenders on all types of loans, some features are more prevalent for alternative mortgages. The array of products available has been broadened by the use of features on all types of loans. For example, prepayment penalties are available on conventional mortgages as well as alternative mortgages. A borrower may decide that a prepayment penalty is worth a lower interest rate given his/her circumstances. The ability to structure an alternative mortgage loan product with a prepayment penalty has opened up the possibility of homeownership for many borrowers.

Second, the OTS asks whether it has appropriately and fairly applied these factors. ACB reiterates its suggestion that the factors be applied based on evidence other than anecdote. We believe that enforcement of existing laws and regulations and borrower education is more important in today's mortgage market than limiting the options for some lenders and the borrowers they serve.

Third, the OTS asks whether it should treat state-chartered savings associations differently. We believe that they are different than other state housing creditors. They are subject to the regulation and supervision of a state banking authority as well as the regular examination and supervision of the OTS. We believe that state-chartered savings associations should be treated like federal associations in this matter as they are in others. Since 1989 they have been subject to substantially similar regulatory schemes with the additional layer of state regulation. These are not institutions for which we believe there should be additional oversight unless it is warranted for safety and soundness reasons. In each of these examples, education of the borrower and enforcement of the lenders who are abusive are the important elements.

Finally, the OTS specifically asks about prepayment penalties and late charges and whether OTS regulations should be applied for all real estate loans made by state savings associations. We believe that, given the nature of the mortgage markets today and the changes that have occurred since 1982, the option to offer a loan with a prepayment penalty provides lenders and borrowers with important choices. Prepayment penalties help lenders to manage the risk of prepayment. Loans prepay at a much faster rate in 2002 than they did in 1982, injecting more risk in the process of originating mortgage loans. In addition, the role of the secondary market and investors in establishing loan pricing and risk characteristics is much more highly developed. The OTS correctly points out that the imposition of late payment charges is useful for safety and soundness reasons.

Financial Literacy

One of ACB's five priority issues for 2002 is the promotion of the use of financial literacy programs to mitigate abusive lending. ACB believes that increased homeownership education and counseling, combined with better enforcement of certain state housing lenders, is an effective way to protect potential victims of predatory lending. The importance of homeownership counseling cannot be overemphasized in helping borrowers avoid becoming victims of predatory lenders. It is particularly important for borrowers with little or no experience in homeownership and finance. ACB members currently provide counseling on their own or in combination with other institutions or community groups. Lenders, community groups, and public agencies should work to expand these programs.

We strongly urge the OTS work with other state and federal regulators to enforce current laws. This will have a much more significant impact on mitigating predatory lending than will changing loan terms that limit the choices for some lenders and all borrowers.

ACB appreciates the opportunity to comment on this very important matter. We stand ready to work with the OTS to determine the most effective way to eradicate abusive and predatory lending to the extent possible. If you have any questions, please contact the undersigned at (202) 857-3121 or cbahin@acbankers.org.

Sincerely,



Charlotte M. Bahin
Director of Regulatory Affairs
Senior Regulatory Counsel