

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 See OCC Unpublished Interpretive Letter dated December 8, 1983 (preempting a Massachusetts law restricting balloon and demand payment terms) and OCC Unpublished Interpretive Letter dated May 9, 1988 (national banks are not required to amortize real estate loans and contrary state laws are preempted).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 See OCC Unpublished Interpretive Letter dated March 30, 1988.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. Assn. 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 visitatorial 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](mailto: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

payment and debt collection programs, FMS maintains records on individuals who receive payments from the Federal Government, as well as individuals who owe delinquent debts to the Federal Government and states. Records on individuals who receive Federal payments are maintained in FMS's "Payment Issue Records for Regular Recurring Benefit Payments," and "Payment Records for Other Than Regular Recurring Benefit Payments." Records on individuals who owe delinquent debts are maintained in its "Debt Collection Operations System" system of records. The systems of records were last published in the **Federal Register** in their entirety on August 22, 2001, beginning in 66 FR 44204.

In keeping with the Government's policy to rely on commercial sources to supply the products and services the Government needs, FMS sometimes retains the services of contractors to perform certain routine functions related to payment and debt collection processing. Disclosures of information maintained in FMS' systems of records may be required in order for the contractor to perform the services for which it has been hired. If disclosure is necessary, the contractor to which disclosure is made will be subject to the same limitations applicable to FMS officers and employees under the Privacy Act. This means that the contractor is required to safeguard Privacy Act information to prevent unauthorized use or disclosure of any Privacy Act records. FMS is altering the referenced systems of records to allow disclosure of information from such systems to a private contractor to the extent necessary for the contractor to accomplish an FMS function related to payment processing and/or debt collection.

The report required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A-130, Federal Agency Responsibilities for Maintaining Records About Individuals, dated November 30, 2000.

For the reasons set forth above, FMS proposes to alter its systems of records as follows:

#### **TREASURY/FMS .002**

##### **SYSTEM NAME:**

Payment Issue Records for Regular Recurring Benefit Payments—Treasury/Financial Management Service.

Description of change: Remove current entry and add the following to read as follows:

##### **SYSTEM LOCATION:**

"The Financial Management Service, U.S. Department of the Treasury, Washington, DC 20227 and Hyattsville, MD 20782. Records maintained at Financial Centers in five regions: Austin, TX; Birmingham, AL; Kansas City, MO; Philadelphia, PA; and San Francisco, CA."

\* \* \* \* \*

##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

\* \* \* \* \*

Description of change: The period "." at the end of routine use (13) is replaced with a semicolon ";", and the following routine use is added at the end thereof:

"(14) Disclose information to a contractor of the Financial Management Service for the purpose of performing routine payment processing services, subject to the same limitations applicable to FMS officers and employees under the Privacy Act."

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#### **TREASURY/FMS .014**

##### **SYSTEM NAME:**

Debt Collection Operations System—Treasury/Financial Management Service.

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##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

\* \* \* \* \*

Description of change: The period "." at the end of routine use (8) paragraph c is replaced with a semicolon ";", and the following language is added before the period ".":

(8) c. \* \* \*

"including for the provision of routine debt collection services by an FMS contractor subject to the same limitations applicable to FMS officers and employees under the Privacy Act."

\* \* \* \* \*

#### **TREASURY/FMS .015**

##### **SYSTEM NAME:**

Payment Records for Other Than Regular Recurring Benefit Payments—Treasury/Financial Management Service.

Description of change: Remove current entry and add the following to read as follows:

##### **SYSTEM LOCATION:**

"The Financial Management Service, U.S. Department of the Treasury, Washington, DC 20227 and Hyattsville, MD 20782. Records maintained at Financial Centers in five regions: Austin, TX; Birmingham, AL; Kansas City, MO; Philadelphia, PA; and San Francisco, CA."

\* \* \* \* \*

##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

\* \* \* \* \*

Description of change: The period "." at the end of routine use (13) is replaced with a semicolon ";", and the following routine use is added at the end thereof:

"(14) Disclose information to a contractor of the Financial Management Service for the purpose of performing routine payment processing services, subject to the same limitations applicable to FMS officers and employees under the Privacy Act."

\* \* \* \* \*

Dated: February 11, 2003.

**W. Earl Wright, Jr.,**

*Chief Management and Administrative Program Officer.*

[FR Doc. 03-4457 Filed 2-25-03; 8:45 am]

**BILLING CODE 4810-35-P**

#### **DEPARTMENT OF THE TREASURY**

##### **Internal Revenue Service**

##### **Proposed Collection; Comment Request for Form 4255**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 4255, Recapture of Investment Credit.

**DATES:** Written comments should be received on or before April 28, 2003 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue