

Article Title: ARCHIVE | Legal Criteria: Standard & Poor's Addresses OCC Rule Regarding Preemption of State Anti-Predatory Lending Laws Data: (EDITOR'S NOTE: —This article is no longer current. It has been superseded by "Standard & Poor's Criteria For Analyzing Loans Governed By Anti-Predatory Lending Laws," published Nov. 5, 2008.) Standard & Poor's Ratings Services has completed its review of the final rule issued by the Office of the Comptroller of the Currency (OCC) Jan. 7, 2004, which amends 12 C.F.R. Parts 7 and 34 (the Rule). On Jan. 26, 2004, Standard & Poor's announced that it was in the process of reviewing the Rule, which clarifies the scope of the OCC's preemption authority over national banks and their operating subsidiaries (collectively, National Banks) and sets forth the extent to which the operations of National Banks are subject to state laws. The purpose of the review was to determine what effect, if any, the Rule will have on Standard & Poor's structured finance rating criteria. (For more information, see the press release, "OCC Rule Regarding Preemption of State Anti-Predatory Lending Laws Under Review," published Jan. 26, 2004, on RatingsDirect, Standard & Poor's Web-based credit analysis system, at [www.ratingsdirect.com](http://www.ratingsdirect.com). The press release is also available on the Standard & Poor's Web site at [www.standardandpoors.com](http://www.standardandpoors.com).)

Approach Described in Jan. 26 Release Standard & Poor's Jan. 26 release identified several concerns with the Rule. First, the OCC declined to exercise its perceived authority to occupy the field with regard to the real estate lending activities of National Banks. Instead, in the Rule, the OCC provides that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally authorized real estate lending powers do not apply to national banks." The Rule then lists examples of state laws that are and are not preempted by the Rule. Second, the Rule was silent on the issue of whether assignee liability provisions contained in state laws and regulations (including anti-predatory lending laws) apply to assignees of loans originated by National Banks, notwithstanding the fact that the OCC separately had addressed this issue in connection with the Georgia Fair Lending Act (GFLA) in a Determination and Order (the Order) issued by the OCC July 31, 2003 (see "Standard & Poor's Announces Position on OCC's Preemption Order for the GFLA," published Oct. 3, 2003, on RatingsDirect and [standardandpoors.com](http://standardandpoors.com) (GA OCC Release)). Finally, the Rule did not address the extent to which servicing restrictions in state anti-predatory lending laws could directly apply to purchasers or assignees of loans originated by National Banks. Because of the above factors, in the Jan. 26 release, Standard & Poor's stated its belief that it is necessary to analyze each provision in a state's anti-predatory lending law to determine whether, and to what extent, provisions of that law may apply to assignees or purchasers of loans originated by National Banks.

Standard & Poor's Reviews the Rule In accordance with the approach described above, Standard & Poor's reviewed the following anti-predatory lending laws in connection with which it has issued releases, including the anti-predatory lending laws in the following jurisdictions: Arkansas, Los Angeles (CA), Oakland (CA), Georgia, Illinois, Kentucky, Maine, Nevada, New Jersey, New Mexico, New York State, North Carolina, Oklahoma, and South Carolina (Reviewed Laws). Based on its review of each of these laws, the Rule, and the Order, as well as relevant case law, Standard & Poor's has determined that assignees and purchasers of loans originated by National Banks that would otherwise be governed by the anti-predatory lending laws of Oakland (CA), Georgia, Illinois, Kentucky, Maine, Nevada, New Jersey, New Mexico, New York State, North Carolina, Oklahoma, and South Carolina (Covered Laws) would not be subject to liability for actions of National Banks under such laws. However, Standard & Poor's was unable to make this same determination for loans originated by National Banks that would otherwise be governed by the anti-predatory lending laws of Los Angeles (CA) and Arkansas (Excluded Laws). Therefore, in evaluating rated structured transactions that include loans governed by all of the Reviewed Laws, Standard & Poor's will follow the criteria outlined below.

Standard & Poor's Criteria Loans Originated by National Banks Under Covered Laws First, Standard & Poor's will continue to permit into its rated structured transactions loans originated by National Banks that are subject to each of the Covered Laws. (This will apply to Oakland, if and when the Oakland anti-predatory lending law becomes effective). For Standard & Poor's to rate transactions that include these loans, Standard & Poor's will continue to rely on the representation and warranty that the loans included in the pool were originated in compliance with all applicable laws, including, but not limited to, all applicable anti-predatory and abusive lending laws (Compliance Representation). In addition, Standard & Poor's will require legal comfort in the form of an officer's certificate to the effect that the originator of the loans is a national

bank or an operating subsidiary of a national bank, as defined in 12 C.F.R. Sec 5.3(j) and 12 C.F.R. Sec 5.34, respectively. (In connection with loans originated by National Banks under the GFLA, see the GA OCC Release noted above, in which Standard & Poor's set forth similar criteria for loans originated by National Banks under the GFLA.) Since the Los Angeles anti-predatory lending law does not, by its own terms, apply to loans originated by national banks themselves (but does purport to apply to certain loans originated by national bank operating subsidiaries), if and when the Los Angeles anti-predatory lending law becomes effective, Standard & Poor's will permit all loans originated by national banks that otherwise would be subject to the Los Angeles anti-predatory lending law into its rated structured finance transactions, in connection with which it will continue to rely on the Compliance Representation. In addition, it will require an officer's certificate certifying that the originator is a national bank, as defined in 12 C.F.R. Sec 5.3(j). Loans Originated by National Banks Under Excluded Laws Second, Standard & Poor's is unable to conclude with certainty that assignees and purchasers of loans originated by National Banks subject to the Arkansas anti-predatory lending law or originated by subsidiaries of national banks subject to the Los Angeles anti-predatory lending law, by the terms of those laws, are not subject to liability, notwithstanding the Rule and the Order. Because such liability might result in damages that exceed the principal balance of a loan as a result of the possible rescission or voiding of the loan, Standard & Poor's will apply its criteria for loans governed by these laws, as set forth in its releases relating to these laws. (See "Standard & Poor's Addresses Arkansas Home Loan Protection Law," and "Standard & Poor's Addresses Los Angeles, CA Anti-Predatory Lending Ordinance," each published on RatingsDirect and the Standard & Poor's Web site, dated July 11, 2003, and Nov. 10, 2003, respectively.) (As stated in its release regarding Los Angeles, Standard & Poor's will apply its criteria to loans governed by the Los Angeles anti-predatory lending law, if and when the law becomes effective.) Loans Originated Under All Reviewed Laws by Entities That Are Not National Banks Similarly, for loans originated by entities that are not National Banks under each of the Reviewed Laws, Standard & Poor's will apply its criteria for loans governed by these laws, as set forth in its various releases relating to these laws. In this regard, see the following releases: "Standard & Poor's Addresses Oakland, CA Anti-Predatory Lending Ordinance," Nov. 10, 2003; "Standard & Poor's Will Admit Georgia Mortgage Loans Into Rated Structured Finance Transactions," March 11, 2003; "Standard & Poor's Addresses Illinois High Risk Home Loan Act," Nov. 17, 2003; "Standard & Poor's Addresses Kentucky High-Cost Law," June 20, 2003; "Standard & Poor's Addresses Amendment to Maine Truth in Lending Act," Sept. 12, 2003; "Standard & Poor's Addresses Nevada Anti-Predatory Lending Law," Sept. 26, 2003; "Standard & Poor's Addresses New Jersey Predatory Lending Law," May 2, 2003; "Standard & Poor's Addresses New Mexico's Home Loan Protection Act," Nov. 25, 2003; "Standard & Poor's Addresses New York State High-Cost Law," March 27, 2003; "Standard & Poor's Addresses North Carolina Anti-Predatory Lending Law," Feb. 12, 2004; "Standard & Poor's Addresses Amendment to Oklahoma Consumer Credit Code," Nov. 17, 2003; and "Standard & Poor's Addresses South Carolina High-Cost and Consumer Home Loans Act," Dec. 23, 2003. These press releases are available on RatingsDirect and the Standard & Poor's Web site. Loans Originated by State Chartered Banks and Their Subsidiaries Finally, for loans originated by state chartered banks and their subsidiaries (other than Georgia state chartered banks and their subsidiaries), Standard & Poor's will apply the same criteria listed in the releases cited above for loans originated by entities that are not National Banks. (For Georgia state chartered banks and their subsidiaries, see the GA OCC Release noted above.) Future Anti-Predatory Lending Laws Must Be Reviewed It should be noted that, consistent with the approach articulated above, for each anti-predatory lending law that becomes effective and that provides for the possibility of assignee liability by the terms of that law, Standard & Poor's will analyze each provision of such law to determine whether, and to what extent, the provision may apply to assignees or purchasers of loans originated by National Banks. (For a discussion of Standard & Poor's general approach to evaluating anti-predatory lending statutes, see "Evaluating Predatory Lending Laws: Standard & Poor's Explains Its Approach," published April 15, 2003, on RatingsDirect and Standard & Poor's Web site.)