

November 30, 1998

Re: Corp. and Preemption under the
Alternative Mortgage Transactions Parity Act.

Dear Mr. :

I write in response to your November 17, 1998 letter to Ms. Hudson. You have asked for the Banking Division's opinion on whether the Alternative Mortgage Transaction Parity Act ("AMTPA") preempts West Virginia's restrictions on prepayment penalties for adjustable rate and/or balloon payment second mortgage loans.

I have reviewed the provisions of AMTPA, 12 U.S.C. 3801, *et seq.* as well as the relevant regulations promulgated by the Office of Thrift Supervision. It is clear that under AMTPA, mortgage loans with adjustable rates and/or balloon payments are "alternative mortgage transactions." 12 U.S.C. 3802(1). It is equally apparent under the Act that housing creditors may make alternative mortgage transactions "notwithstanding any State constitution, law or regulation." 12 U.S.C. 3803(c).

A note to section 3801 of AMTPA requires the appropriate federal regulator (in your client's case, the Office of Thrift Supervision) to "identify, describe and publish those portions of their respective regulations that are inappropriate for (and thus inapplicable to), or that need to be conformed for the use of, the nonfederally chartered housing creditors..." The OTS then promulgated 12 C.F.R. 560.220 which provides that "sections 560.33, 560.34, 560.35, and 560.210 of this part are identified as appropriate and applicable to the exercise of this authority [to make alternative mortgage transactions] and all regulations not so identified are deemed inappropriate and inapplicable." The regulations singled out by the OTS in 12 C.F.R. 560.220 deal with late charges, prepayment penalties, adjustments to interest rate, balance or payment amount, and the disclosure of such adjustments respectively.

Your question specifically addressed AMTPA's preemption of West Virginia's total ban on prepayment penalties for secondary mortgage transactions and its limitation

46A-3-110

on the amount of prepayment penalty that may be imposed when a consumer prepays a first lien mortgage loan (WV Code 46A-3-110).

The express purpose of AMTPA is found at 12 U.S. C. 3801(b):

to eliminate the discriminatory impact that those [federal] regulations [authorizing federal thrifts to enter into alternative mortgage transactions] have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

Since the OTS regulations cited above explicitly include within the parameters of AMTPA's preemption prepayment penalties, we must conclude that the restrictions on prepayment penalties contained in WV Code 46A-3-110 would not apply to adjustable rate mortgage loans or mortgage loans containing balloon payments *provided* such loans are made in conformity with the federal regulations.

This letter should not be used to conclude that it is the Division of Banking's position that AMTPA's preemption applies to mortgages that are not alternative mortgage transactions, i.e., fixed rate, non-balloon payment mortgages, etc.

I hope this letter addresses your concern. If you need further information, please feel free to contact me.

Sincerely,

Robert J. Lamont
General Counsel