Testimony of James D. McLaughlin
On Behalf of the American Bankers Association
Before the
Committee on Banking, Housing, and Urban Affairs
United States Senate
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Mr. Chairman, I am James D. McLaughlin, Director Regulatory and Trust Affairs of the American Bankers Association (ABA). ABA brings together all elements of the banking community to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings institutions, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

The ABA is pleased to testify on the final rule recently issued by the Comptroller of the Currency ("OCC") clarifying the types of state laws that apply to national banks' lending and deposit-taking activities and the role of state regulators in enforcing state laws against national banks.[1] Congressional oversight in this area is certainly appropriate. ABA strongly supports the OCC's rule because it provides greater certainty to national banks (particularly those that conduct business in more than one state), thus enabling greater efficiency, lower regulatory and legal costs, and enhanced delivery of financial services for bank customers. At the same time, we support the new standard designed to prevent possible predatory lending practices.

National banks operate in national credit markets, typically with a physical presence in many states. They are already subject to a comprehensive set of federal laws, including consumer protection laws. An expanding universe of differing state laws would impose substantial burdens on the conduct of their federally authorized activities. Absent preemption, the proliferation of state and local laws that would apply to those activities would inevitably lead at best to higher operating costs, and higher prices for financial services; at worst, it would lead to a reduction in available credit and fewer product options. ***More fundamentally, if state and local authorities are permitted to regulate the lending and deposit-taking activities of national banks, it is hard to see how we***

[1] The rule amends the OCC's rules at Part 34 (real estate lending authority) and Part 7 (deposit-taking and non-real estate lending powers). Although substantively similar, the rule amends two separate provisions of the OCC's regulations because there is separate statutory authority for real estate lending. In addition, the rule imposes a new standard on all consumer lending that is intended to prevent predatory lending practices. 69 *Federal Register* 1904, (January 13, 2004).

would continue to have a dual banking system. After all, what is more fundamental to banking than lending and taking deposits?

To a very large degree, the OCC rule does not break new ground. The areas covered in the rule have in many cases already been subject to preemption by the OCC in its rules and determinations or by the courts. In the past, these preemptive rulings by the OCC went forward generally on a case-by-case basis. That approach worked when the state and local actions that were preempted occurred infrequently. Recently, however, we have seen a proliferation of such state and local actions. Several of these ended up in the courts where preemption under the National Bank Act was upheld. We believe, therefore, that it was very important and correct of the OCC to issue this rule in order to make it clear to all parties where the line in preemption is. While most legal experts in this arena know that state and local laws that impinge on the fundamental activities of national banks violate the National Bank Act, apparently state and local officials have often proceeded despite the virtual certainty that their law or regulatory effort will be struck down by the courts as it pertains to national banks. In the meantime, national banks face the costly uncertainty as to how to proceed with the affected business. Banks (and their trade associations), the OCC, and the taxpayers of those state and local governments end up wasting considerable resources in litigation. This OCC rule will help avoid that uncertainty and litigation cost by bringing together in one place what was, in fact, occurring on a case-by-case basis in any event.

In my statement today, I would like to make four points regarding the OCC's preemption regulation:

- First, it is based on a long history of constitutional and legislative intent, affirmed by the courts, and it is consistent with actions of other regulators of federally chartered depository institutions.
- Second, preemption is necessary to preserve the dual banking system.
- Third, preemption of state laws will not diminish the protection of consumers.
- Fourth, options exist to address specific issues—such as predatory lending practices—without undermining the dual banking system.

These four points are explained in detail in the remainder of this statement.

I. The OCC's Rule is Based on a Long History of Constitutional and Legislative Intent

The OCC's preemption regulation is firmly based on laws enacted one hundred and forty years ago, during the administration of Abraham Lincoln. The Congress created the national banking system and clearly delegated to the Comptroller of the Currency the powers to regulate that system – including the power that is the basis of the new rule. The rule is firmly supported by longstanding U.S. Supreme Court analyses of conflicts between federal and state law. Over the last 140 years, the Supreme Court has consistently recognized that state laws are preempted where they:

(1) Impair the efficiency of national banks to exercise federally authorized powers;
(2) Conflict with federal law;
(3) Frustrate the purpose of the National Bank Act; or
(4) Obstruct the scope and effective exercise of unconditional national bank powers.[2]

ABA believes that there can be no doubt that the OCC's rule has correctly incorporated the Supreme Court's preemption doctrine. A listing of some of the court cases on which the OCC's rule is based is attached to this statement.

The OCC's rule clarifies that state laws that affect the way national banks conduct activities authorized under the National Bank Act are preempted. For lending, these types of state laws include those regarding licensing, terms of credit, permissible rates of interest, escrow accounts, disclosures and advertising. For deposit-taking, they include laws on disclosure, licensing, registration, abandoned and dormant accounts, checking accounts and funds availability. ***These areas are fundamental to the conduct of the banking business*** and rightly fall within the authority of federal regulators to determine the appropriate application of federal law to federally chartered depository institutions.

The OCC rule applies to national banks and their operating subsidiaries. Operating subsidiaries are limited to those activities that may be conducted in the bank itself. In practice, operating subsidiaries function as a department of the bank.

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[2] See, e.g., *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31-32 (1996); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 378 (1954); and *Assn. of Banks in Ins. Inc. v. Duryee,* 270 F.3d. 397, 409 (6th Cir. 2001).

We would point out that there has been a great deal of confusion and misinformation over the different types of subsidiaries and rules applicable to each type. Much of the confusion stems from inaccurate statements made by representatives of the real estate industry, so some clarification is in order.

National bank *operating subsidiaries*, under longstanding regulations of the OCC, may engage only in activities authorized to the bank. They are, in effect, separately incorporated departments of the bank.

Another type of national bank subsidiary is the *financial subsidiary*. Financial subsidiaries were authorized by Congress in the Gramm-Leach-Bliley Act to engage in a broad range of financial activities that the bank itself may not engage in. These financial subsidiaries are functionally regulated. OCC's preemption rule does *not* apply to financial subsidiaries.

A third type of subsidiary is a non-bank subsidiary of a bank or financial holding company. These subsidiaries are subject to state regulation and OCC's preemption rule does not apply to them.

The proposal published by the Treasury and the Federal Reserve to authorize real estate brokerage authority would place those activities in ***financial subsidiaries of national banks or holding company subsidiaries, neither of which comes within OCC's preemption rule***. As a result these subsidiaries would be functionally regulated and subject to all state licensing, continuing education and other requirements that apply to all real estate brokers.

Going back to the OCC's rule, it is important to note that it does not preempt ***all*** state banking and financial services laws for national banks as some state organizations have suggested.[3] Rather, state laws that do not affect the conduct of the banking business, such as "infrastructure" laws,[4] are not subject to the preemption rule.

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[3] The OCC sought comment on whether it should "occupy the field" (*i.e.,* leave no room for any state regulation) with respect to real estate lending activities based on the broad authority Congress granted to the agency in 12 U.S.C. § 371. The OCC chose, however, to take a more conservative approach.

[4] State infrastructure laws are those laws that do not impact banking activities, *i.e.,* contract, criminal, property and local building and fire codes.

In addition, the OCC's determination remains subject to the notice and comment process of Section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal Act") for state laws regarding community reinvestment, consumer protection, and fair lending.[5] Contrary to concerns that have been raised, the OCC's action is fully in accord with Congressional intent in Section 114 of the Riegle-Neal Act.[6] That section imposes on the OCC a process for ensuring public comment on requests for preemption of certain types of state consumer protection laws. *Importantly, that section did not impose or change the standard for preemption determinations.* Rather, Congress expressly intended that it should incorporate traditional judicial preemption analysis.[7]

Similarly, while the Gramm-Leach-Bliley Act[8] affirmed state authority to regulate insurance activities of depository institutions, it also incorporated the *Barnett* standard and broadly preempted all non-insurance state laws that "prevent or restrict" any depository institution (and their affiliates and subsidiaries) from engaging in activities authorized by the Act.[9]

It is important to note that the OCC's regulation does not differ fundamentally from regulations and determinations made by other regulators of federally chartered depository institutions. For example, the categories of state law preempted by the OCC are substantially identical to those already preempted by the Office of Thrift Supervision (OTS) for federally chartered thrift institutions. In fact, the OCC rule does not go as far as the current preemptive regulations of the OTS and the National Credit Union Administration (NCUA). A comparison of the preemption regulations of the OCC, OTS and NCUA is attached to this statement.

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[5] Pub. L. 103-328, 108 Stat. 2338 (1994).
[6] *Id.*
[7] See, H. Report 103-651, 2d Sess. (1994) at 53. "Accordingly, the title emphasizes that a host state's laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches will apply to interstate branches of national banks established in the host state to the same extent as those laws apply to a branch of a state bank *except when Federal law preempts the application of the State laws to a national bank* . . ." [Emphasis added.]
[8] Pub. L. 106-102, 113 Stat. 338 (1999).
[9] Another concern that has also been raised is whether the OCC's preemption determination ignored the savings provision in the Home Owner's Equity Protection Act of 1994 ("HOEPA"). That provision, which is part of the Truth in Lending Act ("TILA"), applies only to state laws that are inconsistent with HOEPA. Indeed, in American Bankers Association v. Lockyer, a U.S. District Court held that the TILA savings provision does not reach beyond TILA to control the preemption analysis under any other federal law. 239 F. Supp. 2d 1000, 1009 (E.D. Calif. 2002).

II. The OCC's Rule is Fundamental to the Dual Banking System

The dual banking system is a simple, yet powerful concept. It consists of a state chartering and supervisory system for state banks and a federal chartering and supervisory system for national banks. Each relies on state or federal legislation to determine the activities of and regulatory policies for the respective charters. Certainly, many common features are shared by both charters. But the success of the system derives from the healthy differences that historically have driven new product innovation, helped reduce excessive regulatory costs, and enhanced the overall safety and soundness of the banking system.

Preservation of this important and unique system of regulation requires both a strong state system *and* a strong national system of chartering and regulation. Federal preemption serves as a check when states pass laws that inappropriately restrict or condition the fundamental activities or operations of federally chartered financial institutions. By contrast, the states are free to amend their laws if they believe that state-chartered institutions are at a competitive disadvantage *vis-à-vis* national banks as a result of preemption.

The areas addressed by the OCC rule – lending and deposit taking – are fundamental to the business of banking. If state laws apply to these most basic activities of national banks, and if states can examine national banks and enforce laws against them, the differences between the two systems would disappear—and so would the dual banking system. Simply put, for a strong national system to exist, state and local governments must not be able to impose material restrictions on the fundamental banking activities of national banks. Thus, the OCC's rule, rather than harming the dual banking system, is necessary to preserve it.

III. The OCC's Preemption of State Laws Will Not Diminish Consumer Protection

Preemption of state laws will not diminish protections for consumers that do business with national banks. Consider the federal consumer protection laws and regulations with which national banks must comply, which include:

- Federal Trade Commission Act
- Truth in Lending Act

- Home Ownership and Equity Protection Act
- Fair Housing Act
- Equal Credit Opportunity Act
- Real Estate Settlement Procedures Act
- Community Reinvestment Act
- Truth in Savings Act
- Electronic Funds Transfer Act
- Expedited Funds Availability Act
- Flood Disaster Protection Act
- Home Mortgage Disclosure Act
- Credit Practices Rule
- Fair Credit Reporting Act
- Federal Privacy Laws
- Fair Debt Collection Practices Act
- OCC anti-predatory lending rules (Parts 7 and 34)
- OCC standards on unfair and deceptive practices
- OCC consumer protection rules for debt cancellation and suspension agreements

The OCC's preemption rule does nothing to diminish this sizable body of federal consumer protection laws. Furthermore, the OCC's rule imposes on national banks a new anti-predatory lending standard to prevent them from making loans based on the value of the collateral rather than the borrower's ability to repay the loan, and to prohibit practices that are unfair or deceptive practices under the Federal Trade Commission Act ("FTC Act").

The OCC has demonstrated its strong commitment to protecting consumers in their dealings with national banks, as evidenced by its promulgation of comprehensive predatory lending advisory letters and vigorous enforcement of unfair or deceptive trade practices. For example, the agency has taken six enforcement actions against national banks under the FTC Act that have generated hundreds of millions of dollars in restitution to consumers. The OCC has also moved aggressively against national banks engaged in payday lending programs, requiring them to terminate relationships with payday lenders.

These enforcement actions further demonstrate that the OCC has the resources to assure compliance with consumer protection laws. In fact, the enforcement resources – ***both in terms of regulatory power and examination capabilities*** – are greater for the OCC with respect to national banks than the resources available to state and local authorities. The OCC employs approximately 1,900 examiners to cover 2,100 national banks. The largest national banks have permanent examiners on site. For example, Bank of America has 40 on-site examiners. All national banks are examined at least once every 18 months, and these examinations include ***both*** safety and soundness and consumer compliance reviews. Clearly, there is no shortage of resources to assure national banks operate safely and soundly, while respecting the rights and needs of consumers.

Unfortunately, there has been misinformation about the OCC's resources emanating from an amendment offered in the House Committee on Financial Services recently. The amendment stated that "[t]here are currently only 40 full-time staff members allocated for [consumer complaints] at the OCC." The amendment goes on to compare this staff of forty to the asserted fact that "state banking agencies and state attorney generals' offices employ nearly 700 full-time examiners and attorneys to monitor and enforce consumer law complaints."

Of course, this comparison to "40" to "700" is apples to oranges. The OCC's consumer enforcement is not limited to forty people at a call center. Moreover, the 700 state individuals mentioned are not devoted solely to addressing consumer issues relating to banks. For example, while the jurisdiction of state banking agencies varies from state-to-state, the state banking agencies regulate well over 100,000 institutions of many different types, from consumer finance companies to check cashers. State attorneys general also have jurisdiction over a broad range of issues, of which banking would be a very small percentage. Thus, rather than a nearly one-to-one relationship between institutions overseen and staff for the OCC, there is a 48-to-1 relationship for institutions overseen at the state level.

Moreover, the ***remedies*** available to the OCC are comprehensive and broader than those available to state and local authorities. For example, a state attorney general may order restitution only to consumers that live in his or her state. By contrast, OCC can require restitution for all of a national bank's customers regardless of where they live. Indeed, as recently observed by the Superior Court of Arizona, Maricopa County, the restitution and remedial action ordered by the

OCC was "comprehensive and significantly broader in scope than that available through state court proceedings."[10]

IV. Options Exist to Address Specific Issues without Undermining the Dual Banking System

Much of the debate over the OCC rule has been in the context of the need to address the terrible problem of predatory lending. However, we believe it would be a mistake to undermine the dual banking system in a very broad way because of concerns about an individual issue, even one as important as predatory lending, since there are other, more direct and effective ways to address the problem. As noted above, allowing state and local governments to regulate the most fundamental activities of national banks—in this case lending—would dramatically impact the dual banking system. However, that does not mean that state and local governments should not have a role in addressing any concerns that should arise with respect to predatory lending by national banks (although there has been scant evidence that banks have been a significant problem in the area of predatory lending, as pointed out in the recent court brief signed by nearly two dozen State Attorneys General).[11]

There are, in fact, at least two approaches – not mutually exclusive – to predatory lending that we believe would work well within the context of the dual banking system and without doing damage to that system. The first involves cooperation between the OCC and state and local officials; the second involves targeted federal legislation to address predatory lending practices.

While some have recently questioned the regulatory and enforcement authority and capabilities of the OCC, we believe (as outlined above) that it is quite clear that the OCC does have strong capabilities in regulation and enforcement, including the area of predatory lending. The OCC has the authority to issue regulations in this area (as evidenced by the rule being reviewed here today), has examiners that routinely examine every national bank (and permanently stationed in the larger banks), and has significant enforcement powers to stop any predatory lending practices and provide penalties and restitution.

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[10] *State of Arizona v. Hispanic Air Conditioning and Heating, Inc.,* CV 2000-003625, Ruling at 27, Conclusions of Law, paragraph 50 (2003).

[11] Brief for Amicus Curiae State Attorneys General, *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02-2506 (GK) (D.D.C.) at 10-11.

To best serve the interests of consumers, we believe that state and local governments should work on an on-going basis with the OCC to identify any problems and recommend any changes in the regulation of national banks that may be necessary to address those problems. The OCC has indicated its strong interest in this kind of cooperation. OCC recently reminded national banks should they receive consumer complaints from state officials that they should deal with the consumer directly to resolve the situation without any need to first notify OCC. Such a complaint referral is not contrary to the exclusive visitorial rule. In addition, should state and local enforcement authorities find specific situations in which national banks are engaging in unethical or illegal activities, they should forward this information directly to the OCC for action. Should such activities be discovered, we are quite confident that the OCC would take strong action against the institution and individuals involved. I am sure Members of Congress would also be interested, given the great concern about predatory lending, in using congressional oversight authority to ensure that the OCC is taking a strong stand.

We believe that this is the way the dual banking system should work. Under this approach, state and local governments would not try to regulate fundamental activities of national banks, and therefore the dual banking system would be maintained. At the same time, any problems that are discovered by state and local enforcement authorities would be addressed by the regulator with the expertise in supervising the national banking system. We believe this is the most efficient use of enforcement resources.

A second approach, which is not inconsistent with the first, is the passage of targeted federal legislation to address predatory lending. There are a number of areas where Congress has determined that a federal approach to a given consumer protection issue is warranted, and the Congress has been able to enact appropriate legislation without undermining the dual banking system. As you know, this is the approach recently taken by the Congress with respect to the Fair Credit Reporting Act.

We do understand that in many ways real estate lending is a local issue, as real estate markets are, by and large, local. However, the huge impact of the secondary market on real estate lending is evidence that a national approach to predatory lending may be the best solution. In fact, several state and local initiatives have immediately run afoul of the national secondary market, with the result that those initiatives had to be changed.

Concerns about predatory lending could be addressed through both these approaches, and we recommend that the Congress actively consider proposals for a national approach to predatory lending.

Conclusion

In conclusion, the ABA believes that the OCC's approach to national standards for national banks and, in particular, predatory lending practices, is a measured one, grounded firmly in traditional judicial preemption doctrine. The OCC's rule preserves national standards for lending and deposit-taking by national banks and strengthens the dual banking system. It eliminates much of the uncertainty for national banks, thereby facilitating better planning and delivery of financial services. Coupled with vigorous enforcement of fair dealing and high ethical standards for national bank lending relationships with consumers, these standards for national banks will ensure that home loans remain available to all consumers and that national banks do not engage in predatory or unfair and deceptive practices.

The ABA appreciates the opportunity to provide our views on this important topic.

Attachment A
Federal Preemption Cases Involving National Banks

1870 – National Bank v. Commonwealth, 76 U.S. (9 Wall) 353. Shortly after the passage of the National Bank Act, the U.S. Supreme Court held that a Kentucky tax on bank shares was not preempted by the National Bank Act. Nonetheless, the Supreme Court stated that national banks are –

> *…exempted from State legislation, so far as legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve…*

1896 – Davis v. Elmira Savings Bank, 161 U.S. 275. A New York State law that established preferences for creditors of an insolvent bank was found to conflict with the terms of the National Bank Act. In its opinion, the Supreme Court noted that national banks are federal instrumentalities, and that state laws that either impair their efficiency or frustrate their authority are void:

> *National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiencies of the agencies of the Federal government to discharge the duties, for the performance of which they were created.*

1903 – Easton v. Iowa, 188 U.S. 220. An Iowa law prohibiting the acceptance of deposits by insolvent banks was found to be incompatible with the system of regulation established by the National Bank Act. In its opinion, the Supreme Court noted that in passing the National Bank Act, Congress created a banking system independent of state legislation:

> *[The National Bank Act] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the States.*

1923 – First Nat'l Bank of San Jose v. State of California et al, 262 U.S. 366. A California statute that provided for the transfer of dormant accounts to the state after a set period of time was found to conflict with the National Bank Act. In its opinion, the Supreme Court again referred to national banks as federal instrumentalities:

> *These banks are instrumentalities of the Federal Government. Their contracts and dealings are subject to the operation of general and undiscriminatory state laws which do not conflict with the letter of the general object and purposes of congressional legislation. But any attempt to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United*

> *States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created.*

1954 – Franklin Nat'l Bank v. New York, 347 U.S. 373. A New York law prohibiting the use of the word "savings" in advertisements by certain state and national banks was found to interfere with the enumerated authority of national banks to accept deposits. In its opinion, the Supreme Court noted that the authority of the Federal Government to regulate national banks was settled over 40 years before the passage of the National Bank Act, when the Court held that the states had no power to tax or regulate the Second National Bank of the United States:

> *Since McCulloch v. State of Maryland … it has not been open to question that the Federal Government may constitutionally create and govern [national banks] within the states.*

1978 – Marquette Nat'l Bank of Minnesota v. First Omaha Services Corp., 439 U.S. 299. A Minnesota usury law was held not to be applicable to national banks. This decision by the U.S. Supreme Court stimulated the development of our national consumer credit system.

1982 – Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141. A California law was held not to apply to a due on sale clause used by a federal thrift. While this case involved a federal thrift, the opinion issued by the U.S. Supreme Court stands for the proposition that a federal regulation has the same preemptive effect as a federal statute.

1983 – Conference of State Bank Supervisors v. Conover, 710 F.2d 878. In this case, the U.S. Court of Appeals for the District of Columbia upheld the preemptive effect of a real estate regulation issued by the OCC, citing the Supreme Court ruling in the de la Cuesta case. In so doing, the Court of Appeals emphasized the limitations of state laws on national banks:

> *It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal laws and where such state law does not conflict with the policies of the National Bank Act. So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state law.*

1996 – Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25. A Florida law that prohibited banks from selling insurance was held to conflict with the insurance sales powers of national banks. In its opinion, the Supreme Court stated that state laws that "prevent or significantly interfere" with the authorized powers of national banks are subject to preemption. Congress subsequently included this "prevent or significantly interfere" phrase in the insurance provisions of the Gramm-Leach-Bliley Act.

1996 – Smiley v. Citibank, 517 U.S. 735. A California law was held not to apply to a late payment fee imposed on a credit card loan by an out-of-state national bank. In this case, the U.S. Supreme Court expanded upon its earlier Marquette ruling, concluding that the provision of the National Bank Act related to interest rates also overrides state laws on late payment fees.

1999 – Bank One, Utah, N.A. v. Guttau, 190 F.3d 844 (8th Cir.). An Iowa law restricting the operation of ATMs by out-of-state banks was held to conflict with the National Bank Act. In reaching this decision, the Court of Appeals for the Eighth Circuit favorably cited a statement made by the U.S. Supreme Court in the Barnett case:

> *Grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law.*

2001 – ABIA v. Duryee, 270 F.3d 409 (6th Cir.). An Ohio law that limited the ability of national banks to sell insurance was found to infringe on the powers of national banks. Citing the Supreme Court's decision in the 1944 Anderson case, the U.S. Court of Appeals for the Sixth Circuit noted that –

> *Pre-emption in the area of national banks may occur even if compliance with both state and federal laws is possible where the state laws "infringe the national banking laws or impose an undue burden on the performance of the banks' functions".*

2002 – Bank of America v. City and County of San Francisco, 309 F.3d 551 (9th Cir.). California municipal ordinances that prohibited banks from charging ATM fees to non-depositors were found to intrude on the powers of national banks. In doing so, the U.S. Court of Appeals for the Ninth Circuit noted that –

> *The National Bank Act was enacted to protect national banks against intrusive regulation by the States.*

2003 – Wells Fargo Bank, N.A. v. Demetrios, 265 F.Supp. 2d 1162 (E.D. Cal.). An attempt by the State of California to license and examine a real estate subsidiary of a national bank was found to be contrary to the National Bank Act. In so holding, the U.S. Court of Appeals for the Ninth Circuit affirmed that the preemptive power of the National Bank Act runs not only to a national bank, but also to an operating subsidiary engaged in activities permissible for the parent:

> *Because [Wells' mortgage subsidiary] "is treated as a department or division of its parent [national bank] for regulatory purposes," the Commissioner lacks visitorial power over [the subsidiary] just as it lacks visitorial power over [the subsidiary's] national bank parent.* (Quote from a Wisconsin federal district court case).

In the Wells case, the Court also cited a federal district court opinion (First Union Nat'l Bank v. Burke) to emphasize that federal preemption does not detract from the inherent regulatory powers of the states:

> *Under the national banking regulatory scheme, Congress does not direct the state executive to affirmatively function in any particular way, nor does the OCC's exercise of exclusive visitorial powers over national banks preclude the state statutory enactments from being applied to national banks provided they are not in conflict with and thus preempted by federal banking laws. By creating such a*

scheme, Congress has not seized the machinery of state government to achieve federal purposes. The relegation of regulatory and supervisory authority over federal instrumentalities to a single federal regulator does not interfere with the Commissioner's enforcement of state law against state banks, does not interfere with the state's enactment of non-preempted state banking law applicable to national banks, does not preclude the Commissioner from seeing OCC enforcement of state laws, and expressly leaves available judicial remedies to compel national bank compliance with state law.

2003 – Beneficial Nat'l Bank v. Anderson, 123 S.Ct. 2058. A state law governing claims and remedies related to usury was found to be contrary to the National Bank Act. In reaching this conclusion, the Supreme Court noted that –

…this Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from "possible unfriendly State legislation."

Attachment B
OCC Preemption Rules Are Patterned After Long-Standing OTS and NCUA Preemption Rules

The Office of the Comptroller of the Currency ("OCC") has regulations to preempt state laws affecting the lending and deposit-taking activities of national banks and their operating subsidiaries. The OCC's regulations are patterned after long-standing regulations issued by the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA").

Both OTS and NCUA have regulations that broadly preempt specific types of state lending and deposit-taking laws for federal thrifts and federal credit unions. OTS also has extended its preemption regulations to the operating subsidiaries of federal thrifts.

The NCUA regulation preempting state lending laws was adopted almost 20 years ago (see 12 C.F.R. § 701.21(b)). NCUA also has adopted a regulation that preempts state deposit-taking laws (see 12 C.F.R. 701.35(c)).

The current OTS regulation preempting state lending laws has been in effect for over 7 years, and is based upon longstanding legal opinions by both OTS and its predecessor, the Federal Home Loan Bank Board (see 12 C.F.R. §560.2). OTS also has issued a regulation that preempts state deposit-taking laws (see 12 C.F.R. § 557.12).

The following tables compare the OCC's preemption regulations and the existing OTS and NCUA preemption regulations. The first table illustrates the similarities between the types of state laws preempted by the OCC regulations and those preempted by the existing OTS and NCUA regulations. The second table lists the types of state laws that are ***not*** preempted by the OCC regulations and the existing OTS and NCUA regulations, and shows that the OCC regulation expressly preserves more state laws than the existing OTS and NCUA regulations.

Types of State Lending and Deposit-Taking Laws Preempted by the OCC Regulations and the Existing NCUA and OTS Regulations

	OCC	**OTS**	**NCUA**
Abandoned and dormant accounts	**v**	**v**	**v**
Aggregate amount of funds that may be lent on the security of real estate	**v***		
Checking/share accounts	**v**	**v**	**v**
Covenants and restrictions necessary to qualify leaseholds as security property for a real estate loan	**v***		
Credit reports, access to and use of	**v**	**v**	
Credit terms	v	**v**	**v**
Creditor insurance/credit enhancements/risk mitigants	v	**v**	
Due-on-sale clauses	**v**	**v**	**v**
Escrow, impound and similar accounts	v	**v**	
Funds availability		**v**	
Interest rates and fees	**v**	**v**	**v**
Licensing, registration, filings and reports	v	**v**	
Loan-to-value ratios	v*	**v**	**v**
Mandated statements and disclosure requirements	**v**	**v**	**v**
Mortgage origination, processing and servicing	**v**	**v**	
Repayment/disbursement	**v***	**v**	**v**
Savings account orders of withdrawal	**v**	**v**	
Security property, including leaseholds	v	**v**	**v**
Special purpose savings services (deposit-taking)	**v**	**v**	

* The OCC's existing real estate lending regulation (12 C.F.R. §34) already preempts these categories of state law.

Types of State Laws ***Not*** Preempted by the OCC Rule and the Existing OTS and NCUA Regulations

	OCC	OTS	NCUA
Collection costs, attorneys' fees			**v**
Commercial		**v**	
Contract	**v**	**v**	
Criminal	**v**	**v**	
Debt collection	**v**		
Default conditions			**v**
Homestead (12 USC 1462(a)(f))	**v**	**v**	
Incidental effect only	**v**	**v**	
Insurance			**v**
Plain language requirements			**v**
Real Property	**v**	**v**	**v**
Taxation	**v**		
Torts	**v**	**v**	
Zoning	**v**		