Testimony of

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CONGRESSIONAL REVIEW OF OCC PREEMPTION

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I wish to thank the Subcommittee for holding oversight hearings on this important issue, and for inviting the views of a state attorney general. In all 50 states, we are the public officers charged with protecting consumers, and ultimately are accountable through the electoral process to our citizens for our performance of that task. We have long been the front line force for this task. What we are discussing here today is whether a single federal agency should unilaterally decide that the facts should be otherwise. What we are discussing here today is not just about arcane, obscure banking regulations. These are fundamental issues of democracy, accountability, federalism, and the boundary between legislative prerogative and bureaucratic fiat.

THE PROPER BALANCES OF FEDERAL AND STATE STANDARDS, AND AUTHORITY TO ENFORCE THOSE STANDARDS ARE LEGISLATIVE DECISIONS, NOT BUREAUCRATIC ONES.

There is a certain amount of revisionism in the OCC's telling of the tale of its powers and those of the national banks it regulates. While the agency has labored mightily to argue that it is merely exercising long-existing powers, that is disingenuous. Public statements, such as Comptroller Hawke's aggressive and condescending remarks in a speech last September suggest a surprising hostility to the long-standing role of the states, and an agenda driven by the

competition with the states over whether banks will choose state or federal charters.[1] Such competition and hostility should lessen or eliminate a court's deference to the discretion of the OCC in its interpretations of its own powers and the preemptive effect of the law. Irrespective of how one feels about the direction the OCC is going in substance, no one else familiar with the law or regulatory history pretends that there has not been an effort in the past decade at the OCC to push the envelope as far as possible -- and farther than it ever has been. The question for this oversight committee is whether the agency has overshot its mark, particularly in three recent regulations: the 2001 OCC rule §7.4006, granting state-chartered operating subsidiaries the same preemption rights and visitorial immunity as the parent national banks;[2] and the two rules promulgated just this month on the gifts that come with a national bank charter. One grants sweeping preemption rights of state laws, jeopardizing consumer protection laws, to national banks and, purportedly to their operating subsidiaries, 69 Fed. Reg. 1904 (January 13, 2004), and the other protects them from enforcement of laws -- state or federal -- except by the OCC itself, 69 Fed. Reg. 1895 (January 13, 2004). State attorneys general submitted comments to both of the latter rules, copies of which are submitted along with my written testimony. I believe the committee will find them helpful both in presenting a balanced discussion of the law, as well as providing examples of the practical impact of the OCC's shifts as it has affected our consumer protection efforts.[3]

In laying an historical groundwork for its positions, the OCC cites the historical record of Civil War-era debates wherein Congress assumed the national bank system would supercede the

[1] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before Women in Housing and Finance, Washington, D.C., September 9, 2003, http://www.occ.treas.gov/ftp/release/2003-69a.pdf.

[2] 66 Fed. Reg. 34792 (July 2, 2001)

[3] Appendix A, Comments of the Attorneys General of 50 states, the Virgin Islands and the District of Columbia Office of Corporation Counsel, Docket No. 03-16, 12 C.F.R. Parts 7 and 34 (October 6, 2003); Appendix B, Comments of the Attorneys General of 45 states, Puerto Rico, the Virgin Islands and the District of Columbia Office of Corporation Counsel, Docket No. 03-02 (April 8, 2003)

state banking system, and result in "diminution of control by the states over banking in general."[4] But history, as it often does, had different plans. Throughout the nearly 150 years since the National Bank Act was enacted, Congress has consistently hewn to a modified vision, where state law has a significant role, except where Congress has made an affirmative decision to preempt, and where states have the authority to use the judicial system to enforce non-discriminatory laws of general applicability.[5] What most observers see in the recent OCC actions is an effort to take the NBA to a place where Congress has yet to specifically decide it should go – to uniform federal standards that virtually eliminate the traditional role of the states in enacting and enforcing consumer protection laws.

Moreover it is arrogating unto itself the authority to decide, to a great extent, what those uniform standards will be. Irrespective of whether a court grants it that right under an agency deference analysis, there is a serious public policy question as to whether "competing interests could be better balanced...by a national Congress whose interests are diverse and universal, or even by the people as they are represented in the state legislatures, than by a solitary institution whose focus is a single industry," as the Fifth Circuit has said, even as it accepted the OCC's position in *Wells Fargo v. James*, 321 F.3d 488, 494 (5th Cir. 2003). Finally, we should be mindful that those agency-created standards will have impacts farther than national banks themselves – farther even than the OCC's recent extension to operating subsidiaries: the impact of parity laws and the search by other lenders for that "level playing field" with the "most favored lender" could well lead to a significant erosion of state laws with virtually no legislative action at either federal or state level.[6] The ultimate question for this Committee is who decides

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[4] 68 Fed. Reg. 6363, 6367 (February 7, 2003).

[5] Some of the case law is set forth in the appended Attorney General comments. A more detailed examination of the history of the National Bank Act, preemption and visitation will appear this spring in Arthur E. Wilmarth, Jr., The OCC's Preemption Proposals Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System, (23 Annual Review of Banking Law, *forthcoming* Spring, 2004).

[6] The Supreme Court's decision in *Marquette National Bank v. First of Omaha Serv. Corp*, 439 U.S. 299 (1978),
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the balancing questions necessarily involved in determining what level that playing field should be on? -- Congress and state legislators, or a single federal agency.

As Professor Arthur Wilmarth has explained, in the first half-century of the national banking system, national banks served a dual purpose – one public, one private. The public purpose was that of lending to the government through its role as primary purchaser of government bonds and issuing national currency.[7] The private purpose was that of all banks – taking deposits, making loans, serving shareholders. After the creation of the Federal Reserve System in 1913, the public function was transferred to the federal reserve, leaving the national banks, like the state banks to serve the private function. At the root of the recent OCC campaign there appears to be a belief that there is now a new public purpose to be served – to set uniform national standards in this era of a mobile society and technology that knows no geographic boundaries.[8] Irrespective of the merits of that question ultimately, the fundamental flaw with the OCC's recent efforts is that it is Congress which should make that decision, and Congress has not yet made it. When it considers it, as the Fifth Circuit noted, the balancing of competing interests may be done far more carefully, and with far greater nuance, than is being done by this single regulator. Undoubtedly the OCC is eager to move toward that goal faster; perhaps it is impatient with the pace at which policy decisions are made in a democratic republic.

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interpreting the National Bank Act, in effect, to authorize a phenomenon which could be called "sister-state preemption" – allowing the state law of a bank based in one state to preempt the state laws of its customers nation wide – led to efforts by non-national banks to get the same preemption benefits national banks had. Given that *Marquette* was only two years old at the time, it is not certain how many realized that Sections 521 - 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 [P.L.96-221, Title V, Part C], together with *Marquette*, would result to a large degree to the nationwide deregulation of credit cards, largely under rules established by the OCC.

[7] See, e.g. *Tiffany v. National Bank of the State of Missouri*, 85 U.S. 409, 413 (1874) ("National banks have been national favorites. There were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks.) Emphasis added.

[8] See, e.g. 69 Fed. Reg. at 1907-1908 (OCC supplementary information to final preemption rule).

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But the real question is, should that be left to bureaucratic fiat, or should it be a Congressional decision?[9] *See also* Jess Bravin and Paul Beckett, "Dependent on Lenders' Fees, the OCC Takes Banks' Side Against Local Laws," Wall Street Journal (January 28, 2002) ("The OCC's solicitousness toward businesses it oversees stems in part from its need to compete for their loyalty. In an uncommon arrangement, banks can choose either a state or federal regulator, and the selection has financial consequences: The OCC and state banking departments subsist entirely on fees paid by the institutions they regulate.")

For over thirty years, Congress has made incremental changes, at each stage weighing the proper balance of national standards versus state standards, consumer interests versus banker and lender interests in a wide variety of contexts. In making these changes, it very clearly has signaled that it is not yet ready to go where the impatient OCC wants to go. In the various enactments of the Consumer Credit Protection Act, Congress generally set the federal standard as the floor, only preempting directly inconsistent state laws, and permitting states to provide greater protections to consumers.[10] We have yet to find from the record or institutional memory signs of Congressional intent that national banks would be treated differently. Indeed, when Congress was considering the predatory lending and "reverse redlining" problems that ultimately led to HOEPA, which also held the federal standard to be a floor,[11] the Fleet corporate family

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[9] These OCC pronouncements fundamentally alter the historical balance of state and federal authority – reversing presumptions as to the applicability of state law. Leaving this fundamental change in the hands of a regulatory agency – this one in particular, given its funding mechanism, can foster public cynicism that special interests, not democracy, drive decision-making -- views not necessarily limited to those who oppose the ultimate goals. *See, e.g.* Amy Bizar, Fred H. Miller, and Alvin C. Harrell, "Introduction to the 2000 Annual Survey of Consumer Financial Services Law," 55 Bus. Lawyer 1255, 1259 (May, 2000) (discussing reasons for absence of discussion about revisiting the Uniform Consumer Credit Code as an alternative to federalizing the law, "unlike federal agencies that may view preemption of state laws as an integral part of an empire-building strategy to expand their clout and jurisdiction, there is no centralized regulatory constituency at the state level that inherently benefits from legal reform."). (Emphasis added).

[10] 15 U.S.C. § 1610; Reg. Z, 12 C.F.R. § 226.18, Official Staff Commentary § 226.28(a)-2,3 (Truth in Lending); 15 U.S.C. § 1691d(f) (Equal Credit Opportunity Act); 15 U.S.C. § 1693q (Electronic Funds Transfer Act); 15 U.S.C. § 1692n (Fair Debt Collection Practices Act); 15 U.S.C. § 1677 (Restrictions on Garnishment).

[11] "The Conferees intend to allow states to enact more protective provisions than those in this legislation." 1994 U.S.C.C.A.N. 1987, 1992.

was in the thick of publicity in Boston and Atlanta, and a representative was called to testify before the Senate Banking Committee on the topic.[12] Though this federal floor preemption model had been in place for nearly 30 years, to my knowledge, it has only been in recent years that the OCC has taken the position that the National Bank Act trumps those federal preemption standards to preempt state laws on those issues.[13]

By 1994, the OCC's newly aggressive preemption stance had become apparent, and Congress used the vehicle of Riegle-Neal to warn the OCC that it was being "inappropriately aggressive" in preemption, citing specific examples of a type of law that now clearly would be preempted under OCC rules enacted in the past three years.[14] In 1999, Congress enacted the Gramm-Leach-Bliley Act – major legislation that significantly changed the business of banking. When Congress included important privacy protections as part of the GLBA, it continued the tradition of preempting only those state laws that directly conflict with the federal law, and expressly permitted states to enact laws that afford greater protection than the federal law.[15]

In short, when it comes to the full panoply of consumer protection, Congress has not yet decided that a uniform federal standard is appropriate as far across the board as the OCC's recent rules would take it. (Indeed, we know that Congress is still considering some of the very issues that these rules would take into the OCC's hands. It was less than three months ago that you and your colleagues on the Subcommittee on Housing and Community Opportunity and the

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[12] *Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending,* Hearings Before the Senate Comm. On Banking, Housing and Urban Affairs, 103rd Congress, 1st Sess. (February 17, 1993).

[13] It did so successfully in *Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999) (competing EFTA preemption standard as to various ATM issues; note dissent); *Bank of America v. City and County of San Francisco*, 309 F.3d 552, 564 (9th Cir. 2002) (same); *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D.Ca. 2002), appeal pending (competing TILA standard as to credit card disclosures.)

[14] H.R. No. 103-651, *reprinted* in 1994 U.S.C.C.A.N. 2068, 2074-2075. See page 10, below.

[15] 15 U.S.C. § 6807.

Subcommittee on Financial Institutions and Consumer Credit invited me to testify as you consider some of the very issues that the OCC seeks to resolve itself as to national banks and their operating subsidiaries.[16] I had rather thought that it was your decision, but apparently there is another view.) In trying to preempt not only the states, but arguably Congress, as well, the OCC has bypassed the important, open discussion and review that elected representatives of Congress -- with its vigilance toward concerns of federalism, and its representation of the broad and diverse interests that are all of America – would bring to the debate.

Looking carefully at the implications of OCC actions, a further shadow falls. Not only has the agency decided that the federal standards should be uniform, but, to a large extent, that it will be the body to decide what those standards are. If past is prologue, the evidence is that there will not be a careful balance. The agency has already expanded preemption by changing definitions from existing law, including its past positions.[17] That the federal standards adopted by the

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[16] Joint hearing on "Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit," November 5, 2003.

[17] We have already seen one cycle of how the *agency's* federalization of law expanded the NBA's preemptive sweep. The usury preemption of Section 85 is a well-accepted express preemption in the National Bank Act. But it preempted state laws which might have discriminated against national banks by permitting the latter to be on a par with the "most favored lender" under state law. In taking advantage of Section 85, a national bank had to "borrow" the state law applicable to the most favored lender in that state. *See, e.g. Attorney General v. Equitable Trust Co.,* 450 A.2d 1273 (Md. 1982).(The bank could take advantage of an "alternative federal rate," but that rate is pegged to the federal discount rate, hence often lower than the "most favored lender" rate borrowed from state law.) Traditional usury analysis, adopted by Congress in its Truth in Lending definition of "finance charge" is that charges for actual, unanticipated late charges are not interest. The OCC historically had agreed with that position. OCC Letter, Saxon, J (June 25, 1964). When the *post-Marquette* credit card exportation industry arose, the OCC then took the position that if the bank's base state broadly defined "interest" to include late fees (which the exportation states did by statute), the OCC opined that a late fee could be interest if the relevant state law so defined it. OCC Letter No. 452, R. Serino, Deputy Chief Counsel (Aug.11, 1988), *reprinted* [1988-89 Transfer Binder] Fed. Banking. L. Rep. (CCH) ¶ 85,676.

Then, among the cases challenging late fee exportation was one which raised a constitutional question as to whether federal law could, in effect, delegate preemption authority to a state, transforming that state's law into a uniform national standard. The trial court held that it would be an unconstitutional delegation of authority. *Irwin v. Citibank (South Dakota),* No. 9112-2557 (Penn. Ct. Com. Pleas, *opinion filed Dec. 9, 1993).* The OCC's position then switched from state law-controlled definition to a federal definition of interest, and defined it much more broadly than traditional law did. OCC Letter No 676, J. Williams, Chief Counsel (Feb. 17, 1995), *reprinted* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618. Because the late fee exportation challenges had made their way up through the appellate system, the position in that letter was promptly published as a proposed interpretive rule, 60 Fed. Reg. 11925 (Mar 3, 1995), and finalized shortly before the oral argument in *Smiley v. Citibank (South Dakota),* 517 U.S. 735, 135 L.Ed 2d 25 (1996). Though the Court deferred to the OCC's

OCC could be viewed as something less than a balancing of competing interests is further evident in the curious Alice in Wonderland logic of its definition of interest. It's a broad definition when exporting a rate, § 7.4001(a), but it is not so broad if it would be inconvenient for the bank under its home state law. §7.4001(c). Under the new rules, it reverses the presumption of preemption, and has air-brushed out of long-standing law the limiting qualifications as to the preemptive scope of the NBA. The presumption is that state law applies except where expressly preempted, or there is a prohibition or significant impairment. (See Appx A, Attorney General Comments, Docket 03-16, pp. 3-4). Under the OCC's new rules, the presumption is reversed, and the limiting qualification is removed. "Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise" its authority are preempted. §§7.4007(b), 7.4008(d), 7.4009(b), and 34.4(a).

This change creates some awkwardness for the OCC, for some state laws that would almost assuredly be preempted under this new standard, if coming to the OCC on a clean state, have already been addressed by the courts or Congress. A state anti-redlining statute would "condition" a bank's ability to fully exercise its authority, but that has already been held not preempted by the NBA.[18] State fair debt collection practices statutes, some of which apply to creditors collecting their own debts, would "condition" a bank's full authority, but debt collection, too, has already been addressed.[19] But even as to this, there is some disquiet about that provision in the new preemption rule. The OCC includes on the list of laws generally not

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interpretation, the switch in the OCC's position from reference to state law to a newly federalized definition is an early step in what continues to be the OCC's effort to federalize banking law by agency rule, rather than by Congressional debate by officials accountable to voters. Of import to today's consideration is that fact that the broad definition of interest adopted by the OCC to facilitate broader preemption of state laws is that it was contrary to the federal definition which had already existed for nearly 30 years, in Truth in Lending, which also excluded late fees from the definition of interest.

[18] *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (1980).

[19] *First National Bank v. Commonwealth of Kentucky*, 76 US (9 Wall) 353, 362; 19 L.Ed 701, 703 (1870). The federal act, which applies only to third-party collectors, specifies that it is a floor, and that states can enact more protective state laws. See note 10, above.

preempted "rights to collect debts," rather than "debt collection." §7.4009(2)(iv); §34.4(b)(5). Given its newly-minted characterization of state laws not preempted as ones relating to "infrastructure," one wonders if the intent is to permit the OCC to distinguish between state laws which permit collection and execution ("infrastructure"), and state laws which provide protections to consumers in the process, which the OCC or a bank might argue imposes "conditions" on the banks' rights.

Where it is Congress that has spoken against "inappropriately aggressive" preemption, the OCC does not appear to have whole-heartedly adopted the message. One of the specific preemption decisions Congress expressed concern about in 1994 was the agency's preemption of New Jersey's basic banking (lifeline account) law. The OCC withdrew that decision, but a look its 2001 rule § 7.4002 and new § 7.4007 leaves little question but that the OCC has not made that the general rule.[20] Similarly, Congress has specifically expressed its support for state consumer protection and fair lending laws, but it appears that the OCC finds it difficult to find a meaningful state consumer protection law that qualifies to remain in place, despite this Congressional concern. Indeed, given the preemption of the Georgia Fair Lending Act, I fear for the fate of North Carolina's highly effective anti-predatory lending act. My colleague Roy Cooper, the Attorney General of North Carolina, will be testifying shortly on the Senate side on this issue, and will, I am sure, speak more to this issue.

THE OCC'S RULES ENCROACH ON TRADITIONAL STATE CONSUMER PROTECTION FUNCTIONS

All three of the recent rules are not mere codifications of existing law, as the OCC would have it; they fundamentally change the rules in many respects. Prior to the 2001 operating

[20] Under § 7.4002, it is difficult to conceive of deposit account service charge that couldn't be justified under the bank's "business plan and marketing strategy." Section 7.4007(b) preempts state law "limitations" on checking accounts. The 1994 message from Congress, however, was that state laws on deposit accounts were by no means assumed to be so easily swept aside. 1994 U.S.C.C.A.N. at 2074 - 2075.

subsidiary rule, operating subsidiaries were created by and under state law, licensed by state regulators, routinely examined by those state regulators for compliance with state laws, and those state regulators enforced state law as to those operating subsidiaries. Those operating subsidiaries were sued by private parties for violation of state laws, including state regulatory and consumer protection laws. While the OCC insists that national banks are not a significant source of predatory mortgage lending problems, the extension of preemption to operating subsidiaries raises the ante. Some non-bank affiliates of national banks have been implicated.[21] One must also wonder if the agency's recent efforts to immunize national banks from all oversight save its own, and extended preemption, may remove a check on the banks themselves. The Better Business Bureau in Bank of America's home base recently noted that bank complaints jumped three fold, led by complaints about B of A. "Andrew Shain, "Customer beefs with B of A jump: Banks lead in Better Business Bureau complaints in '03," Charlotte Observer, (January 7, 2004). Indeed, the very effort to use broad preemption and immunity from state oversight – and in some cases even private enforcement of consumer laws – may well attract to the charter some entities who would abuse that. Combined with the preemption standards, and eliminating state enforcement of any laws – even non-preempted consumer protection laws, the OCC has arrogated unto itself complete discretion to determine the substance of applicable consumer protection laws. It can do so by preemption determinations, or by controlling enforcement of either state or federal law.

The new preemption rule does not mention "consumer protection laws" either in its list of what's preempted, or what's not preempted. That apparently means the OCC has taken it upon itself to rule upon the application of such laws on a case by case basis. §§ 7.4009(2)(viii); 34(b)(9). But, despite express Congressional intent when enacting Riegle-Neal that state consumer protection and fair lending laws remain viable as to national banks, it is difficult to

[21] Others at this hearing may address that subject. Comments submitted to the OCC listed some such cases. See, e.g. Comments of the National Consumer Law Center, Consumer Federation of America, National Association of Consumer Advocates, U.S. PIRG, Docket No. 03-16 (October 6, 2003)

envision ones that would stand under the rules as promulgated. Where will Iowa's right to cure notice requirement fall? Where will state anti-deficiency laws fall? Where will state garnishment protections greater than federal law fall? Indeed, where will state laws mandating judicial foreclosure fall? Are these non-preempted "infrastructure" laws, or are these laws preempted because they "obstruct, impair or condition" a bank's lending power? The OCC's wholesale preemption of Georgia's Fair Lending law does not give me confidence that the OCC will wield this authority with a scalpel rather than an ax.

UDAP laws are a type of consumer protection in which state and federal laws have co-existed: they have not been considered preempted, and, as laws of general applicability, applied non-discriminatorily, such laws have been applied to national banks.[22] But now the combination of OCC rules, and other recent OCC pronouncements leaves serious questions.

Until 2000, the OCC viewed its exam and enforcement authority as primarily as safety and soundness function.[23] The agency itself admits that it was not until 2000 that it found a consumer protection function, when it decided that it had authority to enforce the Federal Trade Commission's unfair and deceptive acts and practices statute, Section 5 of the Federal Trade Commission Act. (15 USC § 45). OCC personnel themselves posed the question, "why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act," and recognized that "[e]ven with the benefit of hindsight, the answer is not easy."[24] The answer the OCC postulates is that (to paraphrase), perhaps because national banks didn't engage in such behavior until recently,[25] though other explanations have also been offered,

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[22] For some cases in which states enforced state consumer protection laws against national banks, see Appx. A, page 8, note 31.

[23] It has authority to examine for and enforce federal credit laws such as TIL, 15 U.S.C. §1607 and the ECOA, 15 U.S.C. §1691c.

[24] Julie L. Williams and Michael S. Bylsma, "On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks," 58 Bus. Lawyer 1243, 1244 (May, 2003).

[25] *Id.* ("Perhaps it is because the concerns that have been raised about aggressive and misleading marketing *by banks*

again, by people who may not necessarily oppose the ultimate direction the OCC is going. The former general counsel of Citigroup's US credit card practices has noted that the OCC ignored the "poster child of abusive consumer practices" in the credit card industry for 10 years – until a state official took action. It was that "fiasco" that was a "turning point for the OCC," causing it to find its consumer protection authority under the FTC Act.[26] The development has to be viewed in the context of the OCC's new aggressive interpretation of its "exclusive" visitorial authority, by which it seeks to deprive state attorneys general of the authority to enforce even non-preempted state laws of general applicability against national banks. As one industry lawyer explained, the OCC recognized that "it couldn't replace something with nothing."[27]

Where does this development leave consumers – and national banks and their operating subsidiaries? In its 2002 Advisory letter, the agency explained that it has authority to enforce state UDAP laws against national banks' operating subsidiaries. AL 2002-3, note 2. However, the OCC has now apparently federalized UDAP law, at least in part. The new preemption rules adopt a prohibition against unfair and deceptive practices, which the agency explains makes "all national banks and their operating subsidiaries...subject to uniform, consistent, and predictable rules of fair conduct wherever they do business throughout the United States." (OCC Preemption Final Rule, Question and Answers, p. 5). However, the rule was adopted only for loans. §§7.4008(c); 34.3(c). Where does that leave a consumer with respect to a national bank's unfair or deceptive non-lending practices? And if only the OCC has authority to decide what an "unfair or deceptive practice" is and when to take enforcement action, will its primary focus be protection of consumers and principled application of a UDAP law – or will it be concerned again primarily

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are relatively recent developments." Emphasis in original) But, as has been noted, national banks have been the subject of both state and private actions.

[26] Letter to the Editor, Duncan A. MacDonald, American Banker, November 21, 2003.See also note 9, above.

[27] Remarks before the Practicing Law Institute, Consumer Financial Services Litigation, San Francisco, May , 2002.

with national uniformity, and the safety and soundness of its banks? And what is the status of FTC rules promulgated under section 5 that do not apply to banks?[28] The OCC has said it doesn't have rule-making authority, does that leave a double standard federal UDAP law? But more importantly, if all state UDAP laws are now effectively preempted, and replaced by a uniform federal standard, is that a decision that Congress, or a federal agency should make?

THE "EXCLUSIVE" VISITORIAL AUTHORITY IS BEYOND THE SCOPE OF EXISTING LAW AND WILL CONTINUE THE PATTERN OF AGENCY PREEMPTION AND AGENCY DEFINITION OF WHAT THE "FEDERAL" CONSUMER PROTECTION STANDARD WILL BE.

The pronounced shift in federal - state relations as to national banks is perhaps no more evident than in the new-found conceit that the visitation rule precludes states from enforcing even non-preempted laws of general applicability in courts. Combined with the extension of the rights of a parent bank to operating subsidiary, this is a profound change from what has been the case historically. As little as six years ago, it was state Attorneys General, under their respective state UDAP statutes, which sat down with a national bank financing highly questionable door-to-door sales of satellite dishes, water treatment systems, and home improvements.[29] It was nothing new or unusual - it was routine. Subsequently, two southwestern states had similar problems with door-to-door sales of air conditioning systems (with the added gloss of potential state civil rights laws, as Hispanics were allegedly targeted), and, incidentally, involving one of the same national

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[28] The new rules say that, as to loans, the FTC act and "regulations promulgated thereunder" apply. Does that mean that the OCC is going to apply all the relevant FTC rules to banks? One of particular concern to states is the anti-holder rule, which is very important to consumers in protecting them from unscrupulous sellers, such as door-to-door home improvement sellers and some car dealers. This rule requires that the financing contracts arranged by such sellers contain a clause that says the holder of the contract is liable for claims and defenses the consumer has against the seller. Though the FTC rule applies to "sellers," not lenders, state UDAP laws have been held to make accountable lenders who try to deprive consumers of their rights under this rule – even national banks. *See Brown v. LaSalle Northwest National Bank*, 820 F. Supp. 1078 (N.D. Ill. 1993).

[29] These same practices also exposed some weaknesses in the TIL rules for open-end disclosures, which led several states to suggest reform to the Federal Reserve Board. National banks were involved in the financing of these sales, using the sellers to sell the financing, along with the goods and services.

banks. But the OCC encouraged banks to notify the agency if contacted by a state official, even issuing an unprecedented formal call to do so. (OCC Advisory Letter 2002-9, 11/25/02). The OCC inserted itself into the situation, and obtained a settlement with the bank. While it touts this as a mark that consumers will be adequately protected, (69 Fed. Reg., at 1900, note 41), the terms of that settlement may not give comfort to all that the decades of experience in the state attorneys general offices of enforcing consumer protection laws can easily be replaced by the OCC's newly minted experience – as of now, of only three years standing. The comment letter that all state Attorneys General submitted to the OCC (Appendix A) details similar tales of OCC intrusion into non-discriminatory state enforcement of non-preempted state laws of general applicability.

Other questions have yet to be answered, including the adequacy of one agency's resources, compared to that of 50 state Attorneys General. (This question becomes even more critical when one considers that there may be an impact on private rights of action, as well. See below). While the OCC policy makers in Washington are certain their resources are adequate to the task,[30] my staff has seen some front-line OCC faces pale at the notion that all complaints about all national banks from all over the country are theirs, and theirs alone to handle. (And rest assured, credit card complaints alone can keep them very busy for a very long time.)

Finally, one impact that has not received much attention is the way that these rules not only remove state laws and state enforcement to a greater extent than in the past as to national banks and their operating subsidies, but they also may, by the back door, deprive consumers of their right to protect themselves under state or federal law. If, as discussed above, the import of the OCC's action is eventually determined to mean that national banks are subject only to federal UDAP law, not state UDAP law, then consumers may have no private right of action, for there is no private right for consumers under Section 5 of the FTC Act. If the OCC's position stands, then

[30] And, if the marketing of the charter increases the OCC's market share enough, see note 9, their coffers may indeed overflow.

no state AG can protect consumers against a national bank or op sub's unfair or deceptive practice, nor, arguably, can consumers themselves.[31] It is all up to the OCC. Enforcement will not only be a matter of resources, but of will. Enforcement – and, to a large extent, interpretation – of the UDAP law nationwide will be entirely at the discretion of this agency. Even as to state UDAP laws, this new found UDAP authority may, by federal bureaucratic fiat, move banks and operating subs into an enforcement and application vacuum without action by either Congress or the state legislatures.

CONCLUSION

As I mentioned at the beginning, all the attorneys general signed onto the preemption comments, demonstrating that this is not a partisan issue, nor is it one which depends upon one's political philosophy about the proper role of government in regulating business. It is a basic question of federalism, and a basic question of whether fundamental, critical decisions about where the proper balance of federalism lies are made by elected, accountable legislators, or by bureaucratic fiat. Thank you again for this opportunity.

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[31] Indeed, the Rhode Island UDAP statute exempts "actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States." The OCC filed an amicus in a private UDAP case, citing its new found UDAP authority, and the court held the national bank was protected from the private consumer's UDAP enforcement as subject to an exemption "as a result of the OCC's authority to bring enforcement actions against national banks for violations of laws or regulations...." *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 269-270 (3rd Cir. 2003).