

Statement of  
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Comptroller of the Comptroller  
Before the  
Committee on Banking, Housing, and Urban Affairs  
Of the  
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Chairman Shelby, Ranking Member Sarbanes, and members of the Committee, I appreciate the invitation to discuss the OCC's recently issued rules on preemption and visitorial powers.

Let me start by emphasizing a few overarching considerations as background for discussion of the rules themselves:

- National banks and their subsidiaries are highly regulated and closely supervised. While we occasionally confront instances of abusive conduct at our banks, the overwhelming number of our banks operate in conformity with the law and with recognized standards of sound banking and fair practices. Because of this it is not at all surprising that the state attorneys general have repeatedly stated that predatory lending is not a problem in the regulated banking system.
- The OCC is committed to protecting and helping customers of national banks and we have ample resources and formidable enforcement powers to carry out that commitment. We have a world-class customer assistance group that resolves literally tens of thousands of inquiries and complaints every year. And where continued or persistent problems have arisen, our track record shows that we will use our supervisory and enforcement powers promptly and effectively to fix them. With the formal enforcement powers that we have, plus the authority and

influence that our examiners exercise over the banks they supervise, I believe we have an unmatched ability to afford consumers the protections we all want for them.

- We recognize that our counterparts at other agencies and in state law enforcement share this commitment to protect consumers, and we welcome opportunities to share information and cooperate and coordinate with them to address customer complaints and consumer protection issues. Through a coordinated and cooperative approach to the remedying of abuses I believe we can achieve a high level of protection for consumers.

With that preamble, let me summarize what the OCC's new regulations do and what they do not do. While I recognize that there are some significant differences of opinion on many of the issues involved, I am concerned that there has been widespread misunderstanding and mischaracterization of what we have done.

The first regulation – which I'll call the preemption rule – codifies principles that have been established in almost 200 years of decisions by the Supreme Court and lower federal courts, that have been applied in innumerable interpretations and rulings of the OCC over many years, and that have been embodied in regulations of our sister agency, the Office of Thrift Supervision, for many years. The regulation provides clear and predictable guidance to national banks regarding the standards that apply to core banking activities – lending and deposit taking.

The rule is based on the well-established principles that the states do not have the constitutional authority to limit or condition the exercise of powers that Congress has conferred on the instrumentalities it creates, and that a state law cannot apply to a

national bank if it “obstructs, impairs, or conditions” the bank’s ability to exercise those powers -- unless Congress has provided that the state law should apply. The regulation then lists specific types of state laws that are preempted, substantially mirroring those already preempted by OTS.

It’s important to emphasize what the regulation does not change, since some confusion may exist on this score. It does not establish brand new standards or principles of preemption. It does not preempt state laws other than those listed. It does not immunize national banks from complying with a host of state laws that form the infrastructure of doing the business of banking, such as contract law, tort law, public safety laws, and generally applicable criminal laws. It does not preempt anti-discrimination laws. It does not extend to activities authorized for financial subsidiaries of national banks, which can exercise powers not permissible for the bank itself. It does not impinge on the functional regulation framework that Congress set in place in the Gramm-Leach-Bliley Act. It does not allow national banks to charge higher rates of interest than they previously could. It does not authorize any new national bank powers -- such as real estate brokerage. And it makes no changes to existing OCC rules governing the activities of operating subsidiaries.

Our second rule -- the “visitorial powers” rule -- amends an existing regulation implementing a federal statute that is as old as the national banking system itself and that grants the OCC exclusive authority to supervise, examine, and regulate the national banking system. Congress reemphasized this principle of exclusive visitorial powers only recently in the Riegle-Neal Interstate Branching law by explicitly providing that to the extent state consumer protection laws apply to the interstate branches of national

banks – that is, where those laws are not preempted under the long-standing principles I have referred to -- the OCC is the exclusive enforcement authority for such laws with respect to national banks.

The visitorial powers statutes provide no exception for the states to regulate the banking activities of national banks through enforcement actions, and I believe it is well recognized by state law enforcement officials that federal law precludes them from taking administrative enforcement actions against a national bank with respect to its banking activities. What is at issue here is solely whether state officials can do through the courts what they cannot do directly, and our visitorial powers rule simply sets forth our understanding of the basic statute as precluding the exercise of similar visitation powers by resort to the courts.

The second, and equally important, issue I want to address is the effects of these rule changes. In addition to clarifying which state laws apply and which do not apply to national banks, the rule also puts into place additional focused standards to protect customers of national banks from unfair, deceptive, abusive or predatory lending practices. These new standards apply nationwide, to all national banks, and provide additional protections to national bank customers in every state – including those states that do not have their own predatory lending standards. The rule does not leave customers of national banks or their subsidiaries vulnerable to predatory lending practices.

The regulation first provides that national banks may not make consumer loans based predominantly on the foreclosure or liquidation value of a borrower's collateral. This will target the most egregious aspect of predatory lending, where a lender extends

credit, based not on a reasonable determination of a borrower's ability to repay, but on a lender's calculation of its ability to seize the borrower's accumulated equity in his or her home.

The regulation also specifically provides that national banks shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act in their lending activities. The OCC was the first federal banking agency to assert the power to take enforcement actions for violations of Section 5 – a position that our sister agencies have recently adopted.

These rules supplement the very extensive guidance we published last year admonishing our banks to stay well clear of predatory practices and telling them in no uncertain terms what we would do if we found such practices in any of our banks. I believe our rules and advisories on predatory lending go well beyond anything that any other bank regulatory authority has done in this regard.

Some may ask – why not allow state and local predatory lending laws to apply as well? Isn't more regulation better?

To that I would answer, not unless there has been a demonstration that more regulation is needed because the existing regulatory scheme does not work. That is not the case with respect to the national banking system. Whatever our differences with the state attorneys general, they have repeatedly stated that the problems of predatory lending are largely confined to unregulated, nondepository institutions and have not been in evidence in regulated banks or their subsidiaries. As I said, this is not at all surprising. National banks and their subsidiaries are highly regulated and closely supervised. The largest national banks have large teams of examiners on premises at all times.

Our approach to predatory lending is a comprehensive, ongoing, integrated supervisory approach, focused on preventing predatory practices, not on banning or restricting specified loan products based on their terms. We have substantial resources available, nationwide, to make sure that our supervision, in this and other areas, is effective.

Additional regulation brings added costs, which may lead to higher prices for customers. It may also have undesirable collateral consequences. For example, there is a vigorous debate ongoing in the economic literature as to whether state predatory lending laws reduce the availability of non-predatory subprime credit. I think there is widespread agreement, however, that these laws have reduced the volume of subprime lending, and it is far from the case that all subprime lending is predatory. Indeed, the expansion of the subprime market has played an extremely important role in our record level of home ownership and in making credit available to segments of the population – particularly minorities – who in the past have not had ready access to credit. State and local laws that increase a bank's costs and its potential liabilities in connection with higher risk subprime loans, and that result in constrictions in the secondary markets, which we have seen, inevitably will cause some legitimate lenders to conclude that the cost and risks are not worth it. The result is diminished credit availability; credit options available to a segment of potentially credit-worthy sub-prime borrowers will be reduced. Paradoxically, when such well-intentioned laws cause regulated banks to reduce their participation in the subprime market they are deterring the most highly regulated segment of the industry, those subject to CRA requirements, and those most likely to conform to accepted practices and standards. We believe our approach does not constrict credit availability

from legitimate – highly regulated – lenders, and effectively protects customers of national banks and their subsidiaries against predatory lending practices.

In conclusion, we believe that our new rules are legally sound, that they enable national banks to operate in a manner fully consistent with the character of their federal charter. Most importantly, coupled with the strong oversight and enforcement powers that the OCC can and will bring to bear, they do not leave national bank customers exposed to abusive practices. We share with our colleagues in the states a commitment to assuring that national banks' treatment of their customers meets the highest standards, and I am confident that if we work in cooperation and coordination we can all fulfill that commitment.

I welcome the opportunity to answer questions the Committee may have.