Remarks by
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"National Banks and Uniform Standards"

My topic today is billed as "National Banks and Uniform Standards," and I doubt it will surprise you to hear that I'm going to talk about preemption and the OCC's recently issued preemption regulations. Actually, this is a welcome opportunity to step back and describe what we have done, and to address some of the issues that have arisen as a result. And given some of those issues, what better audience for this topic than a group that includes CEOs of federally chartered thrifts – institutions very familiar with the benefits of preemption and whose track record emphatically demonstrates that preemption and consumer protection are not incompatible principles.

What I really want to know, though, is why our regulations have provoked such controversy, when the OTS issued virtually identical regulations nearly 10 years ago, and there was hardly a ripple. Obviously, we need to ask Jim Gilleran where he got his Teflon suit – some days I feel like what I need is a suit of armor.

Actually, our regulations have prompted a remarkable outpouring of reactions, and some particularly notable misunderstandings and mischaracterizations of what we did. One publication recently editorialized that by our action we were "tak[ing] over [from the states] the job of protecting consumers," that "the change threatens strong consumer protection laws that have been the responsibility of states for more than a century," and that our action "leaves millions of customers vulnerable" to abusive lending practices. The same publication asserted that the OCC's resources involved in consumer compliance supervision "cannot match" the resources the states have available to look out for consumer interests.

This is simply baloney.

First, let me describe what we did. We acted on two regulations, adopting a new regulation, which I'll call the "preemption rule," and amending our existing regulation on the OCC's exclusive "visitorial powers" with respect to national banks.

The OCC preemption rule adds provisions to our regulations expressly addressing the applicability of certain types of State laws to national banks' lending, deposit-taking activities. If this sounds familiar, it should, since it is the approach reflected in the OTS's preemption regulations. In the case of the new OCC rules, the listed types of laws either already are preempted under longstanding, preexisting OCC regulations, have been found to be preempted in OCC preemption opinions, have been found to be preempted by the courts, or have been determined to be preempted for federal thrifts by the OTS. Other types of laws, not listed in the regulations, will continue to be evaluated by the OCC under, pre-existing, judicially established standards for Federal preemption. The preemption rule distills those standards, stating the general principle that, except where made applicable by Federal law, state laws do not apply to national banks if they "obstruct, impair, or condition" the bank's exercise of powers granted under Federal law. We tried to be very clear in the preamble to the rules that these words are not designed to create a new standard of preemption, but rather to reflect the various phrases the Supreme Court has used in its preemption decisions.

Our preemption rule also contains two new provisions that expressly prohibit abusive or predatory lending practices. First, the rule prohibits national banks from making any consumer loan based predominantly on the foreclosure or liquidation value of a borrower’s collateral, rather than on the borrower's ability to repay the loan according to its terms. This anti-predatory lending standard applies uniformly to all consumer lending activities of national banks and their operating subsidiaries, regardless of the location from which those activities are conducted or where customers reside. This standard strikes at the heart of predatory lending, namely lending practices that effectively swindle a homeowner out of his or her property.

Second, our preemption rule provides that, in connection with *any* type of lending, national banks and their operating subsidiaries shall not engage in unfair and deceptive practices within the meaning of Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits "unfair or deceptive acts or practices" in interstate commerce. Although we do not have the statutory authority to define particular acts or practices as “unfair” or “deceptive” under the FTC Act, we added an express reference to Section 5 to our rule in response to commenters who urged us to affirm that the principles of the Act apply to national banks. We viewed this addition as particularly appropriate in light of the fact that the OCC pioneered the use of Section 5 as a basis for enforcement actions against banks that have engaged in such conduct, and have obtained substantial restitution for customers as a result.

These new standards are comprehensive and they apply nationwide, to all national banks and their operating subsidiaries. They apply strong protections for national bank customers in every state – including the many states that do not have their own anti-predatory lending standards.

Does this sound like a change that threatens strong consumer protection laws? Does this sound like we have left “millions of customers vulnerable” to abusive lending practices?

Our second action involved amendments to our existing regulation concerning the OCC’s exclusive “visitorial powers” with respect to national banks. “Visitorial powers” is a term used to refer to the authority to examine, supervise, and regulate the affairs of a corporate entity. Under Federal law, the OCC has exclusive visitorial powers over national banks – except where Federal law provides otherwise. Specifically, 12 U.S.C. § 484 provides that "no national bank shall be subject to any visitorial powers except as authorized by federal law, vested in the courts of justice" or exercised by Congress or a committee of Congress. This provision, *originally enacted in 1863*, is integral to the overall design of the system and the ability of national banks to conduct the business of banking subject to uniform, consistent standards and supervision, wherever in the nation they operate.

Existing, longstanding OCC regulations implement this law by providing that state officials are not authorized to inspect, examine, or regulate national banks, except where another Federal law authorizes them to do so. One amendment to our visitorial powers rule clarified that the scope of the OCC's exclusive visitorial authority applies to the content and conduct of national bank activities authorized under Federal law. In other words, the OCC is exclusive supervisor of a national bank's banking activities. The rule *does not prevent* state officials from enforcing state laws that do not pertain to a national bank's banking activities, such as public safety standards or criminal laws of general applicability.

Another amendment to the existing rule clarifies that the *preservation* of visitorial powers "vested in the courts of justice" does not *grant* state regulatory or law enforcement officials *new* authority, in addition to whatever they may otherwise have, to exercise visitorial powers over national banks. In other words, state officials may not use the courts to accomplish indirectly what Federal law clearly prohibits them from accomplishing directly.

Does this sound like we are taking on a new role? Does this sound like we are assuming a new responsibility that had previously been handled by the states for more than a century?

In fact, the only thing in this picture that has been around for more than a century is the standard contained in § 484 – which *prevents* States from supervising the activities of national banks.

But, where the challenge is to prevent abusive lending practices, why shouldn't state and local laws apply as well as the Federal standards to which national banks – and federal thrifts – are subject? Why shouldn't state and local regulators also get into the business of supervising the activities of national banks and federal thrifts? Isn't it better to have more regulation and more regulators?

To this we would answer: Not necessarily. More regulation and more regulators can have their own consequences and are not the answer unless there has been a failure of the existing regulatory regime. That is simply not the case with national banks, federal thrifts, and their respective subsidiaries. Clearly, there is a real problem with abusive lending practices in this country, but national banks and federal thrifts are not the breeding ground. Whatever differences of opinion may exist with the state attorneys general, they have stated – unambiguously – in various filings, that there is scant evidence that banks, thrifts, or their subsidiaries, are engaged in abusive lending practices. Indeed, these state officials have recognized the extent to which banks and thrifts are highly regulated and closely supervised, and have credited that regulatory presence for the scarcity of evidence of abusive or predatory practices.

For example, the OCC today supervises approximately 2200 national banks, together with their operating subsidiaries, which must comply with a multitude of federal consumer compliance requirements. We have nearly 1700 examiners in the field, hundreds of which are involved in both safety and soundness and compliance supervision. Over 100 work exclusively on compliance supervision. We have over 300 examiners on site at our largest national banks, engaged in continuous supervision of all aspects of their operations. These resources are supplemented by dozens of attorneys in our district offices and Washington D.C. headquarters, and consumer complaint specialists at our Customer Assistance Group, located in Houston.

By way of comparison, based on data published by the Conference of State Bank Supervisors, state banking departments collectively supervise approximately 113,000 entities. These include, in addition to banks and thrifts – check cashers, consumer finance companies, credit unions, industrial loan companies, other licensed lenders, money transmitters, mortgage brokers, trust companies, pawnshops, payday lenders, and title lenders. For these entities, the states report that they have approximately 2,300 examiners.

Does this sound like the OCC "cannot match" the resources the states bring to bear?

Our approach is a comprehensive, ongoing, integrated, supervisory approach, focused on *preventing abusive or predatory lending practices,* not just punishing those that commit them. We have substantial resources available, nationwide, and a wide array of supervisory and enforcement tools, to make sure that our supervision, in this and other areas, is effective.

Adding layers of regulation brings added costs, which may lead to higher prices for customers. It may also have other undesirable collateral consequences, such as diminished product availability. For example, state and local laws that increase a bank's costs and its potential liabilities in connection with subprime loans, which are already high risk, inevitably will cause some legitimate lenders to conclude that the cost and risks are not worth it. The result is diminished credit availability, and legitimate credit options that may otherwise be available to a segment of potentially credit-worthy sub-prime borrowers will be reduced. We believe our approach to combating abusive lending practices does not diminish credit *access* but does effectively target credit *abuses*.

Adding additional *regulators* also has implications. Just look at the typical responsibilities of a State Attorney General – prosecuting Medicaid fraud, investigating and prosecuting organized crime, enforcing the State's environmental protection laws, overseeing the integrity of charitable organizations, investigating and litigating civil rights complaints, advocating for consumers stymied by Health Maintenance Organizations (HMOs), enforcing the State's securities laws to combat fraud – the list could literally go on for pages. And I've already listed the many types of businesses, in addition to banks and thrifts, that are the responsibility of state banking departments.

When state authorities insist on trying to put a state cop on the national bank – or federal thrift – beat, especially given their budget constraints today, that's probably one less state cop available to protect the state's consumers in connection with all the other potential sources of problems those consumers face. This is one reason why I regret that the most conspicuous response to our new regulations by many state officials has been to assert that they will still try to employ their resources to take actions directly against national banks and their subsidiaries, even with respect to core banking activities, such as lending. The net result, I think, is unfortunate because it diminishes the availability of precious resources to protect consumers in *other* areas – other areas where there *is* evidence of abusive lending – other areas that are not as highly regulated as the banking business.

Our jurisdiction over national banks and their subsidiaries also does not deprive state regulators of a role in protecting consumers in their states, and we welcome the opportunity to work cooperatively with them to further that goal. We have invited state authorities to refer consumer complaints concerning national banks to the OCC, and to bring to our attention concerns that any national bank is engaged in unfair, deceptive, abusive or predatory practices. We have set up special procedures to handle and track referrals from state authorities.

The OCC and the states already cooperate extensively in many respects, referring consumer complaints to the appropriate regulator of the entity generating the complaint, and we welcome additional opportunities to collaborate. We issued a new Advisory Letter to national banks just last week clarifying our expectations about how they should handle consumer complaints that are forwarded to them from state agencies and departments. Personally, I hope that we can move beyond the rhetoric of the current controversy and leverage off existing cooperative processes to put our collective resources to work to maximize their coverage.

I'll close with one last point about preemption. Preemption provides benefits to banks and thrifts in the form of efficiencies that flow from uniform, consistent, and predictable standards that apply wherever in the nation an institution does business. In other words, you know you can run a better railroad if the track gauge doesn't change with every state and county line that you cross. But with preemption also comes responsibility, and this is a timely opportunity for all bankers to recommit to the highest standards of customer service, integrity, and fair play in their business. The *very best* way to counter the controversies that I have just discussed and preserve the benefits of preemption is for bankers to be leaders in responsible corporate behavior and exemplary customer treatment. That way, both bankers and their customers come out winners.

Thank you very much.