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Administrator of National Banks

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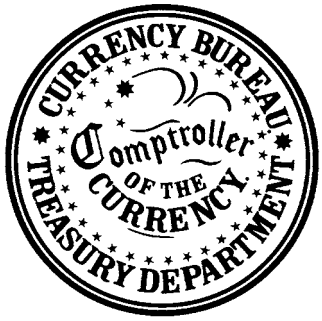

Office of the Comptroller of the Currency
Administrator of National Banks

John D. Hawke, Jr.
Comptroller of the Currency

Volume 23, Number 1

March 2004
(Fourth Quarter Data)

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About the OCC

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Background

The Office of the Comptroller of the Currency (OCC) was established in 1863 as a bureau of the Department of the Treasury. The OCC is headed by the Comptroller, who is appointed by the President, with the advice and consent of the Senate, for a five-year term.

The OCC regulates national banks by its power to:

- Examine the banks;
- Approve or deny applications for new charters, branches, capital, or other changes in corporate or banking structure;
- Take supervisory actions against banks that do not conform to laws and regulations or that otherwise engage in unsound banking practices, including removal of officers, negotiation of agreements to change existing banking practices, and issuance of cease and desist orders; and
- Issue rules and regulations concerning banking practices and governing bank lending and investment practices and corporate structure.

The OCC divides the United States into four geographical districts, with each headed by a deputy comptroller.

The OCC is funded through assessments on the assets of national banks, and federal branches and agencies. Under the International Banking Act of 1978, the OCC regulates federal branches and agencies of foreign banks in the United States.

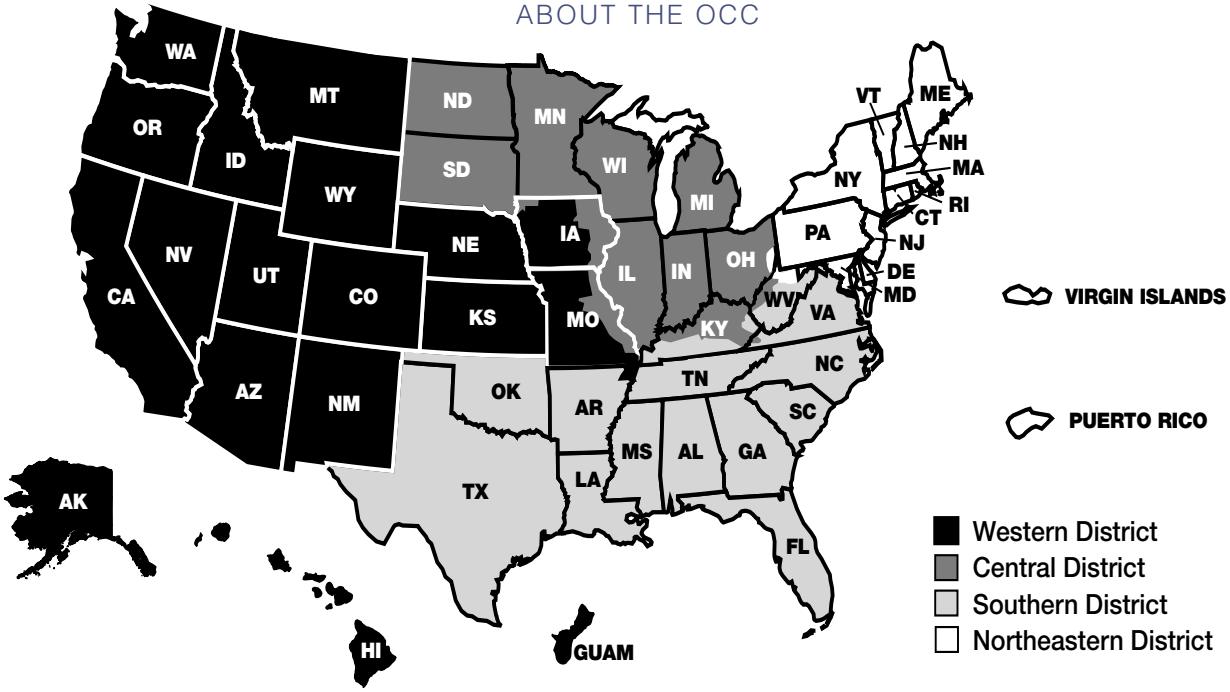
The Comptroller

Comptroller John D. Hawke, Jr. has held office as the 28th Comptroller of the Currency since December 8, 1998, after being appointed by President Clinton during a congressional recess. He was confirmed subsequently by the U.S. Senate for a five-year term starting on October 13, 1999. Prior to his appointment Mr. Hawke served for 3½ years as Under Secretary of the Treasury for Domestic Finance. He oversaw development of policy and legislation on financial institutions, debt management, and capital markets; served as chairman of the Advanced Counterfeit Deterrence Steering Committee; and was a member of the board of the Securities Investor Protection Corporation. Before joining Treasury, he was a senior partner at the Washington, D.C., law firm of Arnold & Porter, which he joined as an associate in 1962. In 1975 he left to serve as general counsel to the Board of Governors of the Federal Reserve System, returning in 1978. At Arnold & Porter he headed the financial institutions practice. From 1987 to 1995 he was chairman of the firm.

Mr. Hawke has written extensively on the regulation of financial institutions, including Commentaries on Banking Regulation, published in 1985. From 1970 to 1987 he taught courses on federal regulation of banking at Georgetown University Law Center. He has also taught courses on bank acquisitions and serves as chairman of the Board of Advisors of the Morin Center for Banking Law Studies. In 1987 Mr. Hawke served on a committee of inquiry appointed by the Chicago Mercantile Exchange to study the role of futures markets in the October 1987 stock market crash. He was a founding member of the Shadow Financial Regulatory Committee and served on it until joining Treasury.

Mr. Hawke was graduated from Yale University in 1954 with a B.A. in English. From 1955 to 1957 he served on active duty with the U.S. Air Force. After graduating in 1960 from Columbia University School of Law, where he was editor-in-chief of the Columbia Law Review, Mr. Hawke clerked for Judge E. Barrett Prettyman on the U.S. Court of Appeals for the District of Columbia Circuit. From 1961 to 1962 he was counsel to the Select Subcommittee on Education, U.S. House of Representatives.

The *Quarterly Journal* is the journal of record for the most significant actions and policies of the Office of the Comptroller of the Currency. It is published four times a year. The *Quarterly Journal* includes policy statements, decisions on banking structure, selected speeches and congressional testimony, material released in the interpretive letters series, statistical data, and other information of interest in the supervision of national banks. We welcome your comments and suggestions. Please send to Rebecca Miller, Senior Writer-Editor, by fax to (202) 874-5263 or by e-mail to quarterlyjournal@occ.treas.gov. Subscriptions to the new electronic *Quarterly Journal Library* CD-ROM are available for $50 a year by writing to Publications—QJ, Comptroller of the Currency, Attn: Accounts Receivable, MS 4-8, 250 E St., SW, Washington, DC 20219. The *Quarterly Journal* continues to be available on the Web at http://www.occ.treas.gov/qj/qj.htm.



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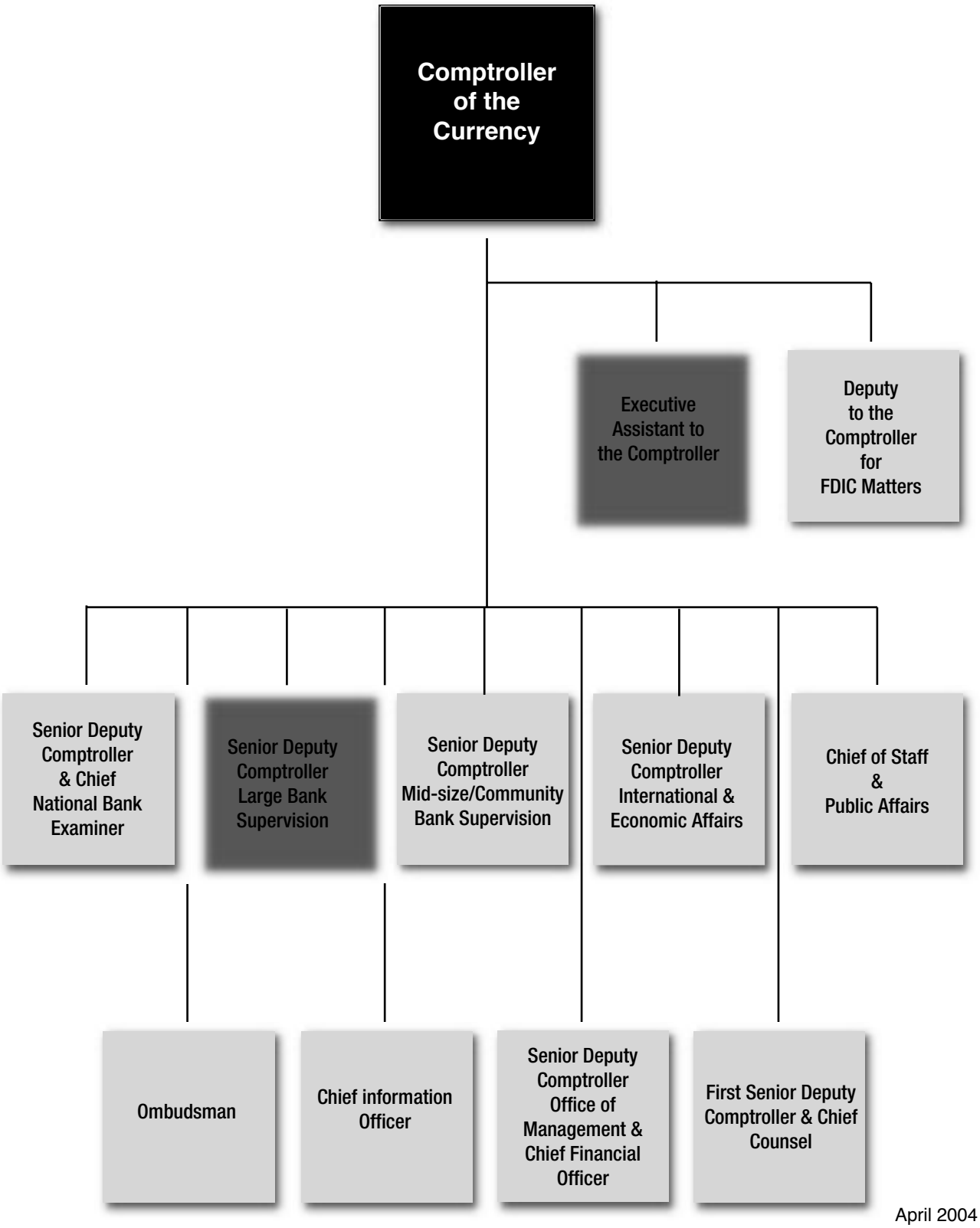
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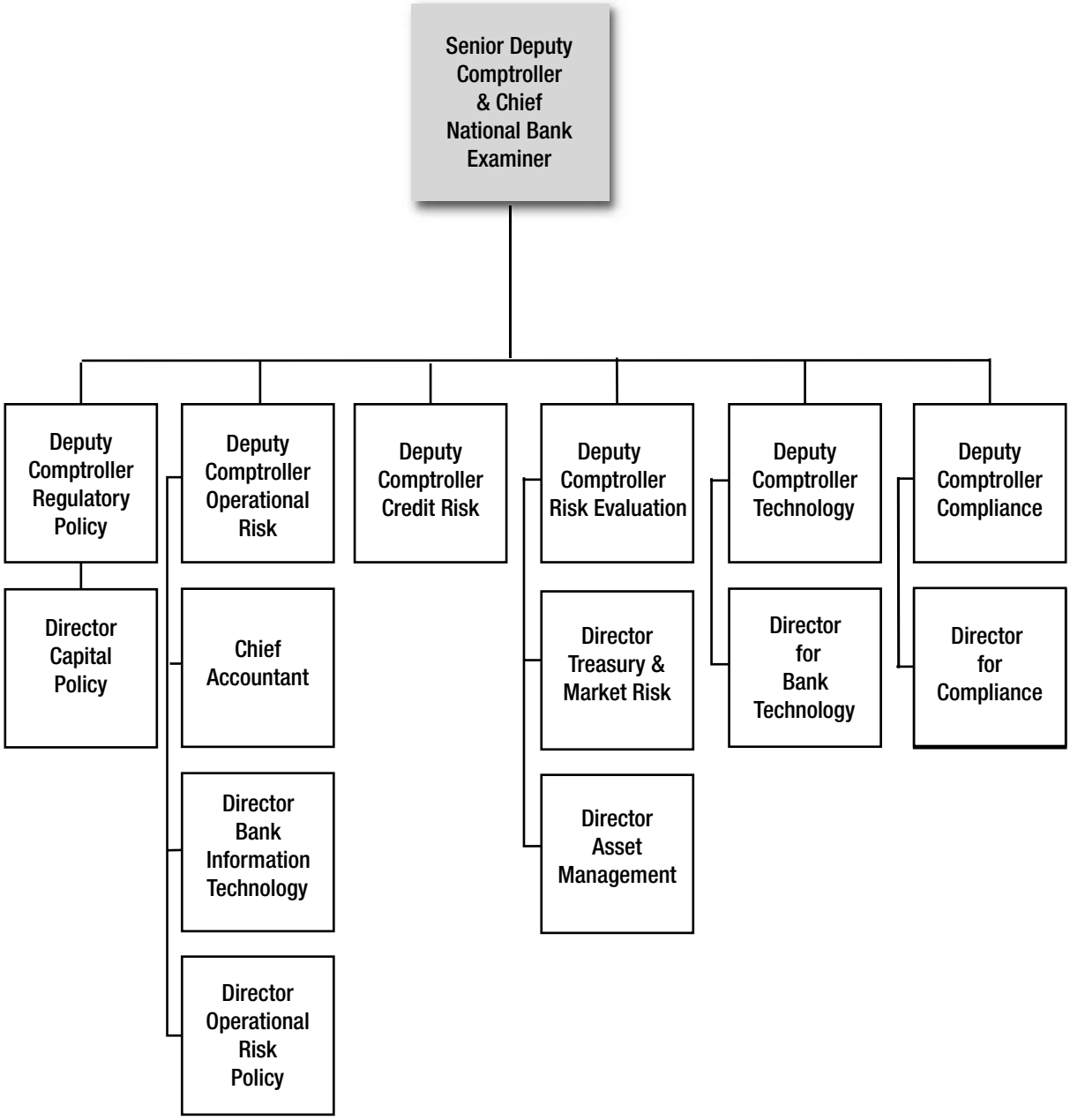
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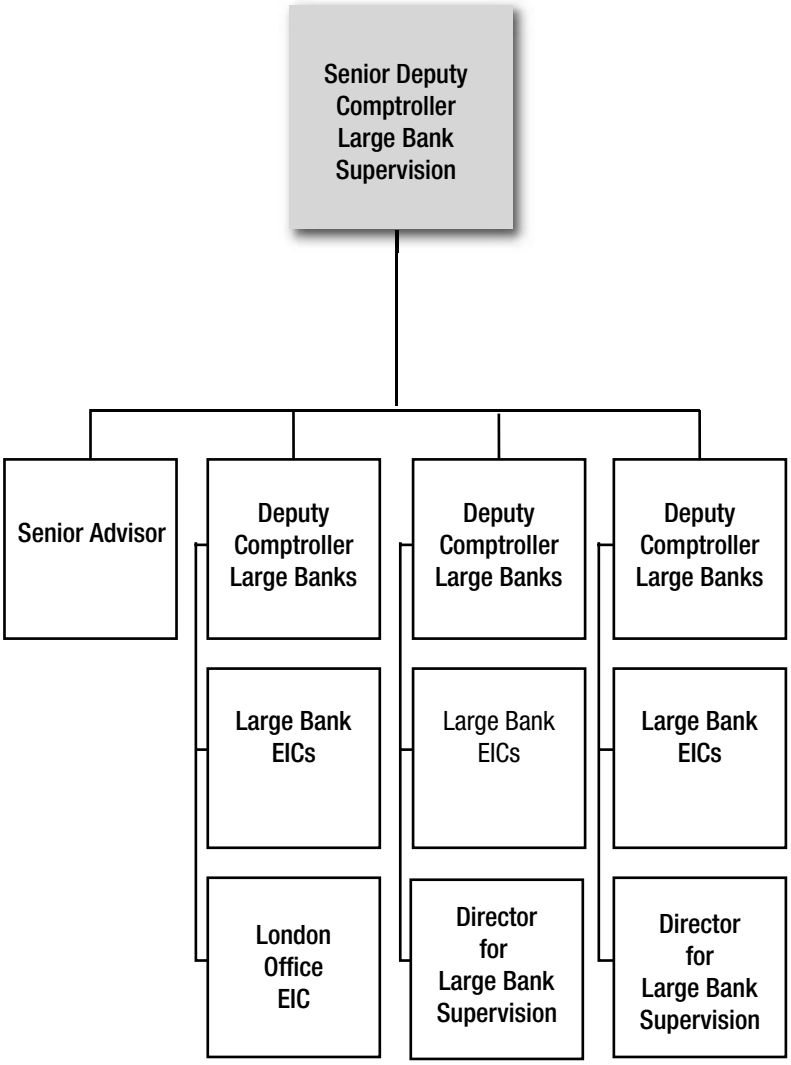
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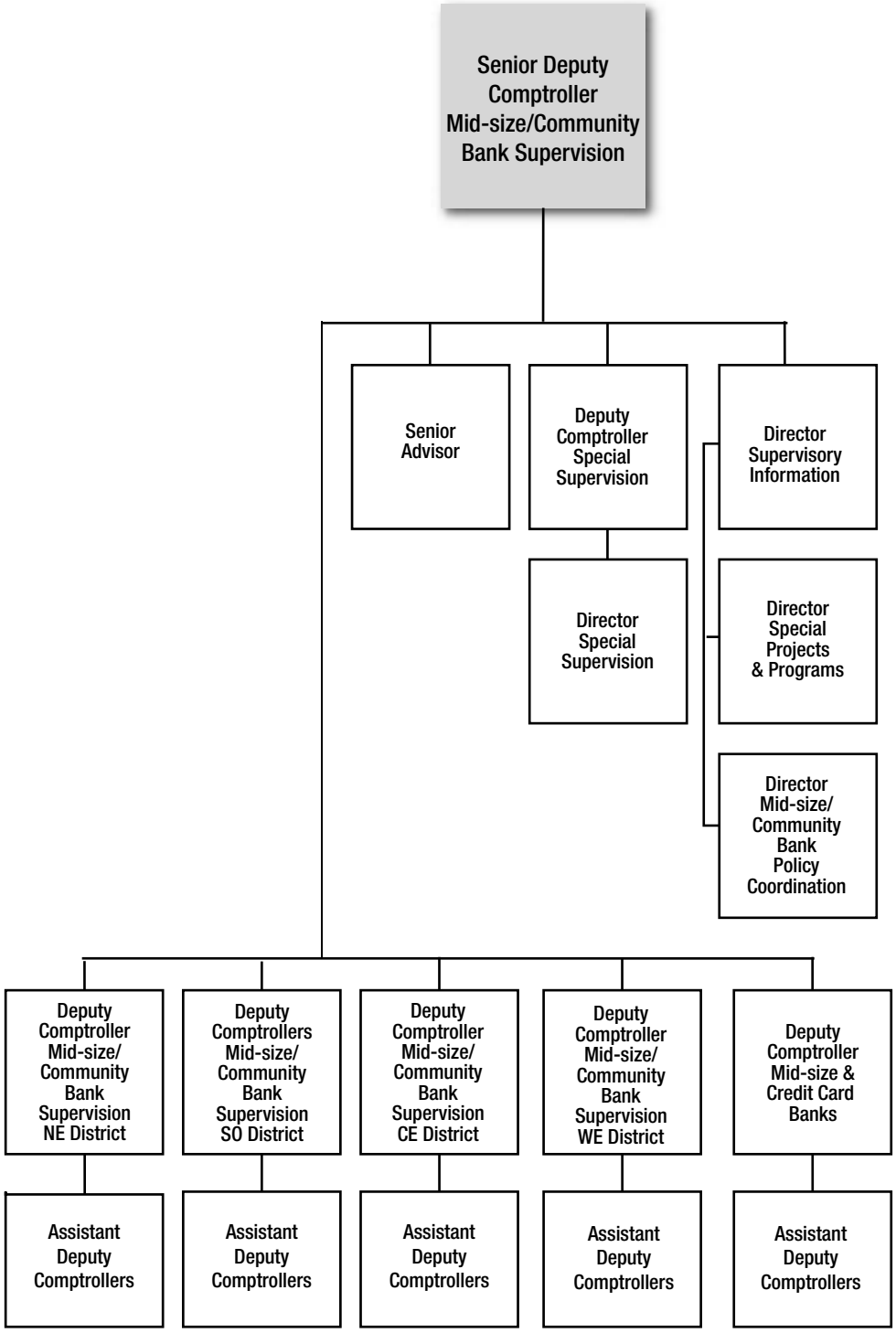
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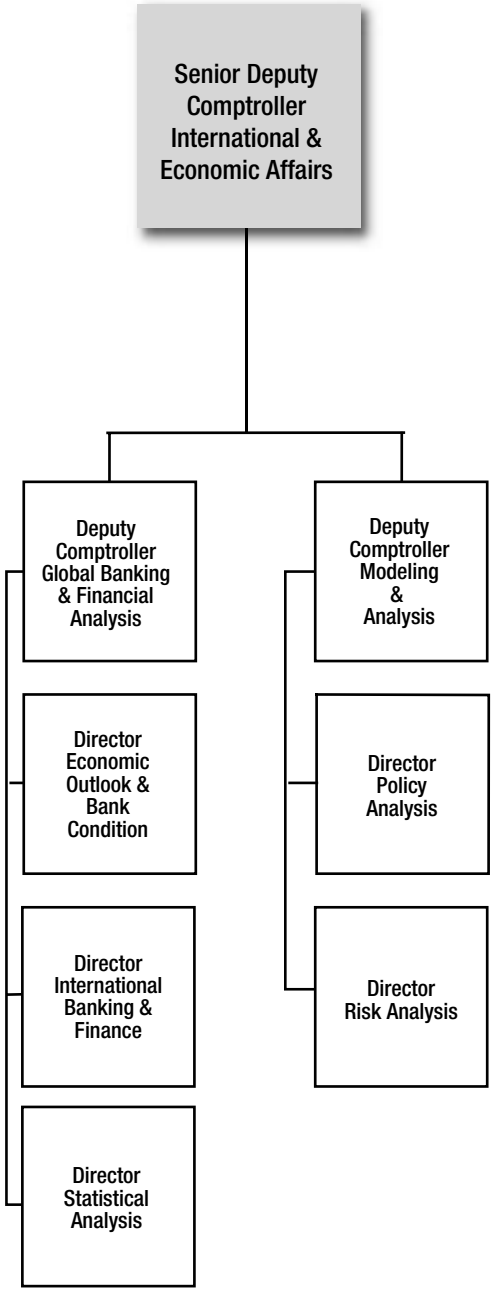
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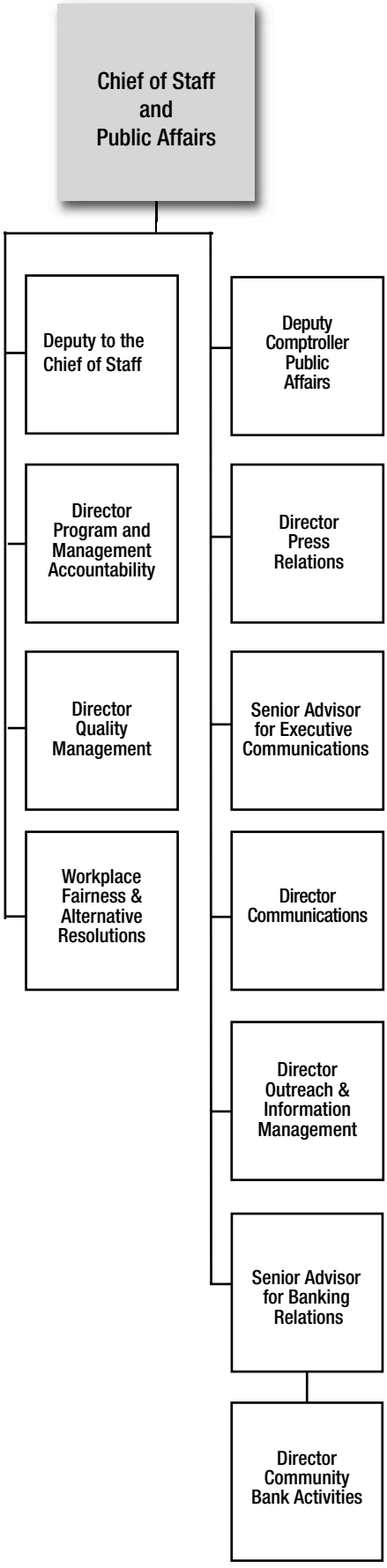
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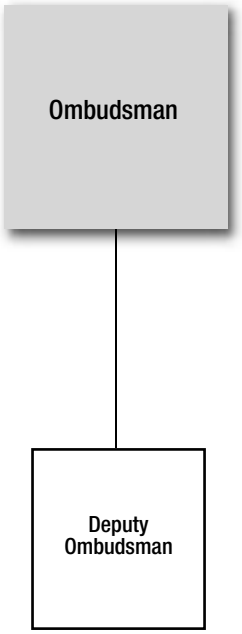
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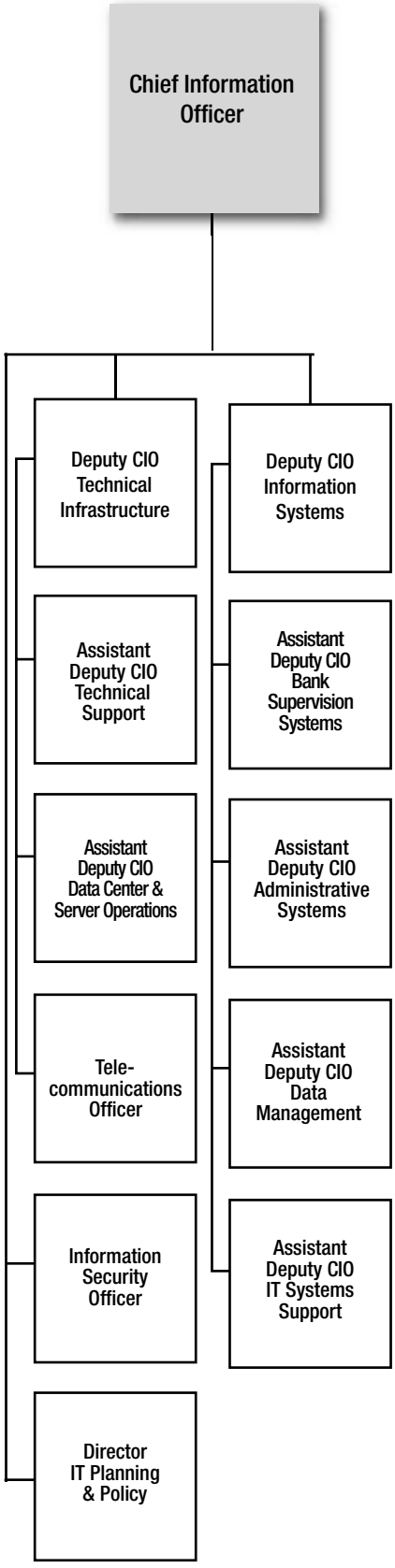
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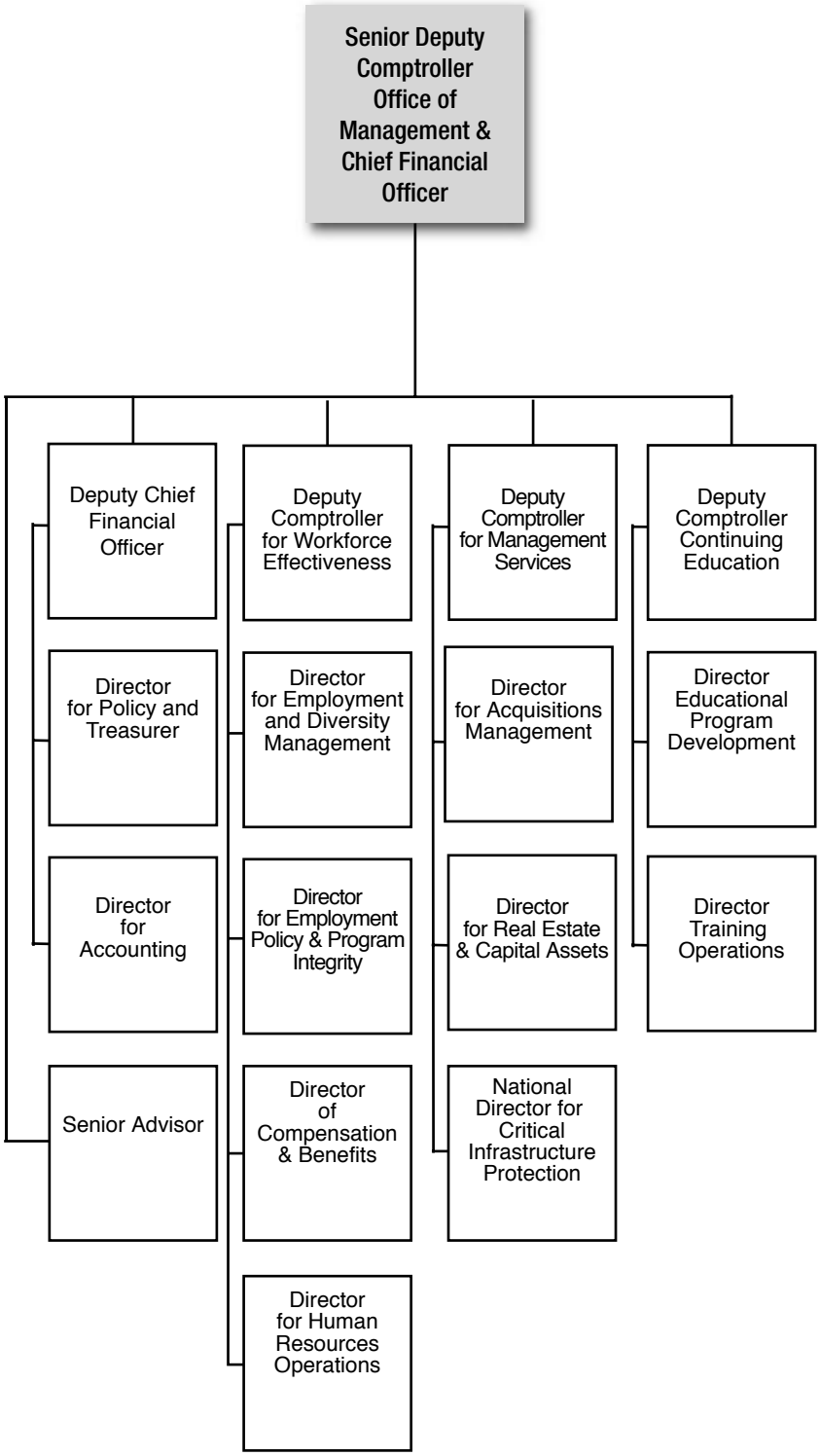
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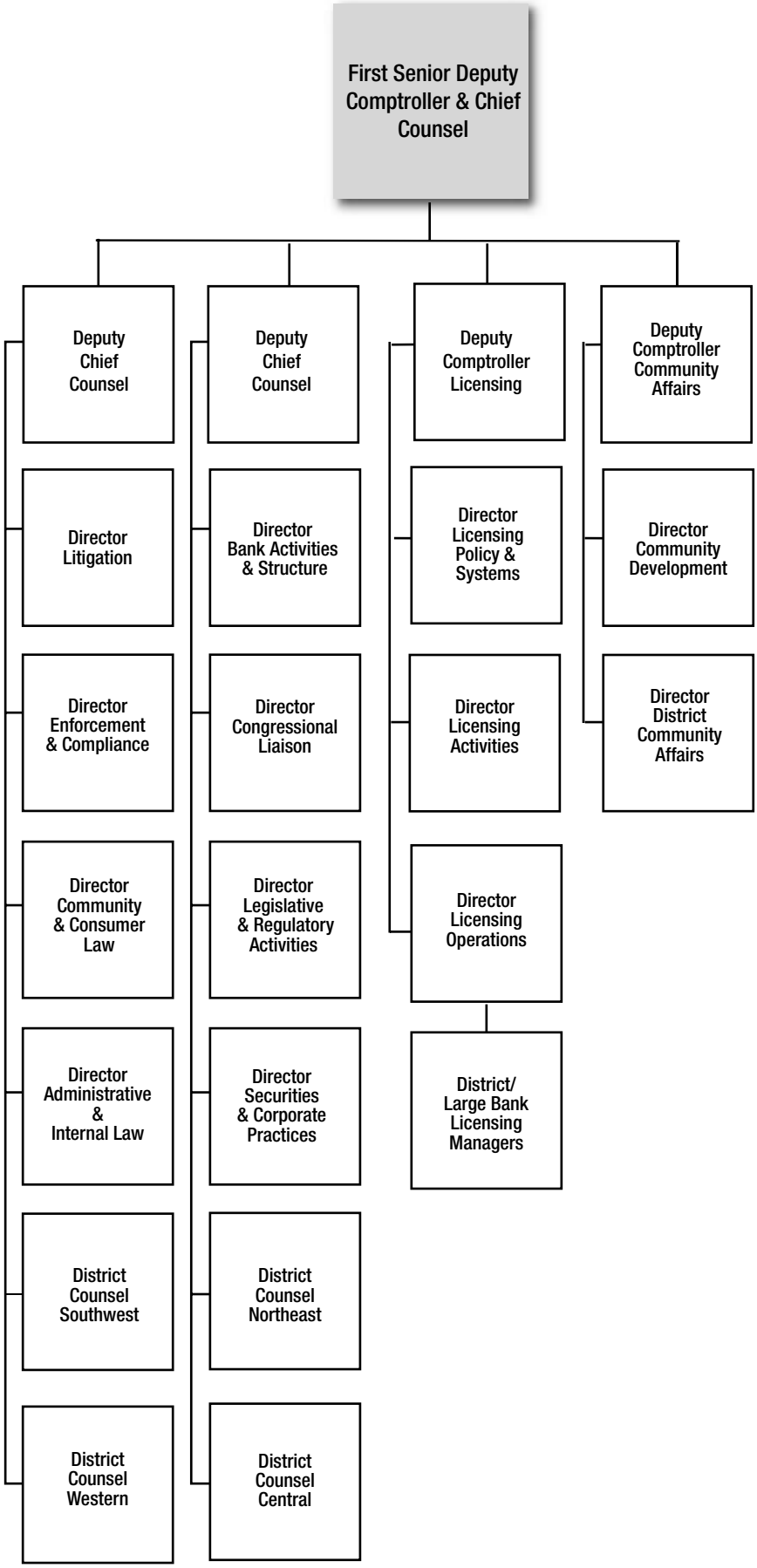
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Table 1—Comptrollers of the Currency, 1863 to the present

No.	Name	Dates of tenure		State
1	McCulloch, Hugh	May 9, 1863	Mar. 8, 1865	Indiana
2	Clarke, Freeman	Mar. 21, 1865	July 24, 1866	New York
3	Hulburd, Hiland R.	Feb. 1, 1865	Apr. 3, 1872	Ohio
4	Knox, John Jay	Apr. 25, 1872	Apr. 30, 1884	Minnesota
5	Cannon, Henry W.	May 12, 1884	Mar. 1, 1886	Minnesota
6	Trenholm, William L.	Apr. 20, 1886	Apr. 30, 1889	South Carolina
7	Lacey, Edward S.	May 1, 1889	June 30, 1892	Michigan
8	Hepburn, A. Barton	Aug. 2, 1892	Apr. 25, 1893	New York
9	Eckels, James H.	Apr. 26, 1893	Dec. 31, 1897	Illinois
10	Dawes, Charles G.	Jan. 1, 1898	Sept. 30, 1901	Illinois
11	Ridgely, William Barret	Oct. 1, 1901	Mar. 28, 1908	Illinois
12	Murray, Lawrence O.	Apr. 27, 1908	Apr. 27, 1913	New York
13	Williams, John Skelton	Feb. 2, 1914	Mar. 2, 1921	Virginia
14	Crissinger, D.R.	Mar. 17, 1921	Mar. 30, 1923	Ohio
15	Dawes, Henry M.	May 1, 1923	Dec. 17, 1924	Illinois
16	McIntosh, Joseph W.	Dec. 20, 1924	Nov. 20, 1928	Illinois
17	Pole, John W.	Nov. 21, 1928	Sept. 20, 1932	Ohio
18	O'Connor, J.F.T.	May 11, 1933	Apr. 16, 1938	California
19	Delano, Preston	Oct. 24, 1938	Feb. 15, 1953	Massachusetts
20	Gidney, Ray M.	Apr. 16, 1953	Nov. 15, 1961	Ohio
21	Saxon, James J.	Nov. 16, 1961	Nov. 15, 1966	Illinois
22	Camp, William B.	Nov. 16, 1966	Mar. 23, 1973	Texas
23	Smith, James E.	July 5, 1973	July 31, 1976	South Dakota
24	Heimann, John G.	July 21, 1977	May 15, 1981	New York
25	Conover, C.T.	Dec. 16, 1981	May 4, 1985	California
26	Clarke, Robert L.	Dec. 2, 1985	Feb. 29, 1992	Texas
27	Ludwig, Eugene A.	Apr. 5, 1993	Apr. 4, 1998	Pennsylvania
28	Hawke, John D., Jr.	Dec. 8, 1998	—	New York

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present

No.	Name	Dates of tenure		State
1	Howard, Samuel T.	May 9, 1863	Aug. 1, 1865	New York
2	Hulburd, Hiland R.	Aug. 1, 1865	Jan. 31, 1867	Ohio
3	Knox, John Jay	Mar. 12, 1867	Apr. 24, 1872	Minnesota
4	Langworthy, John S.	Aug. 8, 1872	Jan. 3, 1886	New York
5	Snyder, V.P.	Jan. 5, 1886	Jan. 3, 1887	New York
6	Abrahams, J.D.	Jan. 27, 1887	May 25, 1890	Virginia
7	Nixon, R.M.	Aug. 11, 1890	Mar. 16, 1893	Indiana
8	Tucker, Oliver P.	Apr. 7, 1893	Mar. 11, 1896	Kentucky
9	Coffin, George M.	Mar. 12, 1896	Aug. 31, 1898	South Carolina
10	Murray, Lawrence O.	Sept. 1, 1898	June 29, 1899	New York
11	Kane, Thomas P.	June 29, 1899	Mar. 2, 1923	District of Columbia
12	Fowler, Willis J.	July 1, 1908	Feb. 14, 1927	Indiana
13	McIntosh, Joseph W.	May 21, 1923	Dec. 19, 1924	Illinois
14	Collins, Charles W.	July 1, 1923	June 30, 1927	Illinois
15	Steams, E.W.	Jan. 6, 1925	Nov. 30, 1928	Virginia
16	Awalt, F.G.	July 1, 1927	Feb. 15, 1936	Maryland
17	Gough, E.H.	July 6, 1927	Oct. 16, 1941	Indiana
18	Proctor, John L.	Dec. 1, 1928	Jan. 23, 1933	Washington
19	Lyons, Gibbs	Jan. 24, 1933	Jan. 15, 1938	Georgia
20	Prentiss, William, Jr.	Feb. 24, 1936	Jan. 15, 1938	Georgia
21	Diggs, Marshall R.	Jan. 16, 1938	Sept. 30, 1938	Texas
22	Oppegard, G.J.	Jan. 16, 1938	Sept. 30, 1938	California
23	Upham, C.B.	Oct. 1, 1938	Dec. 31, 1948	Iowa
24	Mulroney, A.J.	May 1, 1939	Aug. 31, 1941	Iowa
25	McCandless, R.B.	July 7, 1941	Mar. 1, 1951	Iowa
26	Sedlacek, L.H.	Sept. 1, 1941	Sept. 30, 1944	Nebraska
27	Robertson, J.L.	Oct. 1, 1944	Feb. 17, 1952	Nebraska
28	Hudspeth, J.W.	Jan. 1, 1949	Aug. 31, 1950	Texas

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present (continued)

No.	Name	Dates of tenure		State
29	Jennings, L.A.	Sept. 1, 1950	May 16, 1960	New York
30	Taylor, W.M.	Mar. 1, 1951	Apr. 1, 1962	Virginia
31	Garwood, G.W.	Feb. 18, 1952	Dec. 31, 1962	Colorado
32	Fleming, Chapman C.	Sept. 15, 1959	Aug. 31, 1962	Ohio
33	Haggard, Holis S.	May 16, 1960	Aug. 3, 1962	Missouri
34	Camp, William B.	Apr. 2, 1962	Nov. 15, 1966	Texas
35	Redman, Clarence B.	Aug. 4, 1962	Oct. 26, 1963	Connecticut
36	Watson, Justin T.	Sept. 3, 1962	July 18, 1975	Ohio
37	Miller, Dean E.	Dec. 23, 1962	Oct. 22, 1990	Iowa
38	DeShazo, Thomas G.	Jan. 1, 1963	Mar. 3, 1978	Virginia
39	Egerston, R. Coleman	July 13, 1964	June 30, 1966	Iowa
40	Blanchard, Richard J.	Sept. 1, 1964	Sept. 26, 1975	Massachusetts
41	Park, Radcliffe	Sept. 1, 1964	June 1, 1967	Wisconsin
42	Faulstich, Albert J.	July 19, 1965	Oct. 26, 1974	Louisiana
43	Motter, David C.	July 1, 1966	Sept. 20, 1981	Ohio
44	Gwin, John D.	Feb. 21, 1967	Dec. 31, 1974	Mississippi
45	Howland, W.A., Jr.	July 5, 1973	Mar. 27, 1978	Georgia
46	Mullin, Robert A.	July 5, 1973	Sept. 8, 1978	Kansas
47	Ream, Joseph M.	Feb. 2, 1975	June 30, 1978	Pennsylvania
48	Bloom, Robert	Aug. 31, 1975	Feb. 28, 1978	New York
49	Chotard, Richard D.	Aug. 31, 1975	Nov. 25, 1977	Missouri
50	Hall, Charles B.	Aug. 31, 1975	Sept. 14, 1979	Pennsylvania
51	Jones, David H.	Aug. 31, 1975	Sept. 20, 1976	Texas
52	Murphy, C. Westbrook	Aug. 31, 1975	Dec. 30, 1977	Maryland
53	Selby, H. Joe	Aug. 31, 1975	Mar. 15, 1986	Texas
54	Homan, Paul W.	Mar. 27, 1978	Jan. 21, 1983	Nebraska
55	Keefe, James T.	Mar. 27, 1978	Sept. 18, 1981	Massachusetts
56	Muckenfuss, Cantwell F., III	Mar. 27, 1978	Oct. 1, 1981	Alabama

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present (continued)

No.	Name	Dates of tenure		State
57	Wood, Billy C.	Nov. 7, 1978	Jan. 16, 1988	Texas
58	Longbrake, William A.	Nov. 8, 1978	July 9, 1982	Wisconsin
59	Odom, Lewis G., Jr.	Mar. 21, 1979	Nov. 16, 1980	Alabama
60	Martin, William E.	May 22, 1979	Apr. 4, 1983	Texas
61	Barefoot, Jo Ann	July 13, 1979	Sept. 5, 1982	Connecticut
62	Downey, John	Aug. 10, 1980	Aug. 2, 1986	Massachusetts
63	Lord, Charles E.	Apr. 13, 1981	Mar. 31, 1982	Connecticut
64	Bench, Robert R.	Mar. 21, 1982	Sept. 25, 1987	Massachusetts
65	Klinzing, Robert R.	Mar. 21, 1982	Aug. 21, 1983	Connecticut
66	Robertson, William L.	Mar. 21, 1982	Sept. 26, 1986	Texas
67	Arnold, Doyle L.	May 2, 1982	May 12, 1984	California
68	Weiss, Steven J.	May 2, 1982	—	Pennsylvania
69	Stephens, Martha B.	June 1, 1982	Jan. 19, 1985	Georgia
70	Stirnweis, Craig M.	Sept. 19, 1982	May 1, 1986	Idaho
71	Hermann, Robert J.	Jan. 1, 1983	May 3, 1995	Illinois
72	Mancusi, Michael A.	Jan. 1, 1983	Feb. 17, 1986	Maryland
73	Marriott, Dean S.	Jan. 1, 1983	Jan. 3, 1997	Missouri
74	Poole, Clifton A., Jr.	Jan. 1, 1983	Oct. 3, 1994	North Carolina
75	Taylor, Thomas W.	Jan. 1, 1983	Jan. 16, 1990	Ohio
76	Boland, James E., Jr.	Feb. 7, 1983	Feb. 15, 1985	Pennsylvania
77	Fisher, Jerry	Apr. 17, 1983	Apr. 4, 1992	Delaware
78	Patriarca, Michael	July 10, 1983	Aug. 15, 1986	California
79	Wilson, Karen J.	July 17, 1983	July 3, 1997	New Jersey
80	Winstead, Bobby B.	Mar. 18, 1984	June 11, 1991	Texas
81	Chew, David L.	May 2, 1984	Feb. 2, 1985	District of Columbia
82	Walter, Judith A.	Apr. 24, 1985	Dec. 30, 1997	Indiana
83	Maguire, Francis E., Jr.	Jan. 9, 1986	Aug. 6, 1996	Virginia
84	Kraft, Peter C.	July 20, 1986	Sept. 15, 1991	California

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present (continued)

No.	Name	Dates of tenure		State
85	Klinzing, Robert R.	Aug. 11, 1986	July 7, 1997	Connecticut
86	Hechinger, Deborah S.	Aug. 31, 1986	Sept. 14, 1987	District of Columbia
87	Norton, Gary W.	Sept. 3, 1986	Jan. 2, 1999	Missouri
88	Shepherd, J. Michael	Jan. 9, 1987	May 3, 1991	California
89	Rushton, Emory Wayne	Jan. 21, 1987	Sept. 20, 1989	Georgia
90	Fiechter, Jonathan	Mar. 4, 1987	Oct. 30, 1987	Pennsylvania
91	Stolte, William J.	Mar. 11, 1987	Mar. 21, 1992	New Jersey
92	Clock, Edwin H.	Feb. 29, 1988	Jan. 3, 1990	California
93	Krause, Susan F.	Mar. 30, 1988	Oct. 18, 1999	California
94	Coonley, Donald G.	June 29, 1988	May 31, 1996	Virginia
95	Blakely, Kevin M.	Oct. 12, 1988	Sept. 27, 1990	Illinois
96	Steinbrink, Stephen R.	Apr. 8, 1990	May 3, 1996	Nebraska
97	Lindhart, Ronald A.	Apr. 22, 1990	July 27, 1991	Florida
98	Hartzell, Jon K.	July 29, 1990	Dec. 5, 1995	California
99	Cross, Leonora S.	Nov. 4, 1990	Mar. 31, 1998	Utah
100	Finke, Fred D.	Nov. 4, 1990	—	Nebraska
101	Kamihachi, James D.	Nov. 6, 1990	Feb. 18, 2000	Washington
102	Barton, Jimmy F.	July 14, 1991	May 1, 1994	Texas
103	Cross, Stephen M.	July 28, 1991	June 4, 1999	Virginia
104	Guerrina, Allan B.	Apr. 19, 1992	June 23, 1996	Virginia
105	Powers, John R.	Aug. 9, 1992	July 2, 1994	Illinois
106	Alt, Konrad S.	Sept. 5, 1993	Oct. 4, 1996	California
107	Harris, Douglas E.	May 20, 1994	June 21, 1996	New York
108	Williams, Julie L.	July 24, 1994	—	District of Columbia
109	Sharpe, Ralph E.	Oct. 30, 1994	July 6, 1997	Virginia
110	Jee, Delora Ng	May 28, 1995	—	California
111	Britton, Leann G.	Jan. 7, 1996	May 17, 2002	Minnesota
112	Golden, Samuel P.	Mar. 31, 1996	—	Texas

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present (continued)

No.	Name	Dates of tenure		State
113	Abbott, John M.	Apr. 1, 1996	May 26, 2000	Texas
114	Healey, Barbara C.	June 9, 1996	Jan. 3, 1998	New Jersey
115	Calhoun, Scott G.	Sept. 29, 1996	Aug. 30, 1997	New York
116	Roberts, Matthew	Oct. 7, 1996	Oct. 18, 1997	District of Columbia
117	Nebhut, David H.	Oct. 27, 1996	Apr. 26, 1998	Pennsylvania
118	Rushton, Emory Wayne	May 5, 1997	—	Georgia
119	Reid, Leonard F., Jr.	May 19, 1997	Feb. 15, 1998	District of Columbia
120	Robinson, John F.	June 1, 1997	June 14, 2002	Missouri
121	Bailey, Kevin J.	July 6, 1997	June 27, 1999	Pennsylvania
122	Bodnar, John A.	July 6, 1997	Jan. 3, 2002	New Jersey
123	Bransford, Archie L., Jr.	July 6, 1997	—	Michigan
124	Gibbons, David D.	July 6, 1997	—	New York
125	Gilland, Jerilyn	July 6, 1997	—	Texas
126	Jaedicke, Ann F.	July 6, 1997	—	Texas
127	Long, Timothy W.	July 6, 1997	—	North Dakota
128	Nishan, Mark A.	July 6, 1997	—	New York
129	Otto, Bert A.	July 6, 1997	—	Indiana
130	Roeder, Douglas W.	July 6, 1997	—	Indiana
131	Yohai, Steven M.	Feb. 17, 1998	Sept. 21, 2001	New York
132	Finister, William	Mar. 1, 1998	July 3, 2000	Louisiana
133	Hanley, Edward J.	Mar. 1, 1998	Aug. 2, 2003	New York
134	Brosnan, Michael L.	Apr. 26, 1998	Aug. 24, 2002	Florida
135	Brown, Jeffrey A.	June 7, 1998	Aug. 2, 1998	Iowa
136	Hammaker, David G.	June 7, 1998	—	Pennsylvania
137	McCue, Mary M.	July 20, 1998	Apr. 9, 1999	New Jersey
138	Sharpe, Ralph E.	Jan. 3, 1999	—	Michigan
139	Engel, Jeanne K.	Mar. 29, 1999	May 5, 2000	New Jersey
140	Kelly, Jennifer C.	Nov. 22, 1999	—	New York

Table 2—Senior Deputy and Deputy Comptrollers of the Currency, 1863 to the present (continued)

No.	Name	Dates of tenure		State
141	O'Dell, Mark L.	Jan. 2, 2000	—	Colorado
142	Fiechter, Jonathan L.	Feb. 27, 2000	May 31, 2003	Pennsylvania
143	Alvarez Boyd, Anna	June 4, 2000	—	California
144	Stephens, Martha B.	July 30, 2000	—	Georgia
145	Wentzler, Nancy A.	Aug. 27, 2000	—	Pennsylvania
146	Gentille, Paul R.	Jan. 14, 2001	Oct. 3, 2003	California
147	Petitt, Cynthia T.	Jan. 14, 2001	—	South Dakota
148	Dailey, Grace E.	Dec. 16, 2001	—	Pennsylvania
149	Fletcher, Jackquelyn	Feb. 24, 2002	—	District of Columbia
150	Dick, Kathryn	Aug. 25, 2002	—	Minnesota
151	McPherson, James	Sep. 9, 2002	—	Georgia
152	Kolatch, Barry	Sep. 22, 2002	—	New York
153	Grunkemeyer, Barbara	Oct. 20, 2002	—	Massachusetts
154	Kowitt, Kay E.	April 6, 2003	—	Washington
155	Antiporowich, Harriet	May 18, 2003	—	Illinois
156	Davis, Cheryl F.	May 18, 2003	—	Illinois
157	DeCoster, James L.	May 18, 2003	—	South Carolina

December 2003

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(revised August 2004)

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Quarterly Journal

Condition and Performance of Commercial Banks

Condition and Performance of Commercial Banks

Summary

Banks reported another year of record earnings in 2003. National banks posted records for return on equity (ROE), return on assets (ROA), net income, net interest income, and noninterest income. Lower provisioning accounted for the largest contribution to the increase in net income. Large banks have been particularly well positioned in the current financial environment and have reaped a disproportionate share of the income gains.

Continued strength in real estate has offset ongoing weakness in commercial and industrial (C&I) loan volume. Credit quality improved at large banks, particularly for C&I loans. Banks face several risks, including an expected slowdown in residential real estate lending, continuing softness in the C&I market, an end to the benefits of reduced provisioning, and a possible slowing in core deposit growth. In addition, some areas of the country are going through long-term structural adjustments, which a cyclical rebound in the economy is not likely to fully arrest.

Key Trends

National banks posted a new record for return on equity in 2003, surpassing the old record set in 1993, and once again outperforming state banks. National banks tend to be larger than state banks, and large banks have outperformed state banks through the recent economic cycle.

Table 1—In 2003, provisioning decline key to net oncome gains

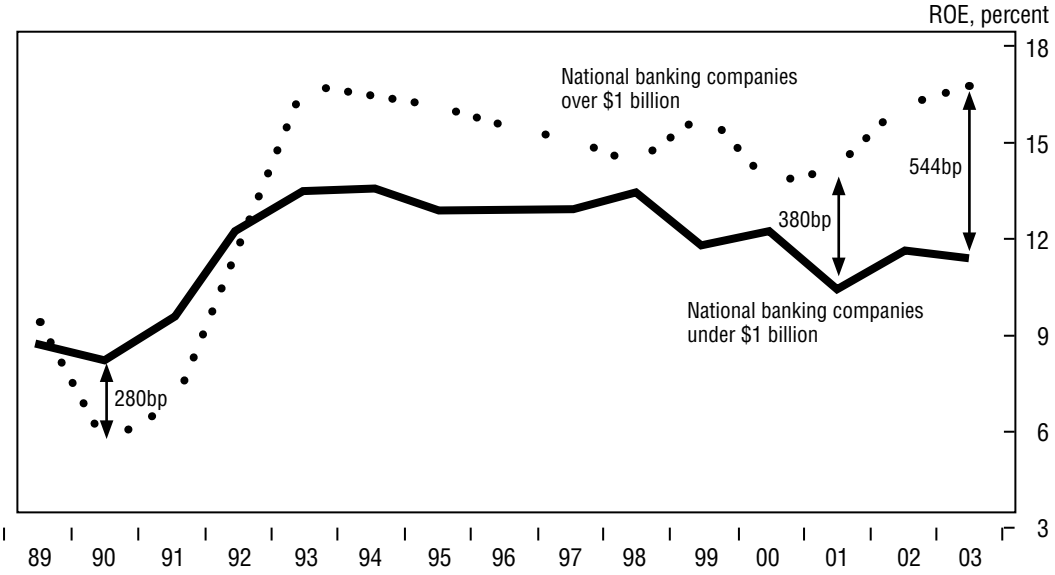
National banks

	Major income components (Change, $ millions)			
	2001-2002	% Change	2002-2003	% Change
Revenues				
Net interest income	16,001	12.8%	1,787	1.3%
Realized gains/losses, securities	739	30.9%	–266	–7.2%
Noninterest income	9,674	9.7%	6,287	5.7%
Expenses				
Provisioning	3,692	12.8%	–8,606	–26.4%
Noninterest expense	5,122	3.4%	8,069	5.9%
Net income	12,437	28.2%	6,339	11.2%

Source: Integrated Banking Information System (OCC)

The largest contributor to net income in 2003 was the decline in provisioning, as Table 1 shows. From 1997 to 2002, national banks were provisioning more than they were charging off. This trend reversed in 2003, as provisions dropped below charge-offs, reflecting the expectation of improved credit quality. Net interest income continued to rise, setting another record for the year, as hot residential real estate markets continued to spur mortgage originations. Noninterest income also set a record. The one income category that fell was realized gains and losses on securities, which suffered as long-term interest rates moved upward over the summer. Noninterest expense grew faster in 2003 than the year before.

Figure 1—Performance diverges at large and small banks



Source: Integrated Banking Information System (OCC)

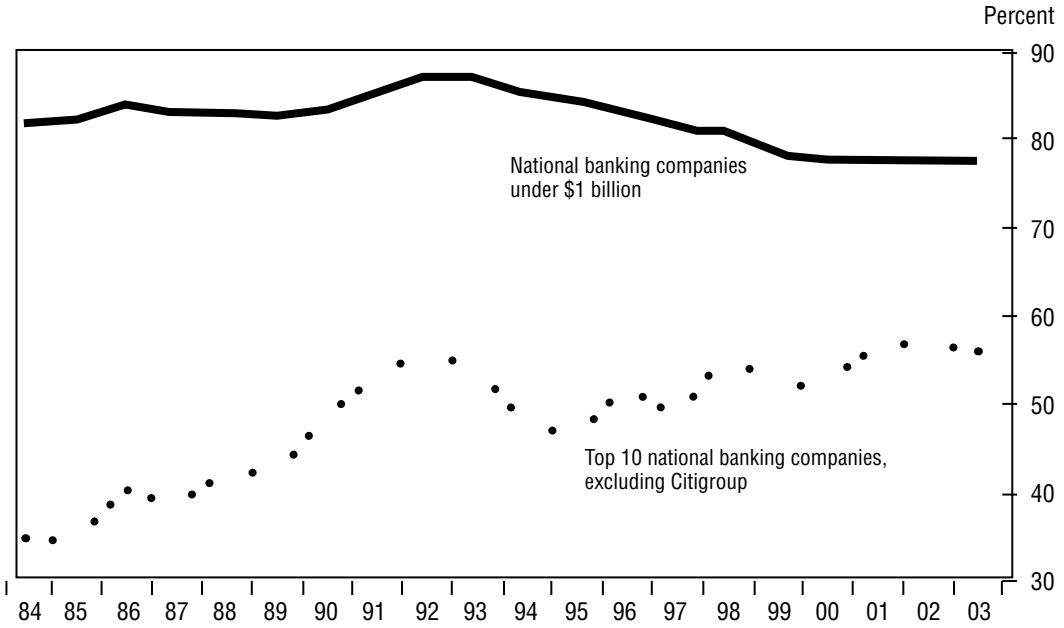
Data as of year-end.

bp = basis points

By most measures, large banks have outperformed small banks over the last decade, as Figure 1 suggests. Larger national banks (over $1 billion in assets) achieved record-high ROE in 2003, after a decade of historically high results. But at smaller national banks (under $1 billion in assets), ROE sank in 2003 to its second lowest point since 1991.

Smaller banks have been squeezed by low and declining net interest margins (NIMs). Over the last year, the drop has been greatest at smaller banks specializing in retail lending. For these banks, assets have grown, but not enough to offset the drop in NIM. In contrast, smaller banks with a wholesale focus have seen enough growth in assets to make up for the decline in NIM and produce a modest increase in net interest income.

Figure 2—Gain in core deposit share has helped largest companies; different story for community banks



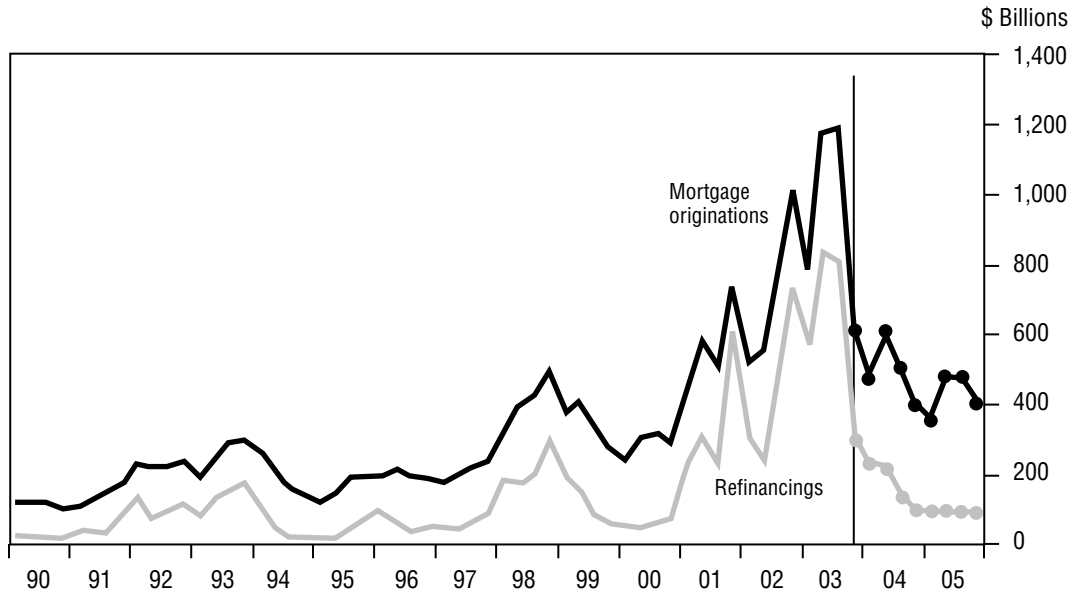
Source: Integrated Banking Information System (OCC)

Core funding is core deposits to total liabilities.

Core deposit growth is another factor explaining the divergence in performance between small and large banks. Core deposits are sharply up over the last three years, growing faster than at any time since the early 1980s, and a disproportionate share of this growth has been going to large banks. Since the mid-1990s, large banks have moved increasingly into retail lending, often by acquiring retail-oriented community banks. This has increased their access to core deposits and pushed up the share of core deposits on their balance sheets. For example, for the top 10 national banking companies, the core deposit share of total liabilities rose from 47 percent in 1995 to 57 percent in 2003, at the same time that the core deposit share was falling at smaller banks (under $1 billion in assets), from 85 percent to 77 percent.

Residential real estate lending, which has driven growth in bank profits over the last three years, is expected to slow down over the next two years, with consequences for loan volume and therefore bank income. Figure 2 shows the recent history of and projections for mortgage lending, both for initial purchase loans and refinancings. Projections shown are from the Mortgage Bankers' Association and reflect the widespread expectation that mortgage lending will slow in 2004 and 2005.

Figure 3—Residential mortgage volume expected to fall

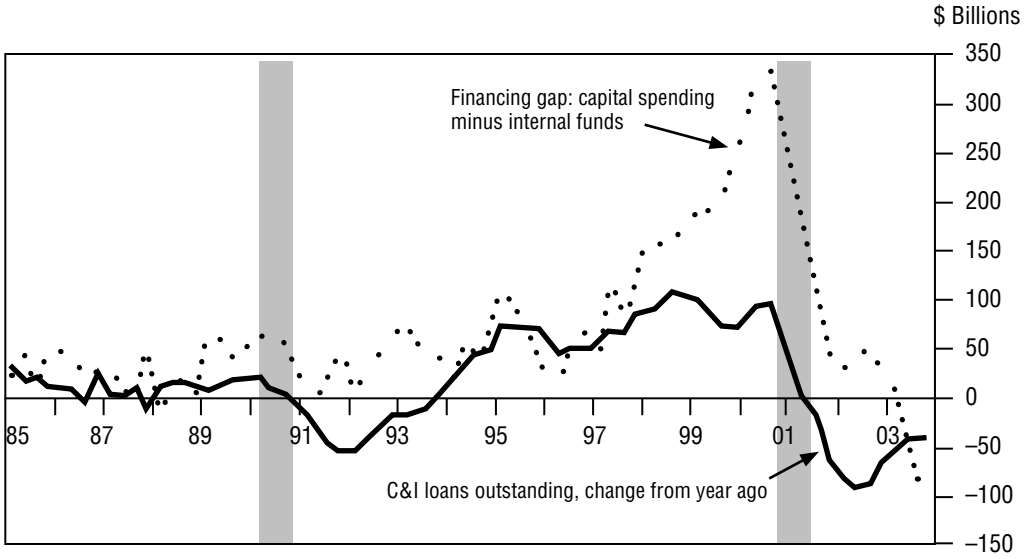


Source: Mortgage Bankers Association, HUD

Actual data through 2003Q3; estimates through 2005Q4.

After falling steadily for three years, C&I loan volume appeared to stabilize at the end of 2003. Moreover, the recent Federal Reserve Board's survey of senior loan officers indicated that banks are now more prepared to make business loans than they have been in six years. The same survey noted a modest rise in demand for C&I loans. This is understandable given the sharp rise in corporate profits in 2003. Higher profits also explain the improvement in credit quality for C&I loans over the last four quarters.

Figure 4—Strong corporate cash flow likely to limit C&I loan demand



Source: Integrated Banking Information System (OCC), Federal Reserve Board/Haver Analytics

Quarterly data through 2003Q4. Shaded areas represent periods of recession.

C&I = commercial and industrial

But higher profits may not mean increased borrowing from banks. Corporations already hold large cash reserves in the aftermath of the recent recession, and many firms will be able to meet their investment needs from internal funds, as Figure 4 suggests. The dotted line shows the corporate financing gap: business capital spending minus internal funds. This shows what businesses need to raise from outside—through bonds, commercial paper, equity, and bank loans. A value less than zero indicates that firms have more than enough internal funding to meet their investment needs. The investment boom of the late 1990s caused a spike in the financing gap, and greatly increased the need for outside capital. C&I loans grew as a result. Now that situation is reversed, with corporations generating far more cash than needed to cover their own investment needs.

Banks face several challenges to sustained earnings growth. First, reduced provisions have added to growth in net income, but benefits from provisioning are unlikely to continue for many more quarters. Second, margins remain tight, particularly for smaller banks. Third, exceptional growth in core deposits has allowed an expansion of assets, contributing to stronger bank profits, but now core deposit growth is expected to slow. And fourth, residential real estate loan growth is expected to drop off as the hot housing market cools.

Key indicators, FDIC-insured national banks
Annual 1999—2002, year-to-date through December 31, 2003, fourth quarter 2002, and fourth quarter 2003
(Dollar figures in millions)

	1999	2000	2001	2002	Preliminary 2003YTD	2002Q4	Preliminary 2003Q4
Number of institutions reporting	2,365	2,230	2,138	2,077	2,001	2,077	2,001
Total employees (FTEs)	983,212	948,549	966,545	993,469	1,000,510	993,469	1,000,510
Selected income data ($)							
Net income	$42,572	$38,907	$44,183	$56,620	$62,959	$13,434	$16,236
Net interest income	114,371	115,673	125,366	141,377	143,165	35,841	36,970
Provision for loan losses	15,536	20,536	28,921	32,613	24,008	8,596	5,994
Noninterest income	93,103	96,749	100,094	109,768	116,055	28,409	30,093
Noninterest expense	126,122	128,973	131,718	136,840	144,909	36,829	38,008
Net operating income	42,396	40,158	42,954	54,477	60,589	12,735	15,723
Cash dividends declared	30,016	32,327	27,783	41,757	45,048	10,878	13,307
Net charge-offs	14,180	17,227	25,107	31,381	26,946	7,690	7,109
Selected condition data ($)							
Total assets	3,271,236	3,414,384	3,635,066	3,908,262	4,292,331	3,908,262	4,292,331
Total loans and leases	2,125,360	2,224,132	2,269,248	2,445,528	2,630,656	2,445,528	2,630,656
Reserve for losses	37,663	39,992	45,537	48,338	48,623	48,338	48,623
Securities	537,321	502,299	576,550	653,702	753,606	653,702	753,606
Other real estate owned	1,572	1,553	1,799	2,075	1,942	2,075	1,942
Noncurrent loans and leases	20,815	27,151	34,261	38,166	34,874	38,166	34,874
Total deposits	2,154,231	2,250,402	2,384,414	2,565,771	2,786,756	2,565,771	2,786,756
Domestic deposits	1,776,084	1,827,064	2,001,243	2,168,876	2,322,051	2,168,876	2,322,051
Equity capital	277,965	293,729	340,668	371,582	390,515	371,582	390,515
Off-balance-sheet derivatives	12,077,568	15,502,911	20,549,785	25,953,473	31,554,688	25,953,473	31,554,688
Performance ratios (annualized %)							
Return on equity	15.56	13.69	13.84	15.83	16.43	14.55	16.72
Return on assets	1.35	1.18	1.25	1.50	1.52	1.39	1.53
Net interest income to assets	3.63	3.50	3.56	3.76	3.46	3.70	3.48
Loss provision to assets	0.49	0.62	0.82	0.87	0.58	0.89	0.56
Net operating income to assets	1.34	1.21	1.22	1.45	1.46	1.31	1.48
Noninterest income to assets	2.95	2.92	2.84	2.92	2.80	2.93	2.84
Noninterest expense to assets	4.00	3.90	3.74	3.63	3.50	3.80	3.58
Loss provision to loans and leases	0.76	0.95	1.28	1.38	0.95	1.42	0.92
Net charge-offs to loans and leases	0.70	0.80	1.11	1.33	1.06	1.27	1.10
Loss provision to net charge-offs	109.56	119.21	115.19	103.93	89.10	111.78	84.31
Performance ratios (%)							
Percent of institutions unprofitable	7.10	6.91	7.48	6.93	5.35	10.11	8.45
Percent of institutions with earnings gains	62.07	66.64	56.83	71.21	56.27	59.70	51.97
Noninterest income to net operating revenue	44.87	45.55	44.40	43.71	44.77	44.22	44.87
Noninterest expense to net operating revenue	60.79	60.72	58.42	54.49	55.90	57.32	56.68
Condition ratios (%)							
Nonperforming assets to assets	0.70	0.86	1.01	1.06	0.89	1.06	0.89
Noncurrent loans to loans	0.98	1.22	1.51	1.56	1.33	1.56	1.33
Loss reserve to noncurrent loans	180.94	147.30	132.91	126.65	139.42	126.65	139.42
Loss reserve to loans	1.77	1.80	2.01	1.98	1.85	1.98	1.85
Equity capital to assets	8.50	8.60	9.37	9.51	9.10	9.51	9.10
Leverage ratio	7.49	7.49	7.81	7.88	7.70	7.88	7.70
Risk-based capital ratio	11.70	11.84	12.60	12.67	12.65	12.67	12.65
Net loans and leases to assets	63.82	63.97	61.17	61.34	60.15	61.34	60.15
Securities to assets	16.43	14.71	15.86	16.73	17.56	16.73	17.56
Appreciation in securities (% of par)	-2.45	-0.01	0.47	2.12	0.88	2.12	0.88
Residential mortgage assets to assets	20.60	19.60	22.55	24.73	24.44	24.73	24.44
Total deposits to assets	65.85	65.91	65.59	65.65	64.92	65.65	64.92
Core deposits to assets	47.01	45.61	48.08	48.74	48.03	48.74	48.03
Volatile liabilities to assets	34.81	35.18	31.23	30.31	30.57	30.31	30.57

Loan performance, FDIC-insured national banks
Annual 1999—2002, year-to-date through December 31, 2003, fourth quarter 2002, and fourth quarter 2003
(Dollar figures in millions)

	1999	2000	2001	2002	Preliminary 2003YTD	2002Q4	Preliminary 2003Q4
Percent of loans past due 30-89 days							
Total loans and leases	1.16	1.25	1.38	1.14	1.02	1.14	1.02
Loans secured by real estate (RE)	1.22	1.42	1.42	1.07	0.91	1.07	0.91
1-4 family residential mortgages	1.61	1.95	1.84	1.45	1.30	1.45	1.30
Home equity loans	0.77	1.07	0.79	0.61	0.45	0.61	0.45
Multifamily residential mortgages	0.69	0.59	0.82	0.42	0.54	0.42	0.54
Commercial RE loans	0.70	0.72	0.85	0.58	0.47	0.58	0.47
Construction RE loans	1.07	1.12	1.28	0.91	0.66	0.91	0.66
Commercial and industrial loans	0.71	0.71	0.94	0.76	0.64	0.76	0.64
Loans to individuals	2.36	2.40	2.38	2.15	2.08	2.15	2.08
Credit cards	2.53	2.50	2.52	2.57	2.48	2.57	2.48
Installment loans and other plans	2.24	2.31	2.62	2.07	1.95	2.07	1.95
All other loans and leases	0.49	0.56	0.84	0.55	0.34	0.55	0.34
Percent of loans noncurrent							
Total loans and leases	0.98	1.22	1.51	1.56	1.33	1.56	1.33
Loans secured by real estate (RE)	0.87	0.93	1.05	0.97	0.95	0.97	0.95
1-4 family residential mortgages	0.91	1.06	1.06	1.02	1.14	1.02	1.14
Home equity loans	0.32	0.41	0.38	0.32	0.24	0.32	0.24
Multifamily residential mortgages	0.43	0.55	0.54	0.48	0.45	0.48	0.45
Commercial RE loans	0.84	0.77	1.02	1.05	0.97	1.05	0.97
Construction RE loans	0.63	0.82	1.15	1.03	0.71	1.03	0.71
Commercial and industrial loans	1.11	1.66	2.44	3.00	2.19	3.00	2.19
Loans to individuals	1.52	1.46	1.49	1.60	1.78	1.60	1.78
Credit cards	2.00	1.90	2.05	2.16	2.24	2.16	2.24
Installment loans and other plans	1.16	1.06	1.24	1.30	1.55	1.30	1.55
All other loans and leases	0.40	0.86	1.19	1.11	0.74	1.11	0.74
Percent of loans charged-off, net							
Total loans and leases	0.70	0.80	1.11	1.33	1.06	1.27	1.10
Loans secured by real estate (RE)	0.10	0.12	0.26	0.19	0.21	0.20	0.34
1-4 family residential mortgages	0.14	0.14	0.32	0.17	0.24	0.17	0.52
Home equity loans	0.19	0.23	0.35	0.23	0.23	0.23	0.32
Multifamily residential mortgages	0.02	0.03	0.04	0.11	0.03	0.18	0.01
Commercial RE loans	0.03	0.07	0.16	0.17	0.13	0.21	0.07
Construction RE loans	0.03	0.05	0.15	0.19	0.14	0.21	0.14
Commercial and industrial loans	0.54	0.87	1.50	1.80	1.35	1.83	1.26
Loans to individuals	2.65	2.84	3.13	4.02	3.35	3.62	3.41
Credit cards	4.52	4.43	5.06	6.58	5.48	5.37	5.54
Installment loans and other plans	1.27	1.54	1.66	1.91	1.71	2.10	1.71
All other loans and leases	0.23	0.23	0.44	0.62	0.44	0.73	0.26
Loans outstanding ($)							
Total loans and leases	$2,125,360	$2,224,132	$2,269,248	$2,445,528	$2,630,656	$2,445,528	$2,630,656
Loans secured by real estate (RE)	853,138	892,138	976,094	1,139,500	1,254,997	1,139,500	1,254,997
1-4 family residential mortgages	433,804	443,000	472,680	573,906	605,107	573,906	605,107
Home equity loans	67,267	82,672	102,131	141,058	192,708	141,058	192,708
Multifamily residential mortgages	26,561	28,026	30,075	33,968	35,650	33,968	35,650
Commercial RE loans	214,145	221,267	236,489	253,427	269,939	253,427	269,939
Construction RE loans	71,578	76,899	91,437	95,361	104,215	95,361	104,215
Farmland loans	11,957	12,350	12,615	13,225	13,618	13,225	13,618
RE loans from foreign offices	27,825	27,923	30,668	28,556	33,758	28,556	33,758
Commercial and industrial loans	622,004	646,988	597,301	546,050	500,027	546,050	500,027
Loans to individuals	348,706	370,394	389,947	450,604	527,986	450,604	527,986
Credit cards*	147,275	176,425	166,628	209,971	250,892	209,971	250,892
Other revolving credit plans	.	.	29,258	33,243	32,930	33,243	32,930
Installment loans	201,431	193,969	194,060	207,390	244,163	207,390	244,163
All other loans and leases	303,406	316,177	307,851	311,822	349,531	311,822	349,531
Less: Unearned income	1,893	1,565	1,944	2,449	1,884	2,449	1,884

*Prior to March 2001, credit cards included "Other revolving credit plans."

Key indicators, FDIC-insured national banks by asset size
Fourth quarter 2002 and fourth quarter 2003
(Dollar figures in millions)

	Less than $100M		$100M to $1B		$1B to $10B		Greater than $10B	
	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4
Number of institutions reporting	940	852	968	981	126	122	43	46
Total employees (FTEs)	21,937	20,174	94,197	94,667	100,133	91,528	777,202	794,141
Selected income data ($)								
Net income	$124	$120	$784	$1,048	$1,734	$1,296	$10,792	$13,772
Net interest income	491	444	2,551	2,514	3,617	3,206	29,182	30,805
Provision for loan losses	48	31	287	204	510	458	7,750	5,301
Noninterest income	227	246	1,609	1,656	3,140	2,514	23,433	25,677
Noninterest expense	512	491	2,897	2,902	3,669	3,344	29,751	31,271
Net operating income	119	118	775	773	1,689	1,288	10,152	13,544
Cash dividends declared	143	123	830	824	1,188	995	8,717	11,365
Net charge-offs	37	30	223	213	525	419	6,906	6,447
Selected condition data ($)								
Total assets	50,241	46,599	261,114	273,307	394,892	376,546	3,202,015	3,595,879
Total loans and leases	29,589	27,264	162,277	169,557	240,035	225,138	2,013,627	2,208,697
Reserve for losses	417	392	2,335	2,464	3,987	3,489	41,599	42,278
Securities	12,460	12,078	65,018	70,095	83,601	90,302	492,623	581,132
Other real estate owned	78	75	281	286	215	174	1,502	1,406
Noncurrent loans and leases	326	322	1,596	1,561	2,339	1,915	33,905	31,075
Total deposits	42,188	38,961	210,866	219,663	257,961	247,007	2,054,756	2,281,125
Domestic deposits	42,183	38,942	210,763	219,529	255,300	243,997	1,660,630	1,819,583
Equity capital	5,787	5,422	27,027	27,983	42,732	40,437	296,036	316,673
Off-balance-sheet derivatives	25	10	3,253	2,207	28,751	17,165	26,069,129	31,757,361
Performance ratios (annualized %)								
Return on equity	8.55	8.88	11.58	15.23	16.40	13.01	14.68	17.46
Return on assets	1.00	1.03	1.21	1.55	1.77	1.40	1.36	1.55
Net interest income to assets	3.96	3.83	3.92	3.72	3.69	3.47	3.68	3.46
Loss provision to assets	0.39	0.27	0.44	0.30	0.52	0.50	0.98	0.60
Net operating income to assets	0.96	1.02	1.19	1.14	1.72	1.39	1.28	1.52
Noninterest income to assets	1.83	2.12	2.47	2.45	3.20	2.72	2.95	2.89
Noninterest expense to assets	4.13	4.24	4.45	4.29	3.74	3.62	3.75	3.51
Loss provision to loans and leases	0.66	0.45	0.71	0.49	0.85	0.82	1.56	0.97
Net charge-offs to loans and leases	0.50	0.44	0.55	0.51	0.87	0.75	1.39	1.18
Loss provision to net charge-offs	132.40	102.39	128.59	95.84	97.25	109.24	112.23	82.23
Performance ratios (%)								
Percent of institutions unprofitable	15.43	14.20	6.20	4.18	2.38	4.92	4.65	2.17
Percent of institutions with earnings gains	53.51	49.06	63.43	54.64	73.81	47.54	69.77	60.87
Nonint. income to net operating revenue	31.59	35.64	38.68	39.70	46.46	43.95	44.54	45.46
Nonint. expense to net operating revenue	71.42	71.20	69.63	69.60	54.30	58.46	56.54	55.36
Condition ratios (%)								
Nonperforming assets to assets	0.83	0.87	0.72	0.68	0.65	0.56	1.14	0.94
Noncurrent loans to loans	1.10	1.18	0.98	0.92	0.97	0.85	1.68	1.41
Loss reserve to noncurrent loans	127.95	121.77	146.26	157.80	170.46	182.14	122.69	136.05
Loss reserve to loans	1.41	1.44	1.44	1.45	1.66	1.55	2.07	1.91
Equity capital to assets	11.52	11.64	10.35	10.24	10.82	10.74	9.25	8.81
Leverage ratio	11.09	11.17	9.46	9.43	9.42	9.38	7.51	7.33
Risk-based capital ratio	18.27	18.68	15.16	14.91	15.78	15.71	12.12	12.16
Net loans and leases to assets	58.06	57.67	61.25	61.14	59.78	58.86	61.59	60.25
Securities to assets	24.80	25.92	24.90	25.65	21.17	23.98	15.38	16.16
Appreciation in securities (% of par)	2.40	1.03	2.53	1.14	2.39	1.51	2.01	0.75
Residential mortgage assets to assets	22.02	20.73	24.51	23.25	25.98	26.98	24.63	24.32
Total deposits to assets	83.97	83.61	80.76	80.37	65.32	65.60	64.17	63.44
Core deposits to assets	71.11	71.35	68.05	67.81	55.90	56.71	45.93	45.32
Volatile liabilities to assets	14.70	14.38	16.96	17.39	23.57	22.08	32.47	32.67

Loan performance, FDIC-insured national banks by asset size
Fourth quarter 2002 and fourth quarter 2003
(Dollar figures in millions)

	Less than $100M		$100M to $1B		$1B to $10B		Greater than $10B	
	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4
Percent of loans past due 30-89 days								
Total loans and leases	1.53	1.38	1.13	0.98	1.16	0.89	1.13	1.03
Loans secured by real estate (RE)	1.38	1.25	0.98	0.84	1.01	0.68	1.08	0.95
1-4 family residential mortgages	1.86	1.79	1.46	1.37	1.48	1.05	1.44	1.32
Home equity loans	0.90	0.99	0.45	0.39	0.51	0.35	0.63	0.45
Multifamily residential mortgages	0.52	0.45	0.46	0.49	0.38	0.33	0.42	0.58
Commercial RE loans	1.05	1.01	0.64	0.55	0.55	0.39	0.55	0.45
Construction RE loans	1.18	0.86	1.05	0.72	1.01	0.63	0.86	0.65
Commercial and industrial loans	1.53	1.45	1.13	1.02	1.18	0.93	0.69	0.58
Loans to individuals	2.70	2.59	2.21	2.11	1.85	1.83	2.18	2.09
Credit cards	1.99	1.96	3.79	3.67	1.93	2.53	2.61	2.46
Installment loans and other plans	2.79	2.66	1.98	1.83	1.97	1.55	2.08	1.99
All other loans and leases	1.01	0.74	0.75	0.56	0.48	0.28	0.54	0.33
Percent of loans noncurrent								
Total loans and leases	1.10	1.18	0.98	0.92	0.97	0.85	1.68	1.41
Loans secured by real estate (RE)	1.00	1.05	0.84	0.83	0.86	0.65	1.00	1.00
1-4 family residential mortgages	0.82	1.00	0.79	0.76	0.94	0.65	1.05	1.22
Home equity loans	0.28	0.23	0.19	0.17	0.31	0.26	0.33	0.24
Multifamily residential mortgages	0.86	0.82	0.57	0.47	0.27	0.44	0.50	0.45
Commercial RE loans	1.17	1.19	0.96	0.93	0.92	0.75	1.10	1.03
Construction RE loans	1.10	0.88	0.79	0.88	0.83	0.56	1.12	0.70
Commercial and industrial loans	1.54	1.92	1.58	1.25	1.37	1.18	3.26	2.35
Loans to individuals	0.86	0.93	0.97	0.94	1.12	1.24	1.70	1.86
Credit cards	1.75	1.86	3.54	3.12	1.74	2.39	2.18	2.22
Installment loans and other plans	0.82	0.90	0.53	0.49	0.82	0.63	1.45	1.73
All other loans and leases	1.24	1.07	0.89	0.98	0.45	0.69	1.16	0.73
Percent of loans charged-off, net								
Total loans and leases	0.50	0.44	0.55	0.51	0.87	0.75	1.39	1.18
Loans secured by real estate (RE)	0.16	0.13	0.13	0.14	0.16	0.14	0.22	0.40
1-4 family residential mortgages	0.17	0.09	0.12	0.14	0.18	0.11	0.17	0.59
Home equity loans	0.11	0.02	0.10	0.04	0.08	0.10	0.24	0.34
Multifamily residential mortgages	0.01	0.03	0.27	0.13	0.11	0.02	0.18	-0.01
Commercial RE loans	0.20	0.28	0.09	0.12	0.21	0.17	0.24	0.03
Construction RE loans	0.15	0.03	0.17	0.22	0.03	0.18	0.26	0.12
Commercial and industrial loans	1.13	1.08	1.10	0.82	1.04	1.09	1.95	1.31
Loans to individuals	1.31	1.15	2.21	2.31	2.88	2.58	3.79	3.53
Credit cards	4.30	2.77	7.43	8.61	5.63	5.54	5.32	5.49
Installment loans and other plans	1.15	1.06	1.32	1.02	1.25	1.02	2.30	1.83
All other loans and leases	0.49	0.46	0.54	0.70	0.55	0.63	0.76	0.23
Loans outstanding ($)								
Total loans and leases	$29,589	$27,264	$162,277	$169,557	$240,035	$225,138	$2,013,627	$2,208,697
Loans secured by real estate (RE)	17,672	16,645	107,011	115,042	130,475	130,492	884,342	992,817
1-4 family residential mortgages	7,538	6,721	39,872	38,251	58,014	51,633	468,482	508,502
Home equity loans	479	495	5,367	6,622	9,150	9,772	126,062	175,819
Multifamily residential mortgages	457	424	3,915	4,456	5,057	4,755	24,539	26,015
Commercial RE loans	5,400	5,249	41,441	46,472	40,845	45,002	165,741	173,216
Construction RE loans	1,709	1,785	11,508	13,780	15,279	16,974	66,865	71,677
Farmland loans	2,089	1,971	4,907	5,458	1,699	1,846	4,530	4,343
RE loans from foreign offices	0	0	1	3	431	511	28,124	33,245
Commercial and industrial loans	4,839	4,389	27,554	27,632	45,349	41,956	468,308	426,051
Loans to individuals	3,671	3,202	18,140	17,111	45,451	37,372	383,343	470,301
Credit cards*	204	139	2,731	3,000	16,954	13,728	190,082	234,025
Other revolving credit plans	61	47	370	352	2,455	2,025	30,357	30,506
Installment loans	3,406	3,015	15,039	13,760	26,042	21,619	162,905	205,770
All other loans and leases	3,447	3,057	9,768	9,958	18,857	15,417	279,750	321,100
Less: Unearned income	40	29	196	186	96	99	2,118	1,571

Key indicators, FDIC-insured national banks by region
Fourth quarter 2003
(Dollar figures in millions)

	Northeast	Southeast	Central	Midwest	Southwest	West	All institutions
Number of institutions reporting	221	232	397	416	575	160	2,001
Total employees (FTEs)	300,024	222,059	214,657	57,805	88,289	117,676	1,000,510
Selected income data ($)							
Net income	$4,958	$3,692	$3,353	$1,272	$822	$2,139	$16,236
Net interest income	10,601	8,231	7,880	2,802	2,300	5,155	36,970
Provision for loan losses	2,706	85	1,365	631	179	1,029	5,994
Noninterest income	11,410	4,882	5,243	2,724	1,291	4,543	30,093
Noninterest expense	12,190	8,068	7,212	3,004	2,221	5,313	38,008
Net operating income	4,987	3,426	3,074	1,269	822	2,145	15,723
Cash dividends declared	3,728	3,019	3,553	477	694	1,835	13,307
Net charge-offs	3,035	515	1,777	772	183	827	7,109
Selected condition data ($)							
Total assets	1,171,842	1,096,485	1,036,225	241,308	257,378	489,093	4,292,331
Total loans and leases	669,376	612,110	664,219	174,603	158,334	352,015	2,630,656
Reserve for losses	17,185	7,838	10,850	4,690	2,162	5,899	48,623
Securities	212,447	188,526	205,302	33,580	61,044	52,707	753,606
Other real estate owned	198	377	724	114	313	217	1,942
Noncurrent loans and leases	13,416	5,148	8,044	2,134	1,499	4,633	34,874
Total deposits	786,011	740,523	621,398	125,896	195,045	317,884	2,786,756
Domestic deposits	481,655	671,516	556,577	125,892	193,606	292,806	2,322,051
Equity capital	113,692	91,613	83,303	26,707	24,766	50,434	390,515
Off-balance-sheet derivatives	11,782,110	17,197,876	1,936,997	6,425	34,469	596,811	31,554,688
Performance ratios (annualized %)							
Return on equity	17.70	16.12	16.03	19.32	13.34	17.12	16.72
Return on assets	1.72	1.35	1.32	2.16	1.29	1.74	1.53
Net interest income to assets	3.69	3.01	3.09	4.77	3.61	4.18	3.48
Loss provision to assets	0.94	0.03	0.54	1.07	0.28	0.83	0.56
Net operating income to assets	1.73	1.25	1.21	2.16	1.29	1.74	1.48
Noninterest income to assets	3.97	1.79	2.06	4.63	2.02	3.69	2.84
Noninterest expense to assets	4.24	2.95	2.83	5.11	3.48	4.31	3.58
Loss provision to loans and leases	1.67	0.06	0.83	1.50	0.46	1.17	0.92
Net charge-offs to loans and leases	1.87	0.34	1.08	1.83	0.47	0.95	1.10
Loss provision to net charge-offs	89.18	16.45	76.82	81.71	97.65	124.29	84.31
Performance ratios (%)							
Percent of institutions unprofitable	7.69	9.91	7.56	7.69	8.52	11.25	8.45
Percent of institutions with earnings gains	54.75	58.62	44.84	49.52	53.74	56.25	51.97
Nonint. income to net operating revenue	51.84	37.23	39.95	49.29	35.94	46.84	44.87
Nonint. expense to net operating revenue	55.38	61.53	54.95	54.37	61.85	54.78	56.68
Condition ratios (%)							
Nonperforming assets to assets	1.21	0.53	0.88	0.93	0.70	0.99	0.89
Noncurrent loans to loans	2.00	0.84	1.21	1.22	0.95	1.32	1.33
Loss reserve to noncurrent loans	128.09	152.27	134.88	219.75	144.21	127.32	139.42
Loss reserve to loans	2.57	1.28	1.63	2.69	1.37	1.68	1.85
Equity capital to assets	9.70	8.36	8.04	11.07	9.62	10.31	9.10
Leverage ratio	8.45	6.81	7.26	8.72	8.30	8.02	7.70
Risk-based capital ratio	13.33	11.76	12.36	12.92	13.19	13.05	12.65
Net loans and leases to assets	55.66	55.11	63.05	70.41	60.68	70.77	60.15
Securities to assets	18.13	17.19	19.81	13.92	23.72	10.78	17.56
Appreciation in securities (% of par)	0.84	0.77	0.80	1.12	0.66	1.84	0.88
Residential mortgage assets to assets	14.03	31.90	26.93	19.73	27.74	27.98	24.44
Total deposits to assets	67.07	67.54	59.97	52.17	75.78	64.99	64.92
Core deposits to assets	35.42	56.07	49.00	47.99	62.36	50.70	48.03
Volatile liabilities to assets	41.75	23.58	30.09	18.17	23.24	30.44	30.57

Loan performance, FDIC-insured national banks by region
Fourth quarter 2003
(Dollar figures in millions)

	Northeast	Southeast	Central	Midwest	Southwest	West	All institutions
Percent of loans past due 30-89 days							
Total loans and leases	1.14	0.67	1.03	1.30	1.06	1.21	1.02
Loans secured by real estate (RE)	0.68	0.76	1.22	0.57	0.99	0.97	0.91
1-4 family residential mortgages	0.80	1.06	1.95	0.69	1.40	1.48	1.30
Home equity loans	0.38	0.47	0.51	0.38	0.52	0.39	0.45
Multifamily residential mortgages	0.12	0.18	0.88	0.23	0.58	0.59	0.54
Commercial RE loans	0.26	0.36	0.65	0.44	0.70	0.35	0.47
Construction RE loans	0.61	0.22	0.86	0.51	0.84	0.87	0.66
Commercial and industrial loans	0.62	0.27	0.81	1.04	0.99	0.67	0.64
Loans to individuals	2.23	1.58	1.65	2.49	1.85	2.18	2.08
Credit cards	2.39	1.64	2.17	2.73	2.39	2.53	2.48
Installment loans and other plans	2.52	1.67	1.66	1.62	1.89	1.67	1.95
All other loans and leases	0.38	0.15	0.35	0.34	0.59	0.76	0.34
Percent of loans noncurrent							
Total loans and leases	2.00	0.84	1.21	1.22	0.95	1.32	1.33
Loans secured by real estate (RE)	1.02	0.51	1.34	0.52	0.89	1.21	0.95
1-4 family residential mortgages	0.92	0.49	1.95	0.34	0.98	1.87	1.14
Home equity loans	0.20	0.16	0.35	0.30	0.22	0.21	0.24
Multifamily residential mortgages	0.49	0.18	0.59	0.38	0.40	0.54	0.45
Commercial RE loans	1.01	0.76	1.33	0.75	0.82	0.81	0.97
Construction RE loans	0.66	0.68	0.82	0.85	0.62	0.56	0.71
Commercial and industrial loans	3.12	2.06	1.96	1.08	1.25	1.44	2.19
Loans to individuals	2.56	0.55	0.65	2.20	0.59	1.57	1.78
Credit cards	2.29	1.32	1.59	2.57	1.78	2.03	2.24
Installment loans and other plans	3.65	0.58	0.49	0.81	0.54	0.68	1.55
All other loans and leases	1.00	0.80	0.45	0.66	1.15	0.94	0.74
Percent of loans charged-off, net							
Total loans and leases	1.87	0.34	1.08	1.83	0.47	0.95	1.10
Loans secured by real estate (RE)	0.14	0.11	0.99	0.09	0.17	0.08	0.34
1-4 family residential mortgages	0.05	0.12	1.88	0.06	0.20	0.05	0.52
Home equity loans	0.14	0.02	0.78	0.12	0.24	0.11	0.32
Multifamily residential mortgages	0.03	-0.01	0.03	0.11	0.22	-0.16	0.01
Commercial RE loans	0.14	0.09	-0.04	0.19	0.11	0.12	0.07
Construction RE loans	0.01	0.18	0.21	0.05	0.09	0.09	0.14
Commercial and industrial loans	1.79	0.90	1.23	0.91	0.88	0.98	1.26
Loans to individuals	4.22	0.96	2.12	5.22	1.44	3.59	3.41
Credit cards	5.53	3.08	4.80	6.72	4.64	4.88	5.54
Installment loans and other plans	2.67	0.95	1.55	0.72	1.27	0.99	1.71
All other loans and leases	0.35	0.13	0.36	0.25	0.63	-0.32	0.26
Loans outstanding ($)							
Total loans and leases	$669,376	$612,110	$664,219	$174,603	$158,334	$352,015	$2,630,656
Loans secured by real estate (RE)	190,769	365,138	327,338	65,086	101,729	204,936	1,254,997
1-4 family residential mortgages	78,498	212,452	140,858	34,667	34,999	103,632	605,107
Home equity loans	36,301	42,856	59,814	4,906	9,553	39,279	192,708
Multifamily residential mortgages	3,863	8,310	14,176	1,826	2,562	4,913	35,650
Commercial RE loans	37,201	69,645	75,017	15,428	31,250	41,398	269,939
Construction RE loans	7,724	27,327	33,217	4,884	16,608	14,455	104,215
Farmland loans	654	1,770	3,753	3,374	2,809	1,258	13,618
RE loans from foreign offices	26,527	2,779	503	0	3,949	1	33,758
Commercial and industrial loans	149,533	113,942	131,009	23,956	33,002	48,586	500,027
Loans to individuals	225,565	56,888	83,800	62,921	15,728	83,085	527,986
Credit cards	128,251	459	14,462	49,900	818	57,003	250,892
Other revolving credit plans	19,708	3,050	4,831	507	575	4,258	32,930
Installment loans	77,605	53,379	64,507	12,514	14,335	21,824	244,163
All other loans and leases	104,936	76,280	122,142	22,661	8,001	15,512	349,531
Less: Unearned income	1,426	138	69	21	127	103	1,884

Key indicators, FDIC-insured commercial banks
Annual 1999—2002, year-to-date through December 31, 2003, fourth quarter 2002, and fourth quarter 2003
(Dollar figures in millions)

	1999	2000	2001	2002	Preliminary 2003YTD	2002Q4	Preliminary 2003Q4
Number of institutions reporting	8,580	8,315	8,079	7,887	7,769	7,887	7,769
Total employees (FTEs)	1,657,628	1,670,758	1,701,717	1,745,507	1,759,081	1,745,507	1,759,081
Selected income data ($)							
Net income	$71,528	$70,795	$73,840	$89,861	$102,578	$21,455	$26,595
Net interest income	191,956	203,584	214,676	236,662	240,023	60,328	62,006
Provision for loan losses	21,803	30,026	43,337	48,196	34,761	12,983	8,439
Noninterest income	144,906	154,247	158,204	172,641	186,481	44,648	48,456
Noninterest expense	204,519	216,831	223,236	233,604	245,956	62,569	64,007
Net operating income	71,294	72,383	71,012	85,560	98,325	19,962	25,936
Cash dividends declared	52,082	53,854	54,206	67,524	77,833	18,356	23,091
Net charge-offs	20,368	24,771	36,474	44,539	37,839	11,324	9,932
Selected condition data ($)							
Total assets	5,735,135	6,245,560	6,552,432	7,077,229	7,602,489	7,077,229	7,602,489
Total loans and leases	3,489,092	3,815,498	3,884,336	4,156,415	4,428,784	4,156,415	4,428,784
Reserve for losses	58,746	64,120	72,273	76,999	77,107	76,999	77,107
Securities	1,046,536	1,078,985	1,172,537	1,334,819	1,456,290	1,334,819	1,456,290
Other real estate owned	2,796	2,912	3,569	4,165	4,235	4,165	4,235
Noncurrent loans and leases	32,999	42,930	54,578	60,549	52,890	60,549	52,890
Total deposits	3,831,058	4,179,567	4,377,558	4,689,835	5,028,866	4,689,835	5,028,866
Domestic deposits	3,175,469	3,472,901	3,748,042	4,031,798	4,287,695	4,031,798	4,287,695
Equity capital	479,690	530,356	593,705	647,599	692,056	647,599	692,056
Off-balance-sheet derivatives	34,819,179	40,570,263	45,326,156	56,078,885	71,081,909	56,078,885	71,081,909
Performance ratios (annualized %)							
Return on equity	15.30	13.99	13.09	14.49	15.31	13.34	15.53
Return on assets	1.31	1.18	1.15	1.33	1.40	1.23	1.41
Net interest income to assets	3.50	3.40	3.35	3.50	3.27	3.45	3.29
Loss provision to assets	0.40	0.50	0.68	0.71	0.47	0.74	0.45
Net operating income to assets	1.30	1.21	1.11	1.27	1.34	1.14	1.38
Noninterest income to assets	2.65	2.58	2.47	2.56	2.54	2.55	2.57
Noninterest expense to assets	3.73	3.62	3.48	3.46	3.35	3.57	3.40
Loss provision to loans and leases	0.66	0.82	1.12	1.21	0.81	1.26	0.77
Net charge-offs to loans and leases	0.61	0.67	0.95	1.12	0.89	1.10	0.91
Loss provision to net charge-offs	107.04	121.14	118.82	108.21	91.86	114.65	84.96
Performance ratios (%)							
Percent of institutions unprofitable	7.52	7.34	8.12	6.64	5.69	11.41	10.00
Percent of institutions with earnings gains	62.81	67.31	56.28	72.73	59.57	61.54	54.45
Nonint. income to net operating revenue	43.02	43.11	42.43	42.18	43.72	42.53	43.87
Nonint. expense to net operating revenue	60.71	60.60	59.87	57.07	57.67	59.60	57.94
Condition ratios (%)							
Nonperforming assets to assets	0.63	0.74	0.92	0.94	0.77	0.94	0.77
Noncurrent loans to loans	0.95	1.13	1.41	1.46	1.19	1.46	1.19
Loss reserve to noncurrent loans	178.02	149.36	132.42	127.17	145.79	127.17	145.79
Loss reserve to loans	1.68	1.68	1.86	1.85	1.74	1.85	1.74
Equity capital to assets	8.36	8.49	9.06	9.15	9.10	9.15	9.10
Leverage ratio	7.79	7.69	7.78	7.83	7.85	7.83	7.85
Risk-based capital ratio	12.15	12.12	12.70	12.77	12.74	12.77	12.74
Net loans and leases to assets	59.81	60.06	58.18	57.64	57.24	57.64	57.24
Securities to assets	18.25	17.28	17.89	18.86	19.16	18.86	19.16
Appreciation in securities (% of par)	-2.31	0.20	0.82	2.22	0.84	2.22	0.84
Residential mortgage assets to assets	20.78	20.19	21.64	23.30	23.28	23.30	23.28
Total deposits to assets	66.80	66.92	66.81	66.27	66.15	66.27	66.15
Core deposits to assets	46.96	46.39	48.72	48.68	48.54	48.68	48.54
Volatile liabilities to assets	34.94	34.97	31.45	31.41	31.04	31.41	31.04

Loan performance, FDIC-insured commercial banks
Annual 1999—2002, year-to-date through December 31, 2003, fourth quarter 2002, and fourth quarter 2003
(Dollar figures in millions)

	1999	2000	2001	2002	Preliminary 2003YTD	2002Q4	Preliminary 2003Q4
Percent of loans past due 30-89 days							
Total loans and leases	1.14	1.25	1.37	1.17	1.03	1.17	1.03
Loans secured by real estate (RE)	1.09	1.26	1.31	1.08	0.90	1.08	0.90
1-4 family residential mortgages	1.43	1.72	1.69	1.49	1.29	1.49	1.29
Home equity loans	0.75	0.98	0.79	0.59	0.45	0.59	0.45
Multifamily residential mortgages	0.57	0.55	0.72	0.46	0.48	0.46	0.48
Commercial RE loans	0.69	0.74	0.90	0.68	0.56	0.68	0.56
Construction RE loans	0.98	1.06	1.21	0.89	0.69	0.89	0.69
Commercial and industrial loans	0.79	0.83	1.01	0.89	0.73	0.89	0.73
Loans to individuals	2.33	2.47	2.46	2.22	2.09	2.22	2.09
Credit cards	2.59	2.66	2.70	2.72	2.54	2.72	2.54
Installment loans and other plans	2.18	2.34	2.54	2.08	1.93	2.08	1.93
All other loans and leases	0.54	0.64	0.84	0.58	0.48	0.58	0.48
Percent of loans noncurrent							
Total loans and leases	0.95	1.13	1.41	1.46	1.19	1.46	1.19
Loans secured by real estate (RE)	0.79	0.81	0.96	0.89	0.86	0.89	0.86
1-4 family residential mortgages	0.82	0.90	0.97	0.93	1.00	0.93	1.00
Home equity loans	0.33	0.37	0.37	0.30	0.24	0.30	0.24
Multifamily residential mortgages	0.41	0.44	0.46	0.38	0.39	0.38	0.39
Commercial RE loans	0.77	0.72	0.96	0.94	0.89	0.94	0.89
Construction RE loans	0.67	0.76	1.06	0.98	0.70	0.98	0.70
Commercial and industrial loans	1.18	1.66	2.41	2.92	2.10	2.92	2.10
Loans to individuals	1.42	1.41	1.43	1.51	1.52	1.51	1.52
Credit cards	2.06	2.01	2.12	2.24	2.21	2.24	2.21
Installment loans and other plans	1.04	0.98	1.12	1.14	1.13	1.14	1.13
All other loans and leases	0.39	0.70	0.97	1.01	0.66	1.01	0.66
Percent of loans charged-off, net							
Total loans and leases	0.61	0.67	0.95	1.12	0.89	1.10	0.91
Loans secured by real estate (RE)	0.08	0.09	0.19	0.15	0.16	0.18	0.25
1-4 family residential mortgages	0.11	0.11	0.22	0.14	0.19	0.15	0.37
Home equity loans	0.15	0.18	0.27	0.19	0.20	0.19	0.26
Multifamily residential mortgages	0.02	0.03	0.04	0.08	0.03	0.12	0.02
Commercial RE loans	0.03	0.05	0.13	0.15	0.13	0.19	0.13
Construction RE loans	0.04	0.05	0.14	0.17	0.13	0.22	0.17
Commercial and industrial loans	0.58	0.81	1.43	1.76	1.26	1.78	1.12
Loans to individuals	2.32	2.43	2.73	3.34	2.98	3.15	3.08
Credit cards	4.46	4.39	5.12	6.38	5.57	5.53	5.72
Installment loans and other plans	1.04	1.18	1.29	1.46	1.40	1.62	1.44
All other loans and leases	0.25	0.23	0.40	0.57	0.40	0.73	0.30
Loans outstanding ($)							
Total loans and leases	$3,489,092	$3,815,498	$3,884,336	$4,156,415	$4,428,784	$4,156,415	$4,428,784
Loans secured by real estate (RE)	1,510,339	1,673,324	1,800,228	2,068,387	2,272,296	2,068,387	2,272,296
1-4 family residential mortgages	737,107	790,028	810,766	945,942	993,935	945,942	993,935
Home equity loans	102,339	127,694	154,193	214,724	284,513	214,724	284,513
Multifamily residential mortgages	53,168	60,406	64,131	71,934	79,875	71,934	79,875
Commercial RE loans	417,633	466,453	505,882	555,990	602,307	555,990	602,307
Construction RE loans	135,632	162,613	193,029	207,452	231,469	207,452	231,469
Farmland loans	31,902	34,096	35,533	38,065	40,694	38,065	40,694
RE loans from foreign offices	32,558	32,033	36,695	34,280	39,503	34,280	39,503
Commercial and industrial loans	969,257	1,051,992	981,130	911,912	870,627	911,912	870,627
Loans to individuals	558,496	606,695	629,412	703,748	770,447	703,748	770,447
Credit cards*	212,147	249,425	232,448	275,957	316,014	275,957	316,014
Other revolving credit plans	.	.	34,202	38,209	37,616	38,209	37,616
Installment loans	346,349	357,269	362,762	389,582	416,818	389,582	416,818
All other loans and leases	454,674	486,400	476,689	475,769	518,283	475,769	518,283
Less: Unearned income	3,673	2,912	3,123	3,401	2,869	3,401	2,869

*Prior to March 2001, credit cards included "Other revolving credit plans."

Key indicators, FDIC-insured commercial banks by asset size
Fourth quarter 2002 and fourth quarter 2003
(Dollar figures in millions)

	Less than $100M		$100M to $1B		$1B to $10B		Greater than $10B	
	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4
Number of institutions reporting	4,168	3,911	3,314	3,434	325	341	80	83
Total employees (FTEs)	82,969	77,504	299,799	300,691	245,664	235,847	1,117,075	1,145,039
Selected income data ($)								
Net income	$434	$410	$2,475	$2,851	$3,503	$3,364	$15,043	$19,970
Net interest income	2,059	1,917	8,587	8,622	8,569	8,455	41,114	43,012
Provision for loan losses	211	144	1,081	738	1,293	1,016	10,398	6,541
Noninterest income	564	578	3,669	3,591	5,814	5,525	34,601	38,762
Noninterest expense	1,881	1,832	7,901	8,011	8,044	7,973	44,742	46,190
Net operating income	418	401	2,425	2,550	3,384	3,328	13,735	19,658
Cash dividends declared	447	431	2,000	2,141	4,233	4,107	11,675	16,412
Net charge-offs	165	138	814	831	1,216	990	9,129	7,974
Selected condition data ($)								
Total assets	211,340	200,689	869,821	910,014	937,436	947,287	5,058,633	5,544,499
Total loans and leases	129,014	121,776	564,081	592,234	568,171	576,587	2,895,149	3,138,188
Reserve for losses	1,884	1,798	8,349	8,524	9,927	9,495	56,839	57,291
Securities	50,655	50,074	200,138	215,237	229,155	241,480	854,871	949,499
Other real estate owned	332	318	1,148	1,190	581	638	2,103	2,090
Noncurrent loans and leases	1,462	1,332	5,436	5,278	6,068	5,479	47,584	40,801
Total deposits	178,351	168,996	707,344	736,815	639,608	645,801	3,164,532	3,477,254
Domestic deposits	178,341	168,976	706,013	735,718	628,922	635,727	2,518,522	2,747,273
Equity capital	23,503	22,625	85,884	90,180	96,930	100,268	441,282	478,983
Off-balance-sheet derivatives	73	111	7,068	6,630	71,926	64,514	56,195,701	71,283,692
Performance ratios (annualized %)								
Return on equity	7.40	7.28	11.59	12.80	14.63	13.72	13.72	16.80
Return on assets	0.83	0.82	1.15	1.27	1.51	1.44	1.20	1.45
Net interest income to assets	3.95	3.86	3.99	3.83	3.70	3.62	3.28	3.13
Loss provision to assets	0.40	0.29	0.50	0.33	0.56	0.44	0.83	0.48
Net operating income to assets	0.80	0.81	1.13	1.13	1.46	1.43	1.10	1.43
Noninterest income to assets	1.08	1.16	1.70	1.60	2.51	2.37	2.76	2.82
Noninterest expense to assets	3.61	3.69	3.67	3.56	3.48	3.42	3.57	3.36
Loss provision to loans and leases	0.66	0.48	0.77	0.50	0.92	0.71	1.45	0.84
Net charge-offs to loans and leases	0.51	0.46	0.58	0.57	0.86	0.70	1.28	1.03
Loss provision to net charge-offs	128.33	104.62	132.70	88.77	106.36	102.67	113.90	82.03
Performance ratios (%)								
Percent of institutions unprofitable	17.06	15.80	5.16	4.08	4.31	4.99	5.00	2.41
Percent of institutions with earnings gains	56.21	51.73	67.05	57.05	72.31	58.65	67.50	57.83
Nonint. income to net operating revenue	21.51	23.15	29.94	29.41	40.43	39.52	45.70	47.40
Nonint. expense to net operating revenue	71.73	73.43	64.47	65.60	55.93	57.03	59.09	56.49
Condition ratios (%)								
Nonperforming assets to assets	0.86	0.83	0.76	0.71	0.72	0.65	1.01	0.80
Noncurrent loans to loans	1.13	1.09	0.96	0.89	1.07	0.95	1.64	1.30
Loss reserve to noncurrent loans	128.87	134.96	153.60	161.49	163.59	173.29	119.45	140.42
Loss reserve to loans	1.46	1.48	1.48	1.44	1.75	1.65	1.96	1.83
Equity capital to assets	11.12	11.27	9.87	9.91	10.34	10.58	8.72	8.64
Leverage ratio	10.66	10.91	9.19	9.32	9.07	9.27	7.23	7.24
Risk-based capital ratio	17.09	17.56	14.18	14.27	14.50	14.61	12.11	12.07
Net loans and leases to assets	60.15	59.78	63.89	64.14	59.55	59.86	56.11	55.57
Securities to assets	23.97	24.95	23.01	23.65	24.44	25.49	16.90	17.13
Appreciation in securities (% of par)	2.43	1.08	2.49	1.16	2.18	1.03	2.15	0.70
Residential mortgage assets to assets	21.66	20.69	23.67	22.28	26.30	26.89	22.74	22.92
Total deposits to assets	84.39	84.21	81.32	80.97	68.23	68.17	62.56	62.72
Core deposits to assets	71.49	71.85	67.97	67.89	55.67	56.01	43.11	43.25
Volatile liabilities to assets	14.48	14.13	17.37	17.58	25.21	24.71	35.68	34.94

Loan performance, FDIC-insured commercial banks by asset size
Fourth quarter 2002 and fourth quarter 2003
(Dollar figures in millions)

	Less than $100M		$100M to $1B		$1B to $10B		Greater than $10B	
	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4	2002Q4	2003Q4
Percent of loans past due 30-89 days								
Total loans and leases	1.60	1.41	1.19	1.03	1.18	0.95	1.15	1.02
Loans secured by real estate (RE)	1.47	1.28	1.04	0.88	0.93	0.71	1.10	0.93
1-4 family residential mortgages	2.05	1.92	1.60	1.50	1.28	1.02	1.47	1.28
Home equity loans	0.61	0.60	0.55	0.39	0.56	0.48	0.60	0.44
Multifamily residential mortgages	0.79	0.72	0.52	0.62	0.34	0.29	0.46	0.49
Commercial RE loans	1.08	0.94	0.72	0.61	0.69	0.56	0.61	0.51
Construction RE loans	1.21	0.87	0.92	0.68	0.90	0.64	0.85	0.71
Commercial and industrial loans	1.69	1.53	1.30	1.07	1.31	0.99	0.74	0.62
Loans to individuals	2.84	2.71	2.29	2.29	2.12	2.22	2.21	2.04
Credit cards	2.04	2.47	4.11	5.41	2.72	3.20	2.69	2.42
Installment loans and other plans	2.91	2.75	2.13	1.96	1.95	1.81	2.06	1.91
All other loans and leases	0.93	0.72	0.80	0.70	0.69	0.45	0.54	0.46
Percent of loans noncurrent								
Total loans and leases	1.13	1.09	0.96	0.89	1.07	0.95	1.64	1.30
Loans secured by real estate (RE)	1.00	0.96	0.83	0.79	0.88	0.80	0.91	0.88
1-4 family residential mortgages	0.93	0.99	0.80	0.81	0.90	0.84	0.96	1.06
Home equity loans	0.28	0.22	0.24	0.21	0.30	0.28	0.31	0.23
Multifamily residential mortgages	0.73	0.51	0.49	0.47	0.27	0.48	0.37	0.32
Commercial RE loans	1.11	1.05	0.89	0.84	0.91	0.89	0.98	0.91
Construction RE loans	1.06	0.82	0.91	0.80	1.13	0.73	0.95	0.62
Commercial and industrial loans	1.65	1.71	1.47	1.27	1.73	1.40	3.36	2.35
Loans to individuals	1.02	1.01	0.96	0.88	1.05	1.11	1.65	1.63
Credit cards	1.45	1.74	3.49	3.08	2.00	2.24	2.24	2.19
Installment loans and other plans	1.03	1.01	0.65	0.61	0.63	0.55	1.33	1.30
All other loans and leases	1.17	1.01	1.04	1.04	0.79	0.77	1.02	0.62
Percent of loans charged-off, net								
Total loans and leases	0.51	0.46	0.58	0.57	0.86	0.70	1.28	1.03
Loans secured by real estate (RE)	0.15	0.14	0.16	0.15	0.18	0.18	0.19	0.31
1-4 family residential mortgages	0.17	0.15	0.13	0.15	0.16	0.12	0.16	0.45
Home equity loans	0.24	0.12	0.08	0.07	0.15	0.18	0.21	0.29
Multifamily residential mortgages	0.05	0.01	0.12	0.09	0.09	0.03	0.14	-0.01
Commercial RE loans	0.15	0.19	0.17	0.17	0.19	0.21	0.21	0.05
Construction RE loans	0.25	0.10	0.29	0.17	0.25	0.34	0.17	0.10
Commercial and industrial loans	1.26	1.22	1.35	1.01	1.33	0.93	1.92	1.17
Loans to individuals	1.30	1.19	2.15	3.05	2.79	2.82	3.36	3.16
Credit cards	4.13	2.94	8.91	18.41	6.25	6.18	5.35	5.37
Installment loans and other plans	1.24	1.15	1.27	1.07	1.12	1.13	1.80	1.54
All other loans and leases	0.52	0.37	0.63	0.59	0.70	0.53	0.75	0.26
Loans outstanding ($)								
Total loans and leases	$129,014	$121,776	$564,081	$592,234	$568,171	$576,587	$2,895,149	$3,138,188
Loans secured by real estate (RE)	77,697	75,240	386,175	415,811	330,105	359,549	1,274,410	1,421,696
1-4 family residential mortgages	32,733	29,976	132,649	127,958	125,281	123,757	655,279	712,244
Home equity loans	2,291	2,421	19,471	22,824	22,605	26,923	170,357	232,345
Multifamily residential mortgages	1,781	1,745	13,807	16,026	14,810	17,355	41,536	44,747
Commercial RE loans	23,393	23,405	154,413	171,684	118,706	134,666	259,478	272,551
Construction RE loans	7,464	7,726	49,177	58,763	43,487	50,542	107,324	114,437
Farmland loans	10,035	9,966	16,625	18,519	4,171	5,238	7,234	6,971
RE loans from foreign offices	0	0	33	35	1,045	1,067	33,202	38,401
Commercial and industrial loans	21,651	19,901	95,805	96,943	109,373	106,011	685,083	647,772
Loans to individuals	14,763	13,007	54,169	50,756	92,427	78,249	542,389	628,435
Credit cards*	363	286	6,303	5,811	30,223	27,196	239,068	282,721
Other revolving credit plans	240	190	1,638	1,642	3,787	3,162	32,544	32,622
Installment loans	14,160	12,531	46,228	43,304	58,417	47,891	270,778	313,092
All other loans and leases	15,016	13,716	28,504	29,294	36,748	33,228	395,501	442,045
Less: Unearned income	113	88	573	570	482	450	2,233	1,760

Key indicators, FDIC-insured commercial banks by region
Fourth quarter 2003
(Dollar figures in millions)

	Northeast	Southeast	Central	Midwest	Southwest	West	All institutions
Number of institutions reporting	612	1,071	1,650	2,020	1,732	684	7,769
Total employees (FTEs)	537,139	411,442	341,904	112,761	168,561	187,274	1,759,081
Selected income data ($)							
Net income	$8,855	$5,953	$4,931	$1,755	$1,390	$3,711	$26,595
Net interest income	18,128	14,054	11,998	4,456	4,363	9,007	62,006
Provision for loan losses	3,127	819	1,810	811	357	1,514	8,439
Noninterest income	20,311	9,039	7,450	3,215	1,976	6,466	48,456
Noninterest expense	22,559	13,926	10,964	4,348	4,051	8,158	64,007
Net operating income	8,823	5,705	4,578	1,745	1,379	3,705	25,936
Cash dividends declared	5,919	7,040	5,037	900	1,214	2,980	23,091
Net charge-offs	3,871	1,136	2,244	1,099	346	1,235	9,932
Selected condition data ($)							
Total assets	2,557,369	1,751,903	1,551,666	411,528	471,537	858,486	7,602,489
Total loans and leases	1,211,600	1,053,574	995,548	289,422	286,894	591,745	4,428,784
Reserve for losses	26,590	14,178	15,839	6,521	3,999	9,981	77,107
Securities	490,755	320,146	320,648	71,295	120,070	133,377	1,456,290
Other real estate owned	512	996	1,250	335	708	434	4,235
Noncurrent loans and leases	20,252	8,483	11,669	3,167	2,800	6,519	52,890
Total deposits	1,609,903	1,195,992	998,028	262,985	371,165	590,793	5,028,866
Domestic deposits	1,075,295	1,108,626	910,083	262,981	369,709	561,001	4,287,695
Equity capital	226,146	153,702	128,954	44,254	45,918	93,081	692,056
Off-balance-sheet derivatives	50,960,722	17,358,505	2,051,648	9,770	35,751	665,513	71,081,909
Performance ratios (annualized %)							
Return on equity	15.86	15.66	15.26	16.02	12.22	16.29	15.53
Return on assets	1.40	1.37	1.29	1.74	1.19	1.74	1.41
Net interest income to assets	2.86	3.24	3.13	4.41	3.74	4.23	3.29
Loss provision to assets	0.49	0.19	0.47	0.80	0.31	0.71	0.45
Net operating income to assets	1.39	1.32	1.19	1.73	1.18	1.74	1.38
Noninterest income to assets	3.20	2.08	1.94	3.18	1.69	3.04	2.57
Noninterest expense to assets	3.56	3.21	2.86	4.31	3.47	3.83	3.40
Loss provision to loans and leases	1.04	0.31	0.73	1.15	0.50	1.04	0.77
Net charge-offs to loans and leases	1.29	0.43	0.91	1.55	0.49	0.85	0.91
Loss provision to net charge-offs	80.78	72.09	80.64	73.82	103.18	122.58	84.96
Performance ratios (%)							
Percent of institutions unprofitable	10.13	11.48	7.45	9.85	10.62	12.57	10.00
Percent of institutions with earnings gains	58.33	61.25	47.94	52.82	54.91	59.65	54.45
Nonint. income to net operating revenue	52.84	39.14	38.31	41.91	31.17	41.79	43.87
Nonint. expense to net operating revenue	58.69	60.30	56.38	56.69	63.91	52.73	57.94
Condition ratios (%)							
Nonperforming assets to assets	0.85	0.56	0.85	0.85	0.74	0.81	0.77
Noncurrent loans to loans	1.67	0.81	1.17	1.09	0.98	1.10	1.19
Loss reserve to noncurrent loans	131.30	167.14	135.73	205.90	142.83	153.09	145.79
Loss reserve to loans	2.19	1.35	1.59	2.25	1.39	1.69	1.74
Equity capital to assets	8.84	8.77	8.31	10.75	9.74	10.84	9.10
Leverage ratio	7.56	7.32	7.68	9.06	8.69	9.02	7.85
Risk-based capital ratio	12.85	11.97	12.41	13.35	13.92	13.72	12.74
Net loans and leases to assets	46.34	59.33	63.14	68.74	59.99	67.77	57.24
Securities to assets	19.19	18.27	20.66	17.32	25.46	15.54	19.16
Appreciation in securities (% of par)	0.51	1.14	0.76	1.15	0.92	1.29	0.84
Residential mortgage assets to assets	17.77	29.17	25.52	19.05	26.67	23.74	23.28
Total deposits to assets	62.95	68.27	64.32	63.90	78.71	68.82	66.15
Core deposits to assets	34.57	55.98	52.13	57.20	64.62	55.52	48.54
Volatile liabilities to assets	43.40	23.44	28.36	16.57	21.24	26.87	31.04

Loan performance, FDIC-insured commercial banks by region
Fourth quarter 2003
(Dollar figures in millions)

	Northeast	Southeast	Central	Midwest	Southwest	West	All institutions
Percent of loans past due 30-89 days							
Total loans and leases	1.15	0.80	1.02	1.22	1.14	1.03	1.03
Loans secured by real estate (RE)	0.89	0.77	1.12	0.73	1.04	0.81	0.90
1-4 family residential mortgages	1.08	1.11	1.77	1.00	1.59	1.33	1.29
Home equity loans	0.41	0.44	0.49	0.54	0.53	0.38	0.45
Multifamily residential mortgages	0.17	0.36	0.88	0.29	0.55	0.34	0.48
Commercial RE loans	0.58	0.49	0.72	0.54	0.71	0.34	0.56
Construction RE loans	0.84	0.45	0.85	0.59	0.80	0.80	0.69
Commercial and industrial loans	0.69	0.50	0.83	1.05	1.08	0.78	0.73
Loans to individuals	2.23	1.96	1.66	2.61	2.11	1.93	2.09
Credit cards	2.49	3.23	2.18	2.98	2.23	2.24	2.54
Installment loans and other plans	2.29	1.77	1.66	1.74	2.16	1.61	1.93
All other loans and leases	0.63	0.19	0.44	0.47	0.70	0.69	0.48
Percent of loans noncurrent							
Total loans and leases	1.67	0.81	1.17	1.09	0.98	1.10	1.19
Loans secured by real estate (RE)	0.82	0.56	1.23	0.64	0.91	0.95	0.86
1-4 family residential mortgages	0.77	0.58	1.70	0.51	0.96	1.48	1.00
Home equity loans	0.18	0.18	0.33	0.34	0.23	0.21	0.24
Multifamily residential mortgages	0.22	0.19	0.67	0.48	0.51	0.30	0.39
Commercial RE loans	0.83	0.73	1.28	0.76	0.93	0.70	0.89
Construction RE loans	0.70	0.55	0.95	0.74	0.65	0.65	0.70
Commercial and industrial loans	3.24	1.66	1.81	1.19	1.26	1.43	2.10
Loans to individuals	2.15	0.86	0.61	2.06	0.70	1.28	1.52
Credit cards	2.38	2.00	1.59	2.59	1.57	1.82	2.21
Installment loans and other plans	2.23	0.64	0.48	0.76	0.68	0.46	1.13
All other loans and leases	0.71	0.66	0.46	0.74	1.35	0.93	0.66
Percent of loans charged-off, net							
Total loans and leases	1.29	0.43	0.91	1.55	0.49	0.85	0.91
Loans secured by real estate (RE)	0.09	0.13	0.72	0.11	0.17	0.08	0.25
1-4 family residential mortgages	0.05	0.14	1.36	0.08	0.22	0.05	0.37
Home equity loans	0.10	0.10	0.62	0.20	0.24	0.10	0.26
Multifamily residential mortgages	0.01	0.02	0.03	0.09	0.18	-0.06	0.02
Commercial RE loans	0.11	0.14	0.10	0.17	0.13	0.14	0.13
Construction RE loans	0.13	0.11	0.37	0.07	0.10	0.08	0.17
Commercial and industrial loans	1.33	0.85	1.18	0.95	1.01	1.12	1.12
Loans to individuals	3.72	1.63	1.82	5.94	1.43	3.06	3.08
Credit cards	5.80	4.34	4.78	8.59	4.37	4.47	5.72
Installment loans and other plans	1.98	1.05	1.34	0.69	1.29	1.01	1.44
All other loans and leases	0.28	0.19	0.45	0.27	0.67	0.01	0.30
Loans outstanding ($)							
Total loans and leases	$1,211,600	$1,053,574	$995,548	$289,422	$286,894	$591,745	$4,428,784
Loans secured by real estate (RE)	447,141	641,661	521,116	135,675	188,420	338,281	2,272,296
1-4 family residential mortgages	218,752	308,473	206,445	55,812	64,696	139,757	993,935
Home equity loans	58,131	75,486	83,436	7,839	11,863	47,758	284,513
Multifamily residential mortgages	16,544	16,778	23,112	4,134	5,246	14,061	79,875
Commercial RE loans	97,921	157,242	141,853	41,021	65,021	99,249	602,307
Construction RE loans	22,487	75,759	55,945	14,022	30,362	32,894	231,469
Farmland loans	1,670	5,143	9,775	12,848	7,284	3,973	40,694
RE loans from foreign offices	31,636	2,779	550	0	3,949	589	39,503
Commercial and industrial loans	263,989	192,718	212,845	44,525	54,434	102,115	870,627
Loans to individuals	311,380	119,628	112,030	72,781	29,886	124,743	770,447
Credit cards	149,165	21,264	15,521	51,952	1,439	76,672	316,014
Other revolving credit plans	21,030	4,510	5,361	653	786	5,276	37,616
Installment loans	141,185	93,854	91,148	20,176	27,661	42,795	416,818
All other loans and leases	190,729	99,930	149,700	36,494	14,401	27,029	518,283
Less: Unearned income	1,640	363	143	53	247	423	2,869

Glossary

Data Sources

Data are from the Federal Financial Institutions Examination Council (FFIEC) Reports of Condition and Income (call reports) submitted by all FDIC-insured, national-chartered and state-chartered commercial banks and trust companies in the United States and its territories. Uninsured banks, savings banks, savings associations, and U.S. branches and agencies of foreign banks are excluded from these tables. All data are collected and presented based on the location of each reporting institution's main office. Reported data may include assets and liabilities located outside of the reporting institution's home state.

The data are stored on and retrieved from the OCC's Integrated Banking Information System (IBIS), which is obtained from the FDIC's Research Information System (RIS) database.

Computation Methodology

For performance ratios constructed by dividing an income statement (flow) item by a balance sheet (stock) item, the income item for the period was annualized (multiplied by the number of periods in a year) and divided by the average balance sheet item for the period (beginning-of-period amount plus end-of-period amount plus any interim periods, divided by the total number of periods). For "pooling-of-interest" mergers, prior period(s) balance sheet items of "acquired" institution(s) are included in balance sheet averages because the year-to-date income reported by the "acquirer" includes the year-to-date results of "acquired" institutions. No adjustments are made for "purchase accounting" mergers because the year-to-date income reported by the "acquirer" does not include the prior-to-merger results of "acquired" institutions.

Definitions

Commercial real estate loans—loans secured by nonfarm nonresidential properties.

Construction real estate loans—includes loans for all property types under construction, as well as loans for land acquisition and development.

Core deposits—the sum of transaction deposits plus savings deposits plus small time deposits (under $100,000).

IBIS—the OCC's Integrated Banking Information System.

Leverage ratio—Tier 1 capital divided by adjusted tangible total assets.

Loans to individuals—includes outstanding credit card balances and other secured and unsecured installment loans.

Net charge-offs to loan and lease reserve—total loans and leases charged off (removed from balance sheet because of uncollectibility), less amounts recovered on loans and leases previously charged off.

Net loans and leases to assets—total loans and leases net of the reserve for losses.

Net operating income—income excluding discretionary transactions such as gains (or losses) on the sale of investment securities and extraordinary items. Income taxes subtracted from operating income have been adjusted to exclude the portion applicable to securities gains (or losses).

Net operating revenue—the sum of net interest income plus noninterest income.

Noncurrent loans and leases—the sum of loans and leases 90 days or more past due plus loans and leases in nonaccrual status.

Nonperforming assets—the sum of noncurrent loans and leases plus noncurrent debt securities and other assets plus other real estate owned.

Number of institutions reporting—the number of institutions that actually filed a financial report.

Off-balance-sheet derivatives—the notional value of futures and forwards, swaps, and options contracts; beginning March 31, 1995, new reporting detail permits the exclusion of spot foreign exchange contracts. For March 31, 1984 through December 31, 1985, only foreign exchange futures and forwards contracts were reported; beginning March 31, 1986, interest rate swaps contracts were reported; beginning March 31, 1990, banks began to report interest rate and other futures and forwards contracts, foreign exchange and other swaps contracts, and all types of option contracts.

Other real estate owned—primarily foreclosed property. Direct and indirect investments in real estate ventures are excluded. The amount is reflected net of valuation allowances.

Percent of institutions unprofitable—the percent of institutions with negative net income for the respective period.

Percent of institutions with earnings gains—the percent of institutions that increased their net income (or decreased their losses) compared to the same period a year earlier.

Reserve for losses—the sum of the allowance for loan and lease losses plus the allocated transfer risk reserve.

Residential mortgage assets—the sum of 1- to 4-family residential mortgages plus mortgage-backed securities.

Return on assets (ROA)—net income (including gains or losses on securities and extraordinary items) as a percentage of average total assets.

Return on equity (ROE)—net income (including gains or losses on securities and extraordinary items) as a percentage of average total equity capital.

Risk-based capital ratio—total capital divided by risk weighted assets.

Risk-weighted assets—assets adjusted for risk-based capital definitions which include on-balance-sheet as well as off-balance-sheet items multiplied by risk weights that range from zero to 100 percent.

Securities—excludes securities held in trading accounts. Effective March 31, 1994 with the full implementation of Financial Accounting Standard (FAS) 115, securities classified by banks as "held-to-maturity" are reported at their amortized cost, and securities classified a "available-for-sale" are reported at their current fair (market) values.

Securities gains (losses)—net pre-tax realized gains (losses) on held-to-maturity and available-for-sale securities.

Total capital—the sum of Tier 1 and Tier 2 capital. Tier 1 capital consists of common equity capital plus noncumulative perpetual preferred stock plus minority interest in consolidated subsidiaries less goodwill and other ineligible intangible assets. Tier 2 capital consists of subordinated debt plus intermediate-term preferred stock plus cumulative long-term preferred stock plus a portion of a bank's allowance for loan and lease losses. The amount of eligible intangibles (including mortgage servicing rights) included in Tier 1 capital and the amount of the allowance included in Tier 2 capital are limited in accordance with supervisory capital regulations.

Volatile liabilities—the sum of large-denomination time deposits plus foreign-office deposits plus federal funds purchased plus securities sold under agreements to repurchase plus other borrowings. Beginning March 31, 1994, new reporting detail permits the exclusion of other borrowed money with original maturity of more than one year; previously, all other borrowed money was included. Also beginning March 31, 1994, the newly reported "trading liabilities less revaluation losses on assets held in trading accounts" is included.

Quarterly Journal

Special Interest—On Preemption and Visitorial Powers

Special Interest—On Preemption and Visitorial Powers

The Federal Character of the National Bank Charter[1]

The OCC issued two regulations that reflect fundamental characteristics of the national banking system. The first clarifies what types of state laws apply to national banks, while the second clarifies issues related to the OCC's exclusive visitorial powers over national banks. As part of the rulemaking on the applicability of state laws to national banks, the OCC also established a strong standard to ensure that predatory lending does not gain a foothold in the national banking system. The OCC took this step despite widespread agreement that predatory lending remains a problem for unregulated financial institutions, rather than for regulated commercial banks.

In January 2004, the OCC published the following documents explaining the rulemaking on national bank preemption and the OCC's visitorial powers:

- News Release 2004–03
- Statement of Comptroller of the Currency John D. Hawke, Jr. Regarding the Issuance of Regulations Concerning Preemption and Visitorial Powers
- Preemption Final Rule
- Visitorial Powers Final Rule
- Questions and Answers on the Preemption Rulemaking
- Questions and Answers on the Visitorial Powers Rulemaking
- Two tables comparing OCC's preemption rules with those of the Office of Thrift Supervision and the National Credit Union Administration

[1]Also available on the OCC's public Web site at http://www.occ.treas.gov/newrules.htm.

NEWS RELEASE NR 2004-3

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January 7, 2004
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OCC Issues Final Rules on National Bank Preemption and Visitorial Powers; Includes Strong Standard to Keep Predatory Lending Out of National Banks

WASHINGTON—The Office of the Comptroller of the Currency issued two final rules today that reflect the federal character of the national banking system. The regulations enhance the ability of national banks to plan their activities with predictability and to operate efficiently, subject to effective and efficient supervision.

The first rule codifies a series of court decisions and OCC interpretations, establishes symmetry with federal thrifts regarding the types of state laws that apply to national banks, and includes a strong anti-predatory lending standard. The second rule clarifies the scope of the OCC's visitorial authority under federal law.

The new rules respond to numerous questions the OCC has received in recent years about the extent to which state laws apply to national banks and the authority of state or other agencies to examine or take actions against national banks. National banks are already subject to a comprehensive set of federal requirements, and the overlay of multiple state law standards would impose unnecessary and excessively costly burdens.

"When national banks are unable to operate under uniform, consistent and predictable standards, their business suffers and so does the safety and soundness of the national banking system," said Comptroller of the Currency John D. Hawke, Jr. "The application of multiple and often unpredictable state laws interferes with their ability to plan and manage their business, as well as their ability to serve the people, the communities and the economy of the United States."

Mr. Hawke noted that national banks operate in an environment characterized by rapidly-evolving technology, a highly mobile customer base and credit markets that are national, if not international in scope. In that environment, the proliferation of state and local laws leads to higher costs that banks must either absorb themselves, pass on to their customers, or avoid by dropping products and reducing the availability of credit.

While states are free to pass laws governing the operation of the institutions they supervise and regulate, customers of national banks will continue to benefit from an array of consumer protections available through federal law, OCC regulations and the rigorous supervision of national banks and their subsidiaries by the OCC, the Comptroller added.

In the area of predatory lending, national bank customers would be protected by the comprehensive standard included in today's rulemaking. The standard, which applies to all consumer lending activities, codifies the OCC's pioneering approach to combating unfair and deceptive practices and bars loans that rely upon the foreclosure value of the collateral for repayment, a restriction that will prevent lenders from extending credit with an eye toward seizing a borrower's home.

"We have seen only isolated cases of abusive practices among national banks," Mr. Hawke added. "But when we have identified problems, we have taken quick and effective action. Our enforcement actions have resulted in the payment of hundreds of millions of dollars in restitution to national bank customers."

The Comptroller said that the OCC's anti-predatory lending standard is a preventive measure that is aimed at keeping abuses out of the national banking system.

"Predatory lending is a very significant problem in many American communities, but there is scant evidence that regulated banks are engaged in abusive or predatory practices," he said. "Our regulation will ensure that predatory lending does not gain a foothold in the national banking system."

The prohibition on basing loans on the foreclosure value of the borrower's collateral is grounded in safety and soundness principles. However, in response to comment letters noting that such practices are common in business lending and with some types of loans such as reverse mortgages, the OCC specified that the rule applies only to consumer loans and that loans could be based on collateral values if the borrower and lender agree that it is likely the collateral will be used to repay the debt.

While the OCC does not have legal authority to issue regulations defining particular acts or practices as unfair and deceptive practices under the Federal Trade Commission (FTC) Act, the agency does have the authority to take enforcement actions where a national bank is found to have engaged in unfair or deceptive practices. The rule thus specifically provides that national banks shall not engage in unfair and deceptive practices within the meaning of Section 5 of the act. In recent years, the OCC has taken a series of enforcement actions based on Section 5 of the FTC Act.

The preemption rule deals with lending, deposit taking, and other national bank activities. OCC regulations already included a partial list of state laws that do not apply to national bank real estate lending activities, which are covered by a separate federal statute, 12 USC 371.

The preemption rule issued today builds on the current regulation by providing that state laws that "obstruct, impair, or condition" a national bank's powers in the areas of lending, deposit taking and other national bank operations are not applicable to national banks. The rule identifies additional specific types of state laws that apply to national banks and specific types of laws that do not apply.

Examples of laws that do not apply to national banks are those that regulate loan terms, require state licenses, or impose conditions on deposit or credit relationships. Laws that do not affect the manner or content of national bank activities, such as those dealing with contracts, torts, taxation, or zoning, are not preempted under the rule.

"Federal preemption is not a new idea," Mr. Hawke said. "Its roots lie in the Supremacy Clause of the Constitution, and the courts have repeatedly held that the states cannot restrict the federally-authorized activities of national banks."

The Comptroller noted that the list of preempted state laws is nearly identical to the list incorporated into the regulations of the Office of Thrift Supervision, the federal agency that supervises nationally chartered thrift institutions.

The visitorial powers rule clarifies two points concerning the OCC's existing regulation governing its exclusive power to supervise national banks. Under federal statute, "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress. . . ."

The rule clarifies that the scope of the OCC's exclusive visitorial authority applies to the content and conduct of national bank activities authorized under federal law, but not to areas that have nothing to do with the business of banking, such as environmental laws and fire codes.

The regulation also clarifies that the exception for visitorial powers "vested in the courts of justice" pertains to the powers of the judiciary and does not grant state or other government authorities rights they do not otherwise possess to examine or supervise a national bank.

Under existing regulations that were not changed in today's rulemakings, both the visitorial powers rule and the preemption regulation apply to the operating subsidiaries of national banks. They do not apply to financial subsidiaries, nor do they authorize any new powers or activities, such as real estate brokerage.

The two regulations will take effect 30 days after publication in the *Federal Register*.

The two regulations and additional explanatory materials are available on the OCC's Internet site at: http://www.occ.treas.gov/newrules.htm [and are available here on the following pages.]

STATEMENT OF COMPTROLLER OF THE CURRENCY JOHN D. HAWKE, JR. REGARDING THE ISSUANCE OF REGULATIONS CONCERNING PREEMPTION AND VISITORIAL POWERS

January 7, 2004

Today the OCC is issuing two final regulations that concern fundamental characteristics of the national bank charter and fundamental responsibilities of the OCC. Both regulations are important to the future of the national banking system, and will enhance the ability of national banks to plan their activities with predictability and operate efficiently in the modern financial services marketplace, subject to effective and efficient supervision. Both also are solidly grounded in the long-established authority of national banks under federal law and the longstanding responsibilities of the OCC as their supervisor.

The first final regulation clarifies the extent to which the operations of national banks are subject to state laws. The rule identifies the types of state laws that are preempted by the federal powers of national banks under the National Bank Act, as well as various types of state laws that are not preempted. The types of laws that the regulation preempts—including laws regulating loan terms, imposing conditions on lending and deposit relationships, and requiring state licenses—create impediments to the ability of national banks to exercise powers that are granted under federal law. These laws create higher costs and operational burdens that the banks either must shoulder, or pass on to consumers, or that may have the practical effect of driving them out of certain businesses.

The preemption of state laws that limit the powers and activities of federally chartered banks is based on Constitutional principles that have been recognized from the earliest decades of our nation. In fact, the concept was first announced in the Supreme Court's *M'Cullough* v. *Maryland* decision in 1819, a case involving the federally chartered Second Bank of the United States. Precedents of the Supreme Court dating back to 1869 have addressed preemption in the context of national banks and have consistently and repeatedly recognized that national banks were designed to operate, throughout the nation, under uniform, federally set standards of banking operations. Today, as a result of technology and our mobile society, many aspects of the financial services business are unrelated to geography or jurisdictional boundaries, and efforts to apply restrictions and directives that differ based on a geographic source increase the costs of offering products or result in a reduction in their availability, or both. In this environment, the ability of national banks to operate under consistent, uniform national standards administered by the OCC will be a crucial factor in their business future.

Preemption has been a controversial subject of late, however, in large part because of concerns that preemption of state predatory lending laws will expose consumers to abusive and predatory lending practices. I have made clear on a number of occasions that predatory and abusive lend-

ing practices have no place in the national banking system, and we have no evidence that national banks (or their subsidiaries) are engaged in such practices to any discernible degree. Virtually all State Attorneys General have more than once expressed the view that information available to them does not show that banks and their subsidiaries are engaged in abusive or predatory lending practices. On those limited occasions where we have found national banks to be engaged in unacceptable practices, we have taken vigorous enforcement action. We have an array of supervisory measures and enforcement tools available and we are firmly committed to use them to keep such practices out of the national banking system.

To that end, we have taken the extra step of including in our new preemption regulation two new provisions to prevent abusive or predatory lending practices. These new provisions apply to all national banks (and their subsidiaries), wherever in the nation they are located. 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, not based on a reasonable determination of a borrower's ability to repay, but on the lender's calculation of its ability to foreclose on and appropriate the borrower's accumulated equity in his or her home. This practice has particularly tragic results for minorities and the elderly and, as a result of our new regulation, is now specifically banned throughout the national banking system.

The regulation also recognizes that other practices also are associated with predatory lending. While we do not have authority under the Federal Trade Commission Act to adopt rules defining particular acts or practices as unfair or deceptive under that act, (since the act confers exclusive rulemaking authority on the Federal Reserve to define such practices by banks), we do have the authority to take enforcement action where we find unfair and deceptive practices. Our new regulation thus specifically provides that national banks shall not engage in unfair or deceptive practices within the meaning of section 5 of the FTC Act in connection with their lending activities.

The preemption standards in our new regulation are firmly grounded on standards announced by the U.S. Supreme Court in cases that trace back over 130 years, and our authority to adopt the regulation is solidly based on our statutes. Some critics of the regulation have claimed that we are using an incorrect preemption standard; this is simply not so, and the final regulation specifically—and meticulously—explains the sources of our authority to issue the regulation and the standards we use. It is relevant to note in that regard that the laws listed as preempted in our new regulation are virtually identical to those listed as preempted with respect to federal thrifts in existing regulations of the Office of Thrift Supervision.

Other critics have suggested that by codifying in a regulation the types of state laws that are, or are not, preempted as applied to national banks, that the OCC "will demolish" the dual banking system, or "deprive bankers of a choice of charters." Not only do these comments short-change the state banking systems, but the argument is fundamentally backwards. Distinctions between state and federal bank charters, powers, supervision, and regulation are not contrary to the dual

banking system; they are the essence of it. These differences are what make the dual banking system dual. Clarification of how the federal powers of national banks preempt inconsistent state laws is entirely consistent with the distinctions that make the dual banking system dual.

The second regulation that we are issuing today concerns the OCC's exclusive "visitorial powers" with respect to national banks. "Visitorial powers" refers to the authority to examine, supervise and regulate the affairs of a corporate entity. Under the National Bank Act, the OCC has exclusive visitorial powers over national banks. In practice, this means that state officials are not authorized to inspect, examine or regulate national banks, except where another federal law authorizes them to do so. These provisions of the National Bank Act date from the earliest days of the national banking system. They are an integral part of the overall scheme of the national banking system and to the ability of national banks to operate efficiently today, because they help to assure that the business of banking conducted by national banks is subject to uniform, consistent standards and supervision, wherever national banks operate.

Our final rule here clarifies 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, we are the exclusive supervisor of a national bank's banking activities; we do not enforce fire codes, environmental laws, zoning ordinances, generally applicable criminal laws, and the like. The final rule also clarifies that the National Bank Act does not give state officials any authority, in addition to whatever they may otherwise have, to use the court system to exercise visitorial powers over national banks.

This rule also has provoked controversy. As with the preemption regulation, concerns have been expressed that the regulation will undermine the dual banking system, as well as the ability of the states to protect consumers. For the same reasons as I've described above, we think these regulations are fully consistent with the dual banking system. We also are committed to assuring that customers of national banks have strong consumer protections. We apply federal standards of consumer protection and uniform supervisory standards and have been proactive to assure that customers of national banks are not harmed by unfair, deceptive, abusive, or predatory practices. We also have offered to work cooperatively with the states and have encouraged the states to work with us to refer consumer complaints involving national banks to the OCC. This approach, with the OCC applying its resources to protect customers of national banks, and the states directing their efforts to state-supervised entities, would *maximize* overall the regulatory oversight and protection that consumers receive.

Preemption Final Rule

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Parts 7 and 34
[Docket No. 04–04]
RIN 1557–AC73
[Billing Code 4810–33–P]

Bank Activities and Operations; Real Estate Lending and Appraisals

AGENCY: Office of the Comptroller of the Currency, Treasury.
ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing a final rule amending parts 7 and 34 of our regulations to add provisions clarifying the applicability of state law to national banks' operations. The provisions concerning preemption identify types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending, deposit-taking, and other operations. In tandem with these preemption provisions, we are also adopting supplemental anti-predatory lending standards governing national banks' lending activities.

EFFECTIVE DATE: February 12, 2004.

FOR FURTHER INFORMATION CONTACT: For questions concerning the final rule, contact Michele Meyer, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090.

Supplementary Information:

I. Introduction

The OCC is adopting this final rule to specify the types of state laws that do not apply to national banks' lending and deposit taking activities *and* the types of state laws that generally *do* apply to national banks. Other state laws not specifically listed in this final rule also would be preempted under principles of preemption developed by the U.S. Supreme Court, if they obstruct, impair, or condition a national bank's exercise of its lending, deposit-taking, or other powers granted to it under federal law.

This final rule also contains a new provision prohibiting the making of any type of consumer loan based predominantly on the bank's realization of the foreclosure value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. (A consumer

loan for this purpose is a loan made for personal, family, or household purposes). This anti-predatory lending standard applies uniformly to all consumer-lending activities conducted by national banks, wherever located. A second anti-predatory lending standard in the final rule further specifically prohibits national banks from engaging in practices that are unfair and deceptive under the Federal Trade Commission Act (FTC Act)[1] and regulations issued thereunder, in connection with all types of lending.

The provisions concerning preemption of state laws are contained in 12 CFR part 34, which governs national banks' real estate lending, and in three new sections to part 7 added by this final rule: § 7.4007 regarding deposit-taking activities; § 7.4008 regarding non-real-estate-lending activities; and § 7.4009 regarding the other federally authorized activities of national banks. The first anti-predatory-lending standard appears both in part 34, where it applies with respect to real estate consumer lending, and in part 7, with respect to other consumer lending. The provision prohibiting a national bank from engaging in unfair or deceptive practices within the meaning of section 5 of the FTC Act and regulations promulgated thereunder[2] similarly appears in both parts 34 and 7.

II. Description of Proposal

On August 5, 2003, the OCC published a notice of proposed rulemaking (NPRM or proposal) in the *Federal Register* (68 FR 46119) to amend parts 7 and 34 of our regulations to add provisions clarifying the applicability of state law to national banks. These provisions identified the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other federally authorized activities.

A. Proposed Revisions to Part 34—Real Estate Lending

Part 34 of our regulations implements 12 USC 371, which authorizes national banks to engage in real estate lending subject to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." Prior to the adoption of this final rule, subpart A of part 34 explicitly preempted state laws concerning five enumerated areas with respect to national banks and their operating subsidiaries.[3] Those are state laws concerning the loan to value ratio; the schedule for the repayment of principal and interest; the term to maturity of the loan; the aggregate amount of funds that may be loaned upon the security of real estate; and the covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan. Section 34.4(b) stated that the OCC would apply recognized principles of federal preemption in considering whether state laws apply to other aspects of real estate lending by national banks.

[1] 15 USC 45(a)(1).

[2] 12 CFR part 227.

[3] Prior 12 CFR 34.1(b) and 34.4(a).

Pursuant to our authority under 12 USC 93a and 371, we proposed to amend § 34.4(a) and (b) to provide a more extensive enumeration of the types of state law restrictions and requirements that do, and do not, apply to the real estate lending activities of national banks. To the five types of state laws already listed in the regulations, proposed § 34.4(a) added a fuller, but non-exhaustive, list of the types of state laws that are preempted, many of which have already been found to be preempted by the federal courts or OCC opinions. As also explained in the preamble to the NPRM, consistent with the applicable federal judicial precedent, other types of state laws that wholly or partially obstruct the ability of national banks to fully exercise their real estate lending powers might be identified and, if so, preemption of those laws would be addressed by the OCC on a case-by-case basis.

We also noted in the preamble that the nature and scope of the statutory authority to set "requirements and restrictions" on national banks' real estate lending may enable the OCC to "occupy the field" of the regulation of those activities. We invited comment on whether our regulations, like those of the Office of Thrift Supervision (OTS),[4] should state explicitly that federal law occupies the field of real estate lending. We noted that such an occupation of the field necessarily would be applied in a manner consistent with other federal laws, such as the Truth-in-Lending Act (TILA)[5] and the Equal Credit Opportunity Act (ECOA).[6]

Under proposed § 34.4(b), certain types of state laws are not preempted and would apply to national banks to the extent that they do not significantly affect the real estate lending operations of national banks or are otherwise consistent with national banks' federal authority to engage in real estate lending.[7] These types of laws generally pertain to contracts, collection of debts, acquisition and transfer of property, taxation, zoning, crimes, torts, and homestead rights. In addition, any other law that the OCC determines to interfere to only an insignificant extent with national banks' lending authority or is otherwise consistent with national banks' authority to engage in real estate lending would not be preempted.

The proposal retained the general rule stated in § 34.3 that national banks may "make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate, subject to terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." That provision was unchanged, other than by designating it as paragraph (a).

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[4] 12 CFR 560.2.

[5] 15 USC 1601 *et seq.*

[6] 15 USC 1691 *et seq.*

[7] Federal law may explicitly resolve the question of whether state laws apply to the activities of national banks. There are instances where federal law specifically incorporates state law standards, such as the fiduciary powers statute at 12 USC 92a(a). The language used in this final rule "[e]xcept where made applicable by Federal law" refers to this type of situatio

The proposal added a new paragraph (b), prescribing an explicit, safety and soundness-based anti-predatory lending standard to the general statement of authority concerning lending. Proposed § 34.3(b) prohibited a national bank from making a loan subject to 12 CFR part 34 based predominantly on the foreclosure value of the borrower's collateral, rather than on the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources.

This standard augments the other standards that already apply to national bank real estate lending under federal laws. These other standards include those contained in the OCC's Advisory Letters on predatory lending;[8] section 5 of the FTC Act,[9] which makes unlawful "unfair or deceptive acts or practices" in interstate commerce; and many other federal laws that impose standards on lending practices.[10] The NPRM invited commenters to suggest other anti-predatory lending standards that would be appropriate to apply to national bank real estate lending activities.

As a matter of federal law, national bank operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent banks, except where federal law provides otherwise. *See* 12 CFR 5.34(e)(3) and 7.4006. *See also* 12 CFR 34.1(b) (real estate lending activities specifically). Thus, by virtue of regulations in existence prior to the proposal, the proposed changes to part 34, including the new anti-predatory lending standard, applied to both national banks and their operating subsidiaries.

B. Proposed Amendments to Part 7—Deposit-taking, Other Lending, and Bank Operations

The proposal also added three new sections to part 7: § 7.4007 regarding deposit-taking activities, § 7.4008 regarding non-real estate lending activities, and § 7.4009 regarding other national bank operations. The structure of the proposed amendments was the same for §§ 7.4007 and 7.4008 and was similar for § 7.4009. For §§ 7.4007 and 7.4008, the proposal first set out a statement of the authority to engage in the activity. Second, the proposal stated that state laws that obstruct, in whole or in part, a national bank's exercise of the federally authorized power in question are not applicable, and listed several types of state laws that are preempted. As with the list of preempted state laws set forth in the proposed amendments to part 34, this list reflects judicial precedents

[8] *See* OCC Advisory Letter 2003–2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (February 21, 2003) and OCC Advisory Letter 2003–3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (February 21, 2003). These documents are available on the OCC's Web site at http://www.occ.treas.gov/advlst03.htm.

[9] 15 USC 45(a)(1).

[10] There is an existing network of federal laws applicable to national banks that protect consumers in a variety of ways. In addition to TILA and ECOA, national banks are also subject to the standards contained in the Real Estate Settlement Procedures Act, 12 USC 2601 *et seq.,* the Fair Housing Act, 42 USC 3601 *et seq.,* the Home Mortgage Disclosure Act, 12 USC 2801 *et seq.,* the Fair Credit Reporting Act, 15 USC 1681 *et seq.,* the Truth in Savings Act, 12 USC 4301 *et seq.,* the Consumer Leasing Act, 15 USC 1667, and the Fair Debt Collection Practices Act, 15 USC 1692 *et seq.*

and OCC interpretations concerning the types of state laws that can obstruct the exercise of national banks' deposit-taking and non-real estate lending powers. Finally, the proposal listed several types of state laws that, as a general matter, are not preempted.

As with the proposed amendments to part 34, the proposed amendment to part 7 governing non-real estate lending included a safety and soundness-based anti-predatory lending standard. As proposed, § 7.4008(b) stated that a national bank shall not make a loan described in § 7.4008 based predominantly on the foreclosure value of the borrower's collateral, rather than on the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources. The preamble to the NPRM pointed out that non-real estate lending also is subject to section 5 of the FTC Act.

For proposed § 7.4009, as with proposed §§ 7.4007 and 7.4008, the NPRM first stated that a national bank could exercise all powers authorized to it under federal law. To address questions about the extent to which state law may permissibly govern powers or activities that have not been addressed by federal court precedents or OCC opinions or orders, proposed new § 7.4009(b) provided that state laws do not apply to national banks if they obstruct, in whole or in part, a national bank's exercise of powers granted to it under federal law. Next, proposed § 7.4009(c) noted that the provisions of this section apply to any national bank power or aspect of a national bank's operation that is not otherwise covered by another OCC regulation that specifically addresses the applicability of state law. Finally, the proposal listed several types of state laws that, as a general matter, are not preempted.

As with the proposed changes to part 34, and for the same reasons, the proposal's changes to part 7 would be applicable to both national banks and their operating subsidiaries by virtue of an existing OCC regulation.

III. Overview of Comments

The OCC received approximately 2,600 comments, most of which came from the following groups:

- *Realtors.* The vast majority—approximately 85 percent—of the opposing comments came from realtors and others representing the real estate industry, who expressed identical concerns about the possibility that national banks' *financial subsidiaries* would be permitted to engage in real estate brokerage activities[11] and that, if that power were authorized, the proposal would permit them to do so without complying with state real estate brokerage licensing laws. This final rule will not have that result because it does

[11]Pursuant to procedures established by the Gramm–Leach–Bliley Act, Pub. L. 106–102, 113 Stat. 1338 (November 12, 1999), for determining that an activity is "financial in nature," and thus permissible for financial holding companies and financial subsidiaries, the Board and Treasury jointly published a proposal to determine that real estate brokerage is "financial in nature." *See* 66 FR 307 (January 3, 2001). No final action has been taken on the proposal.

not apply to the activities of national bank financial subsidiaries. Thus, should the Department of the Treasury (Treasury) and the Board of Governors of the Federal Reserve System (Board) proposal to permit financial subsidiaries and financial holding companies to engage in real estate brokerage activities go forward, this final rule would not affect the application of state real estate licensing requirements to national bank financial subsidiaries.

Many realtor comments also raised arguments concerning the impact of this rulemaking on consumers and market competition and some argued that preemption of state licensing requirements related to real estate *lending* is inappropriate on the basis of field or conflict preemption. These issues also were raised by other commenters and are addressed in sections IV and VI of this preamble.

- *Community and consumer advocates.* In addition to the comments from realtors, the OCC received opposing comments from community and consumer advocates. These commenters argued that the OCC should not adopt further regulations preempting state law and, in particular, should not adopt in the final rule an "occupation of the field" preemption standard for national banks' real estate lending activities. The community and consumer advocates also asserted that the proposed "obstruct, in whole or in part" preemption standard is inconsistent with, and a lowering of, the preemption standards articulated by the U.S. Supreme Court. Whatever the standard, the community and consumer advocates expressed concern that preemption would allow national banks to escape some state tort, contract, debt collection, zoning, property transfer, and criminal laws, and would expose consumers to widespread predatory and abusive practices by national banks. These commenters asserted that the OCC's proposed anti-predatory lending standard is insufficient and urged the OCC to further strengthen consumer protections in parts 7 and 34, including prohibiting specific practices characterized as unfair or deceptive. These issues are addressed in sections IV and VI of this preamble.

- *State officials and members of Congress.* State banking regulators, the Conference of State Bank Supervisors (CSBS), the National Conference of State Legislators, individual state legislators, the National Association of Attorneys General (NAAG), and individual state attorneys general questioned the legal basis of the proposal and argued that the OCC lacks authority to adopt it. These commenters, like the community and consumer advocates, also challenged the OCC's authority to adopt in the final rule either a "field occupation" preemption standard or the proposed "obstruct, in whole or in part" standard. These commenters raised concerns about the effect of the proposal, if adopted, on the dual banking system, and its impact on what they assert is the states' authority to apply and enforce consumer protection laws against national banks, and particularly against operating subsidiaries. Several members of Congress submitted comments, or forwarded letters from constituents and state officials, that echoed these concerns. The arguments concerning the dual banking system are addressed in the discussion of Executive Order

13132 later in this preamble.[12] The remaining issues raised by the state commenters are addressed in sections IV and VI of this preamble.[13]

- *National banks and banking industry trade groups.* National banks, other financial institutions, and industry groups supported the proposal. Many of these commenters argued that Congress has occupied the fields of deposit-taking and lending in the context of national banks and urged the OCC to adopt a final rule reflecting an extensive occupation of the field approach. These commenters concluded that various provisions of the National Bank Act establish broad statutory authority for the activities and regulation of national banks, and that these provisions suggest strongly that Congress did in fact intend to occupy the fields in question. In addition to these express grants of authority, the commenters noted that national banks may, under 12 USC 24(Seventh), "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," and that this provision has been broadly construed by the Supreme Court.[14] These commenters concluded that this broad grant of federal powers, coupled with equally broad grants of rulemaking authority to the OCC,[15] effectively occupy the field of national bank regulation.

Many of the supporting commenters also urged the adoption of the proposal for the reasons set forth in its preamble. These commenters agreed with the OCC's assertion in the preamble that banks with customers in more than one state "face uncertain compliance risks and substantial additional compliance burdens and expense that, for practical purposes, materially impact their ability to offer particular products and services."[16] The commenters stated that, in effect, a national bank must often craft different products or services (with associated procedures and policies, and their attendant additional costs) for each state in which it does business, or elect not to provide all of its products or services (to the detriment of consumers) in one or more states. These commenters believe that the proposal, if adopted, would offer much-needed clarification of when state law does or does not apply to the activities of a national bank and its operating subsidiaries. Such clarity, these commenters argued, is critical to helping national banks maintain and expand provision of financial services. Without such

[12] *See also* OCC publication titled *National Banks and the Dual Banking System* (September 2003).

[13] *See also* Letter from John D. Hawke, Jr., Comptroller of the Currency, to Senator Paul S. Sarbanes (December 9, 2003), available on the OCC's Web site at http://www.occ.treas.gov/foia/SarbanesPreemptionletter.pdf; and identical letters sent to nine other senators; and Letters from John D. Hawke, Jr., Comptroller of the Currency, to Representatives Sue Kelly, Peter King, Carolyn B. Maloney, and Carolyn McCarthy (December 23, 2003).

[14] *See, e.g., Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.,* 513 U.S. 251, 258 n.2 (1995) *(VALIC).*

[15] *See, e.g.,* 12 USC 93a.

[16] 68 FR *[Federal Register]* 46119, 46120.

clarity, these commenters assert, the burdens and costs, and uncertain liabilities arising under a myriad of state and local laws, are a significant diversion of the resources that national banks otherwise can use to provide services to customers nationwide, and a significant deterrent to their willingness and ability to offer certain products and services in certain markets. These issues are addressed in sections IV and VI of this preamble.

IV. Reason and Authority for the Regulations

A. The regulations are issued in furtherance of the OCC's responsibility to ensure that the national banking system is able to operate as authorized by Congress

As the courts have recognized, federal law authorizes the OCC to issue rules that preempt state law in furtherance of our responsibility to ensure that national banks are able to operate to the full extent authorized under federal law, notwithstanding inconsistent state restrictions, and in furtherance of their safe and sound operations.

Federal law is the exclusive source of all of national banks' powers and authorities. Key to these powers is the clause set forth at 12 USC 24(Seventh) that permits national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking."

This flexible grant of authority furthers Congress's long-range goals in establishing the national banking system, including financing commerce, establishing private depositories, and generally supporting economic growth and development nationwide.[17] The achievement of these goals required national banks that are safe and sound and whose powers are dynamic and capable of evolving so that they can perform their intended roles. The broad grant of authority provided by 12 USC 24(Seventh), as well as the more targeted grants of authority provided by other statutes,[18] enable national banks to evolve their operations in order to meet the changing needs of our economy and individual consumers.[19]

The OCC is charged with the fundamental responsibility of ensuring that national banks operate on a safe and sound basis, and that they are able to do so, if they choose, to the full extent of their powers under federal law. This responsibility includes enabling the national banking system to

[17] For a more detailed discussion of Congress's purposes in establishing a national banking system that would operate to achieve these goals distinctly and separately from the existing system of state banks, *see* the preamble to the proposal, 68 FR 46119, 46120, and *National Banks and the Dual Banking System, supra* note 12.

[18] *See, e.g.,* 12 USC 92a (authorizing national banks to engage in fiduciary activities) and 371 (authorizing national banks to engage in real estate lending activities).

[19] The Supreme Court expressly affirmed the dynamic, evolutionary character of national bank powers in *VALIC,* in which it held that the "business of banking" is not limited to the powers enumerated in 12 USC 24(Seventh) and that the OCC has the discretion to authorize activities beyond those specifically enumerated in the statute. *See* 513 U.S. at 258 n.2.

operate as authorized by Congress, consistent with the essential character of a national banking system and without undue confinement of their powers. Federal law gives the OCC broad rule-making authority in order to fulfill these responsibilities. Under 12 USC 93a, the OCC is authorized "to prescribe rules and regulations to carry out the responsibilities of the office"[20] and, under 12 USC 371, to "prescribe by regulation or order" the "restrictions and requirements" on national banks' real estate lending power without state-imposed conditions.[21]

In recent years, the financial services marketplace has undergone profound changes. Markets for credit (both consumer and commercial), deposits, and many other financial products and services are now national, if not international, in scope. These changes are the result of a combination of factors, including technological innovations, the erosion of legal barriers, and an increasingly mobile society.

Technology has expanded the potential availability of credit and made possible virtually instantaneous credit decisions. Mortgage financing that once took weeks, for example, now can take only hours. Consumer credit can be obtained at the point of sale at retailers and even when buying a major item such as a car. Consumers can shop for investment products and deposits on-line. With respect to deposits, they can compare rates and duration of a variety of deposit products offered by financial institutions located far from where the consumer resides.

Changes in applicable law also have contributed to the expansion of markets for national banks and their operating subsidiaries. These changes have affected both the type of products that may be offered and the geographic region in which banks—large and small—may conduct business. As a result of these changes, banks may branch across state lines and offer a broader array of products than ever before. An even wider range of customers can be reached through the use of technology, including the Internet. Community national banks, as well as the largest national banks, use new technologies to expand their reach and service to customers.

Our modern society is also highly mobile. Forty million Americans move annually, according to a recent Congressional report issued in connection with enactment of the Fair and Accurate Credit Transactions Act of 2003.[22] And when they move, they often have the desire, if not the expectation, that the financial relationships and status they have established will be portable and will remain consistent.

These developments highlight the significance of being able to conduct a banking business pursuant to consistent, national standards, regardless of the location of a customer when he or she first becomes a bank customer or the location to which the customer may move *after* becoming a bank

[20] 12 USC 93a.

[21] 12 USC 371(a).

[22] *See* S. Rep. No. 108–166, at 10 (2003) (quoting the hearing testimony of Secretary of the Treasury Snow).

customer. They also accentuate the costs and interference that diverse and potentially conflicting state and local laws have on the ability of national banks to operate under the powers of their federal charter. For national banks, moreover, the ability to operate under uniform standards of operation and supervision is fundamental to the character of their national charter.[23] When national banks are unable to operate under national standards, it also implicates the role and responsibilities of the OCC.

These concerns have been exacerbated recently, by increasing efforts by states and localities to apply state and local laws to bank activities. As we have learned from our experience supervising national banks, from the inquiries received by the OCC's law department, by the extent of litigation in recent years over these state efforts, and by the comments we received on the proposal, national banks' ability to conduct operations to the full extent authorized by federal law has been curtailed as a result.

Commenters noted that the variety of state and local laws that have been enacted in recent years—including laws regulating fees, disclosures, conditions on lending, and licensing—have created higher costs and increased operational challenges.[24] Other commenters noted the proliferation of state and local anti-predatory lending laws and the impact that those laws are having on lending in the affected jurisdictions. As a result, national banks must either absorb the costs, pass the costs on to consumers, or eliminate various products from jurisdictions where the costs are prohibitive. Commenters noted that this result is reached even in situations where a bank concludes that a law is preempted, simply so that the bank may avoid litigation costs or anticipated reputational injury.

As previously noted, the elimination of legal and other barriers to interstate banking and interstate financial service operations has led a number of banking organizations to operate, in multi-state metropolitan statistical areas, and on a multi-state or nationwide basis, exacerbating the impact of the overlay of state and local standards and requirements on top of the federal standards and OCC supervisory requirements already applicable to national bank operations. When these multi-jurisdictional banking organizations are subject to regulation by each individual state or municipality in which they conduct operations, the problems noted earlier are compounded.

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[23] As we explained last year in the preamble to our amendments to part 7 concerning national banks' electronic activities, "freedom from State control over a national bank's powers protects national banks from conflicting local laws unrelated to the purpose of providing the uniform, nationwide banking system that Congress intended." 67 FR 34992, 34997 (May 17, 2002).

[24] Illustrative of comments along these lines were those of banks who noted that various state laws would result in the following costs: (a) approximately $44 million in start-up costs incurred by six banks as a result of a recently enacted California law mandating a minimum payment warning; (b) 250 programming days required to change one of several computer systems that needed to be changed to comply with anti-predatory lending laws enacted in three states and the District of Columbia; and (c) $7.1 million in costs a bank would incur as a result of complying with mandated annual statements to credit card customers.

Even the efforts of a single state to regulate the operations of a national bank operating only within that state can have a detrimental effect on that bank's operations and consumers. As we explained in our recent preemption determination and order responding to National City Bank's inquiry concerning the Georgia Fair Lending Act (GFLA),[25] the GFLA caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. National banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities.

When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.[26]

The OCC therefore is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations. The final rule does not entail any new powers for national banks or any expansion of their existing powers. Rather, we intend only to ensure the soundness and efficiency of national banks' operations by making clear the standards under which they do business.

B. Pursuant to 12 USC 93a and 371, the OCC may adopt regulations that preempt state law

The OCC has ample authority to provide, by regulation, that types of state laws are not applicable to national banks. As mentioned earlier, 12 USC 93a grants the OCC comprehensive rulemaking authority to further its responsibilities, stating that—

> Except to the extent that authority to issue such rules and regulations has been expressly and

[25] See 68 FR 46264 (August 5, 2003).

[26] As was recently observed by Federal Reserve Board Chairman Alan Greenspan (in the context of amendments to the Fair Credit Reporting Act), "[l]imits on the flow of information among financial market participants, *or increased costs resulting from restrictions that differ based on geography, may lead to an increase in the price or a reduction in the availability of credit,* as well as a reduction in the optimal sharing of risk and reward." Letter of February 28, 2003, from Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, to The Honorable Ruben Hinojosa (emphasis added).

> exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office. . . .[27]

This language is significantly broader than that customarily used to convey rulemaking authority to an agency, which is typically focused on a particular statute. This was recognized, some 20 years ago, by the United States Court of Appeals for the D.C. Circuit in its decision confirming that 12 USC 93a authorizes the OCC to issue regulations preempting state law. In *Conference of State Bank Supervisors* v. *Conover,*[28] the Conference of State Bank Supervisors (CSBS) sought to overturn a district court decision upholding OCC regulations that provided flexibility regarding the terms on which national banks may make or purchase adjustable rate mortgages (ARMs) and that preempted inconsistent state laws. The regulations provided generally that national banks may make or purchase ARMs without regard to state law limitations. The district court granted the OCC's motion for summary judgment on the ground that the regulations were within the scope of the OCC's rulemaking powers granted by Congress.

On appeal, the CSBS asserted that 12 USC 93a grants the OCC authority to issue only "housekeeping" procedural regulations. In support of this argument, the CSBS cited a remark from the legislative history of 12 USC 93a by Senator Proxmire that 12 USC 93a "carries with it no new authority to confer on national banks powers which they do not have under existing law." CSBS also cited a statement in the conference report that 12 USC 93a "carries no authority [enabling the Comptroller] to permit otherwise impermissible activities *of national banks* with specific reference to the provisions of the McFadden Act and the Glass–Steagall Act."[29]

The Court of Appeals rejected the CSBS's contentions concerning the proper interpretation of 12 USC 93a. The Court of Appeals explained first that the challenged regulations (like this final rule) did not confer any new powers on national banks. Moreover,

> [t]hat the Comptroller also saw fit to preempt those state laws that conflict with his responsibility to ensure the safety and soundness of the national banking system, *see* 12 USC § 481, does not constitute an expansion of the powers of national *banks.*[30]

Nor did the Court of Appeals find support for the CSBS's position in the conference report:

> as the "specific reference" to the McFadden and Glass–Steagall Acts indicates, the "impermissible activities" which the Comptroller is not empowered to permit are activities that are impermissible under federal, not state, law.[31]

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[27] 12 USC 93a.

[28] 710 F.2d 878 (D.C. Cir. 1983).

[29] *Id.* at 885 (emphasis in original).

[30] *Id.* (emphasis in original).

[31] *Id.*

The court summarized its rationale for holding that 12 USC 93a authorized the OCC to issue the challenged regulations by saying:

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking 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 laws.*[32]

The authority under 12 USC 93a described by the court in *CSBS* v. *Conover* thus amply supports the adoption of regulations providing that specified types of state laws purporting to govern as applied to national banks' lending and deposit-taking activities are preempted.

Under 12 USC 371, the OCC has the additional and specific authority to provide that the specified types of laws relating to national banks' real estate lending activities are preempted. As we have described and as recognized in *CSBS* v. *Conover,*[33] 12 USC 371 grants the OCC unique rulemaking authority with regard to national banks' real estate lending activities. That section states:

> [a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.[34]

The language and history of 12 USC 371 confirm the real estate lending powers of national banks and that only the OCC—subject to other applicable federal law—and not the states may impose restrictions or requirements on national banks' exercise of those powers. The federal powers conferred by 12 USC 371 are subject *only* "to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."[35] Thus, the exercise of the powers granted by 12 USC 371 is not conditioned on compliance with

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[32] *Id.* at 878 (emphasis added).

[33] In *CSBS* v. *Conover,* the court also held that the authority conferred by 12 USC 371, as the statute read at the time relevant to the court's decision, conferred authority upon the OCC to issue the preemptive regulations challenged in that case. The version of section 371 considered by the court authorized national banks to make real estate loans "subject to such terms, conditions, and limitations" as prescribed by the Comptroller by order, rule or regulations. The court said that the "restrictions and requirements" language contained in the statute today was "not substantially different" from the language that it was considering in that case. *Id.* at 884.

[34] 12 USC 371(a).

[35] *Id.* As noted *supra* at note 7, federal legislation occasionally provides that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross–marketing activities subject to certain types of state restrictions expressly set out in the Gramm–Leach–Bliley Act. *See* 15 USC 6701(d)(2)(B). There is no similar federal legislation subjecting national banks' real estate lending activities to state law standards.

any state requirement, and state laws that attempt to confine or restrain national banks' real estate lending activities are inconsistent with national banks' real estate lending powers under 12 USC 371.

This conclusion is consistent with the fact that national bank real estate lending authority has been extensively regulated at the *federal* level since the power first was codified. Beginning with the enactment of the Federal Reserve Act of 1913,[36] national banks' real estate lending authority has been governed by the express terms of 12 USC 371. As originally enacted in 1913, section 371 contained a limited grant of authority to national banks to lend on the security of "improved and unencumbered farm land, situated within its Federal Reserve district."[37] In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, 12 USC 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits.

In 1982, Congress removed these "rigid statutory limitations"[38] in favor of a broad provision that is very similar to the current law and that authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation."[39] The purpose of the 1982 amendment was "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market."[40] In 1991, Congress removed the term "rule" from this phrase and enacted an additional requirement, codified at 12 USC 1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to uniform standards adopted at the federal level by regulation of the OCC and the other federal banking agencies.[41]

Thus, the history of national banks' real estate lending activities under 12 USC 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which Congress has delegated broad rulemaking authority to the Comptroller. The two versions of 12 USC 371—namely, the lengthy and prescriptive approach prior to 1982 and the more recent

[36] Federal Reserve Act, December 23, 1913, ch. 6, 38 Stat. 251, as amended.

[37] *Id.* Section 24, 38 Stat. 273.

[38] S. Rep. No. 97–536, at 27 (1982).

[39] Garn–St. Germain Depository Institutions Act of 1982, Pub. L. 97–320, section 403, 96 Stat. 1469, 1510–11 (1982).

[40] S. Rep. No. 97–536, at 27 (1982).

[41] *See* section 304 of the Federal Deposit Insurance Corporation Improvement Act, codified at 12 USC 1828(o). These standards governing national banks' real estate lending are set forth in Subpart D of 12 CFR part 34.

statement of broad authority qualified only by reference to federal law—may be seen as evolving articulations of the same idea.

C. The preemption standard applied in this final rule is entirely consistent with the standards articulated by the Supreme Court

State laws are preempted by federal law, and thus rendered invalid with respect to national banks, by operation of the Supremacy Clause of the U.S. Constitution.[42] The Supreme Court has identified three ways in which this may occur. First, Congress can adopt express language setting forth the existence and scope of preemption.[43] Second, Congress can adopt a framework for regulation that "occupies the field" and leaves no room for states to adopt supplemental laws.[44] Third, preemption may be found when state law actually conflicts with federal law. Conflict will be found when either: (i) compliance with both laws is a "physical impossibility;"[45] or (ii) when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[46]

In *Barnett Bank of Marion County* v. *Nelson,*[47] the Supreme Court articulated preemption standards used by the Supreme Court in the national bank context to determine, under the Supremacy Clause of the U.S. Constitution, whether federal law conflicts with state law such that the state law is preempted. As observed by the Supreme Court in *Barnett,* a state law will be preempted if it conflicts with the exercise of a national bank's federally authorized powers.

The Supreme Court noted in *Barnett* the many formulations of the conflicts standard. The Court stated:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. *See, e.g., Anderson Nat. Bank* v. *Luckett,* 321 U.S. 233, 247–252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights

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[42] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution VI, cl. 2.

[43] *See Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977).

[44] *See Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

[45] *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 143 (1963).

[46] *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941); *Barnett Bank of Marion County, N.A.* v. *Nelson,* 517 U.S. 25, 31 (1996) (quoting *Hines).*

[47] 517 U.S. 25 (1996).

> and privileges of national banks"); *McClellan* v. *Chipman,* 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions); *National Bank* v. *Commonwealth,* 76 U.S. (9 Wall.) 353, 362 (1869) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").[48]

The variety of formulations quoted by the Court—"unlawfully encroach," "hamper," "interfere with or impair national banks' efficiency"—defeats any suggestion that any one phrase constitutes the exclusive standard for preemption. As the Supreme Court explained in *Hines* v. *Davidowitz*:[49]

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. *But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.* Our primary function is to determine whether, under the circumstances of this particular case, [the state law at issue] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[50]

Thus, in *Hines,* the Court recognized that the Supremacy Clause principles of preemption can be articulated in a wide variety of formulations that do not yield substantively different legal results. The variation among formulations that carry different linguistic connotations does not produce different legal outcomes.

We have adopted in this final rule a statement of preemption principles that is consistent with the various formulations noted earlier. The phrasing used in the final rule—"obstruct,[51] impair,[52] or condition"[53]—differs somewhat from what we proposed. This standard conveys the same sub-

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[48] *Id.* at 33–34. Certain commenters cite *Nat'l Bank* v. *Commonwealth* for the proposition that national banks are subject to state law. These commenters, however, omit the important caveat, quoted by the *Barnett* Court, that state law applies only where it does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the federal] Government."

[49] 312 U.S. 52 (1941).

[50] *Id.* at 67 (emphasis added) (citations omitted).

[51] See *Hines,* 312 U.S. at 76.

[52] *See Nat'l Bank* v. *Commonwealth,* 76 U.S. at 362; *Davis* v. *Elmira Savings Bank,* 161 U.S. 275, 283 (1896); *McClellan,* 164 U.S. at 357.

[53] *See Barnett,* 517 U.S. at 34; *Franklin Nat'l Bank of Franklin Square* v. *New York,* 347 U.S. 373, 375–79 (1954).

stantive point as the proposed standard, however; that is, that state laws do not apply to national banks if they impermissibly contain a bank's exercise of a federally authorized power. The words of the final rule, which are drawn directly from applicable Supreme Court precedents, better convey the range of effects on national bank powers that the Court has found to be impermissible. The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* and *Barnett,* and not as a replacement construct that is in any way inconsistent with those standards.

In describing the proposal, we invited comment on whether it would be appropriate to assert occupation of the entire field of real estate lending. Some commenters strongly urged that we do so, and that we go beyond real estate lending to cover other lending and deposit-taking activities as well. Upon further consideration of this issue and careful review of comments submitted pertaining to this point, we have concluded, as the Supreme Court recognized in *Hines* and reaffirmed in *Barnett,* that the effect of labeling of this nature is largely immaterial in the present circumstances. Thus, we decline to adopt the suggestion of these commenters that we declare that these regulations "occupy the field" of national banks' real estate lending, other lending, and deposit-taking activities. We rely on our authority under both 12 USC 93a and 371, and to the extent that an issue arises concerning the application of a state law not specifically addressed in the final regulation, we retain the ability to address those questions through interpretation of the regulation, issuance of orders pursuant to our authority under 12 USC 371, or, if warranted by the significance of the issue, by rulemaking to amend the regulation.

V. Description of the Final Rule

A. Amendments to Part 34.

1. § 34.3(a). The final rule retains the statement of national banks' real estate lending authority, now designated as § 34.3(a), that national banks may "make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate (real estate loans), subject to 12 USC 1828(o) and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."

2. § 34.3(b). New § 34.3(b) adds an explicit safety and soundness-derived anti-predatory lending standard to the general statement of authority concerning lending. Many bank commenters voiced concern that the proposed anti-predatory lending standard, by prohibiting a national bank from making a loan based predominantly on the foreclosure value of a borrower's collateral without regard to the borrower's repayment ability, would also prohibit a national bank from engaging in legitimate, non-predatory lending activities. These commenters noted that reverse mortgage, small business, and high net worth loans are often made based on the value of the collateral.

We have revised the anti-predatory lending standard in the final rule to clarify that it applies to consumer loans only, (i.e., loans for personal, family, or household purposes), and to clarify that it is intended to prevent borrowers from being unwittingly placed in a situation where repayment is

unlikely without the lender seizing the collateral. Where the bargain agreed to by a borrower and a lender involves an understanding by the borrower that it is likely or expected that the collateral will be used to repay the debt, such as with a reverse mortgage, it clearly is not objectionable that the collateral will then be used in such a manner. Moreover, the final rule's anti-predatory lending standard is not intended to apply to business lending or to situations where a borrower's net worth would support the loan under customary underwriting standards.

Thus, we have revised the anti-predatory lending standard so that it focuses on consumer loans and permits a national bank to use a variety of reasonable methods to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

Several commenters urged the OCC to expressly affirm that a national bank's lending practices must be conducted in conformance with section 5 of the FTC Act, which makes unlawful "unfair or deceptive acts or practices" in interstate commerce,[54] and regulations promulgated thereunder. As discussed in more detail in section VI of this preamble, the OCC has taken actions against national banks under the FTC Act where the OCC believed they were engaged in unfair or deceptive practices. As demonstrated by these actions, the OCC recognizes the importance of national banks and their operating subsidiaries acting in conformance with the standards contained in section 5 of the FTC Act. We therefore agree that an express reference to those standards in our regulation would be appropriate and have added it to the final rules.[55]

3. State laws that are preempted (§ 34.4(a)). Pursuant to 12 USC 93a and 371, the final rule amends § 34.4(a) to add to the existing regulatory list of types of state law restrictions and requirements that are not applicable to national banks. This list, promulgated under our authority "to prescribe rules and regulations to carry out the responsibilities of the office" and to prescribe the types of restrictions and requirements to which national banks' real estate lending activities shall be subject, reflects our experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers.[56]

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[54] 15 USC 45(a)(1).

[55] It is important to note here that we lack the authority to do what some commenters essentially urged, namely, to specify by regulation that particular practices, such as loan "flipping" or "equity stripping," are unfair or deceptive. While we have the ability to take enforcement actions against national banks if they engage in unfair or deceptive practices under section 5 of the FTC Act, the OCC does not have rulemaking authority to define specific practices as unfair or deceptive under section 5. *See* 15 USC 57a(f).

[56] As we noted in our discussion of this list in the preamble to the proposal, the "OCC and Federal courts have thus far concluded that a wide variety of state laws are preempted, either because the state laws fit within the express preemption provisions of an OCC regulation or because the laws conflict with a Federal power vested in national banks." *See* 68 FR 46119, 46122–46123. The list is also substantially identical to the types of laws specified in a comparable regulation of the OTS. *See* 12 CFR 560.2(b).

The final rule revises slightly the introductory clause used in proposed § 34.4(a) in order to conform this section more closely to the amended sections of part 7 discussed later in this preamble. Thus, the final rule provides: "Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally authorized real estate lending powers do not apply to national banks." The final rule then expands the current list of the types of state law restrictions and requirements that are not applicable to national banks.

Many of the supporting commenters requested that the final rule clarify the extent to which particular state or local laws that were not included in the proposal are preempted. For example, these commenters suggested that the final rule address particular state laws imposing various limitations on mortgage underwriting and servicing.

We decline to address most of these suggestions with the level of specificity requested by the commenters. Identifying state laws in a more generic way avoids the impression that the regulations only cover state laws that appear on the list. The list of the types of preempted state laws is not intended to be exhaustive, and we retain the ability to address other types of state laws by order on a case-by-case basis, as appropriate, to make determinations whether they are preempted under the applicable standards.[57]

4. State laws that are not preempted (§ 34.4(b)). Section 34.4(b) also provides that certain types of state laws are not preempted and would apply to national banks to the extent that they are consistent with national banks' federal authority to engage in real estate lending because their effect on the real estate lending operations of national banks is only incidental. These types of laws generally pertain to contracts, rights to collect debts, acquisition and transfer of property, taxation, zoning, crimes, torts,[58] and homestead rights. In addition, any other law the effect of which is incidental to national banks' lending authority or otherwise consistent with national banks' authority to engage in real estate lending would not be preempted.[59] In general, these would be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible federal power.

[57] *See, e.g.,* OCC Determination and Order concerning the Georgia Fair Lending Act, *supra* footnote 25.

[58] *See Bank of America* v. *City & County of San Francisco,* 309 F.3d 551, 559 (9th Cir. 2002).

[59] The label a state attaches to its laws will not affect the analysis of whether that law is preempted. For instance, laws related to the transfer of real property may contain provisions that give borrowers the right to "cure" a default upon acceleration of a loan if the lender has not foreclosed on the property securing the loan. Viewed one way, this could be seen as part of the state laws governing foreclosure, which historically have been within a state's purview. However, as we concluded in the OCC Determination and Order concerning the GFLA, to the extent that this type of law limits the ability of a national bank to adjust the terms of a particular class of loans once there has been a default, it would be a state law limitation "concerning . . . (2) The schedule for the repayment of principal and interest; [or] (3) The term to maturity of the loan. . . ." 12 CFR 34.4(a). In such a situation, we would be governed by the effect of the state statute.

One category of state law included in the proposed list of state laws generally not preempted was "debt collection." Consistent with Supreme Court precedents addressing this type of state law,[60] we have revised the language of the final rule to refer to national banks' "right to collect debts."

B. Amendments to Part 7—Deposit-taking, Other Consumer Lending, and National Bank Operations.

The final rule adds three new sections to part 7: § 7.4007 regarding deposit-taking activities, § 7.4008 regarding non-real estate lending activities, and § 7.4009 regarding national bank operations. The structure of the amendments is the same for §§ 7.4007 and 7.4008 and is similar for § 7.4009.

For § 7.4007, the final rule first sets out a statement of the authority to engage in the activity. Second, the final rule notes that state laws that obstruct, impair, or condition a national bank's ability to fully exercise the power in question are not applicable, and lists several types of state laws that are preempted. Types of state laws that are generally preempted under § 7.4007 include state requirements concerning abandoned and dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, state licensing or registration requirements, and special purpose savings services. Finally, the final rule lists types of state laws that, as a general matter, are not preempted. Examples of these laws include state laws concerning contract, rights to collect debt, tort, zoning, and property transfers. These lists are not intended to be exhaustive, and the OCC retains the ability to address other types of state laws on a case-by-case basis to make preemption determinations under the applicable standards.

For § 7.4008, the final rule also sets out a statement of the authority to engage in the activity (non-real estate lending), notes that state laws that obstruct, impair, or condition a national bank's ability to fully exercise this power are not applicable, and lists several types of state laws that are, or are not, preempted. Section 7.4008 also includes a safety and soundness-based anti-predatory lending standard. Final § 7.4008(b) states that "[a] national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors." Separately, § 7.4008(c) also includes a statement that a national bank shall not engage in unfair or deceptive practices within

[60] *See, e.g., Nat'l Bank* v. *Commonwealth,* 76 U.S. at 362 (national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, *their right to collect their debts,* and their liability to be sued for debts, are all based on State law.") (emphasis added); *see also McClellan,*164 U.S. at 356–57 (quoting *Nat'l Bank* v. *Commonwealth).*

the meaning of section 5 of the FTC Act and regulations promulgated thereunder in connection with making non-real estate related loans. The standards set forth in § 7.4008(b) and (c), plus an array of federal consumer protection standards,[61] ensure that national banks are subject to consistent and uniform federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their lending activities.

In § 7.4009, the final rule first states that national banks may exercise all powers authorized to them under federal law.[62] Second, the final rule states that except as otherwise made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its authorized powers do not apply to the national bank.[63] Finally, the final rule lists several types of state laws that, as a general matter, are *not* preempted. For the reasons outlined earlier in the discussion of the amendments to 12 CFR part 34, the reference to debt collection laws has been revised to refer to state laws concerning national banks' "rights to collect debts."

The OCC's regulations adopted in this final rule address the applicability of state law with respect to a number of specific types of activities. The question may persist, however, about the extent to which state law may permissibly govern powers or activities that have not been addressed by federal court precedents or OCC opinions or orders. Accordingly, as noted earlier, new § 7.4009 provides that state laws do not apply to national banks if they obstruct, impair, or condition a national bank's ability to fully exercise the powers authorized to it under federal law, including the content of those activities and the manner in which and standards whereby they are conducted.

As explained previously, in some circumstances, of course, federal law directs the application of state standards to a national bank. The wording of § 7.4009 reflects that a federal statute may require the application of state law,[64] or it may incorporate—or "federalize"—state standards.[65]

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[61] *See supra* note 10.

[62] As noted in the proposal, the OTS has issued a regulation providing generally that state laws purporting to address the operations of federal savings associations are preempted. *See* 12 CFR 545.2. The extent of federal regulation and supervision of federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the federally authorized activities of both types of entities. *Compare, e.g.,* 12 USC 1464(a) (OTS authorities with respect to the organization, incorporation, examination, operation, regulation, and chartering of federal savings associations) *with* 12 USC 21 (organization and formation of national banking associations), 12 USC 481 (OCC authority to examine national banks and their affiliates), 12 USC 484 (OCC's exclusive visitorial authority), and 12 USC 93a (OCC authority to issue regulations).

[63] As noted previously, the final rule makes changes to the introductory clause concerning the applicability of state law in 12 CFR 34.4(a), 7.4007(b), 7.4008(d), and 7.4009(b) to make the language of these sections more consistent with each other.

[64] *See, e.g.,* 15 USC 6711 (insurance activities of national banks are "functionally regulated" by the states, subject to the provisions on the operation of state law contained in section 104 of the Gramm–Leach–Bliley Act).

[65] *See, e.g.,* 12 USC 92a (permissible fiduciary activities for national banks determined by reference to state law).

In those circumstances, the state standard obviously applies. State law may also apply if it only incidentally affects a national bank's federally authorized powers or if it is otherwise consistent with national banks' uniquely federal status. Like the other provisions of this final rule, § 7.4009 recognizes the potential applicability of state law in these circumstances. This approach is consistent with the Supreme Court's observation that national banks "are governed in their daily course of business far more by the laws of the state than of the nation."[66] However, as noted previously, these types of laws typically do not regulate the manner or content of the business of banking authorized for national banks, but rather establish the legal infrastructure that makes practicable the conduct of that business.

C. Application of amendments to operating subsidiaries

As a matter of federal law, national bank operating subsidiaries conduct their activities under a federal license, subject to the same terms and conditions as apply to the parent banks, except where federal law provides otherwise. *See* 12 CFR 5.34 and 7.4006. *See also* 12 CFR 34.1(b) (real estate activities specifically).[67] Thus, by virtue of preexisting OCC regulations, the changes to parts 7 and 34, including the new anti-predatory lending standards applicable to lending activities, apply to both national banks and their operating subsidiaries. The final rule makes no change to these existing provisions.

VI. The OCC's Commitment to Fair Treatment of National Bank Customers and High Standards of National Bank Operations

The OCC shares the view of the commenters that predatory and abusive lending practices are inconsistent with national objectives of encouraging home ownership and community revitalization, and can be devastating to individuals, families, and communities. We will not tolerate such practices by national banks and their operating subsidiaries. Our Advisory Letters on predatory lending,[68] our pioneering enforcement positions resulting in substantial restitution to affected consumers, and the anti-predatory lending standards adopted in this final rule reflect our commitment that national banks operate pursuant to high standards of integrity in all respects. The provisions of this final rule, clarifying that certain state laws are not applicable to national banks' operations, do not undermine the application of these standards to all national banks, for the protection of all national bank customers—wherever they are located.

Advisory Letters 2003–2, which addresses loan originations, and 2003–3, which addresses loan purchases and the use of third party loan brokers, contain the most comprehensive supervisory

[66] *Nat'l Bank* v. *Commonwealth,* 76 U.S. at 362 (holding that shares held by shareholders of a national bank were lawfully subject to state taxation).

[67] For a detailed discussion of this issue, *see* the OCC's visitorial powers rulemaking also published today in the *Federal Register.*

[68] *See supra* note 8.

standards ever published by any federal financial regulatory agency to address predatory and abusive lending practices and detail steps for national banks to take to ensure that they do not engage in such practices. As explained in the Advisory Letters, if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices not only to determine whether they violate specific provisions of law such as the Homeowners Equity Protection Act of 1994 (HOEPA), the Fair Housing Act, or the Equal Credit Opportunity Act, but also to determine whether they involve unfair or deceptive practices that violate the FTC Act. Indeed, several practices that we identify as abusive in our Advisory Letters—such as equity stripping, loan flipping, and the refinancing of special subsidized mortgage loans that originally contained terms favorable to the borrower—generally can be found to be unfair or deceptive practices that violate the FTC Act.

Moreover, our enforcement record, including the OCC's pioneering actions using the FTC Act to address consumer abuses that were not specifically prohibited by regulation, demonstrates our commitment to keeping abusive practices out of the national banking system. For example, *In the Matter of Providian Nat'l Bank, Tilton, New Hampshire,*[69] pursuant to the FTC Act, the OCC required payment by a national bank to consumers in excess of $300 million and imposed numerous conditions on the conduct of future business. Since the Providian settlement in 2000, the OCC has taken action under the FTC Act to address unfair or deceptive practices and consumer harm involving five other national banks.[70]

Most recently, on November 7, 2003, the OCC entered into a consent order with Clear Lake National Bank that requires the bank to reimburse fees and interest charged to consumers in a series of abusive home equity loans. More than $100,000 will be paid to 30 or more borrowers. This is the first case brought by a federal regulator under the FTC Act that cites the unfair nature of the terms of the loan. The OCC also found that the loans violated HOEPA, the Truth in Lending Act, and Real Estate Settlement Procedures Act.[71]

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[69] Enforcement Action 2000–53 (June 28, 2000), *available at* the OCC's Web site in the "Popular FOIA Requests" section at http://www.occ.treas.gov/foia/foiadocs.htm.

[70] *See In the Matter of First Consumers National Bank, Beaverton, Oregon,* Enforcement Action 2003–100 (required restitution of annual fees and overlimit fees for credit cards); *In the Matter of Household Bank (SB), N.A., Las Vegas, Nevada,* Enforcement Action 2003–17 (required restitution regarding private label credit cards); *In the Matter of First National Bank in Brookings, Brookings, South Dakota,* Enforcement Action 2003–1 (required restitution regarding credit cards); *In the Matter of First National Bank of Marin, Las Vegas, Nevada,* Enforcement Action 2001–97 (restitution regarding credit cards); and *In the Matter of Direct Merchants Credit Card Bank, N.A., Scottsdale, Arizona,* Enforcement Action 2001–24 (restitution regarding credit cards). These orders can be found on the OCC's Web site within the "Popular FOIA Requests" section at http://www.occ.treas.gov/foia/foiadocs.htm.

[71] *See In the Matter of Clear Lake National Bank, San Antonio, Texas,* Enforcement Action 2003–135 (November 7, 2003), available at http://www.occ.treas.gov/FTP/EAs/ea2003–135.pdf. We believe these enforcement actions, which have generated hundreds of millions of dollars for consumers in restitution, also demonstrate that the OCC has the resources to enforce applicable laws. Indeed, as recently observed by the Superior Court of Arizona, Maricopa County, in an action brought by Arizona against a national bank, among others, the restitution and remedial action ordered by the OCC in that matter against the bank was "comprehensive and significantly broader in scope that that available through

The OCC also has moved aggressively against national banks engaged in payday lending programs that involved consumer abuses. Specifically, we concluded four enforcement actions against national banks that had entered into contracts with payday lenders for loan originations, and in each case ordered the bank to terminate the relationship with the payday lender.[72]

Other than these isolated incidences of abusive practices that have triggered the OCC's aggressive supervisory response, evidence that national banks are engaged in predatory lending practices is scant. Based on the absence of such information—from third parties, our consumer complaint database, and our supervisory process—we have no reason to believe that such practices are occurring in the national banking system to any significant degree. Although several of the commenters suggested this conclusion is implausible given the significant share of the lending market occupied by national banks, this observation is consistent with an extensive study of predatory lending conducted by the Department of Housing and Urban Development (HUD) and the Treasury Department,[73] and even with comments submitted in connection with an OTS rulemaking concerning preemption of state lending standards by *46* state Attorneys General.

Less than one year ago, nearly two dozen state Attorneys General signed a brief in litigation that reached the same conclusion. That case involved a revised regulation issued by the Office of Thrift Supervision to implement the Alternative Mortgage Transaction Parity Act (AMTPA). The revised regulation seeks to distinguish between federally supervised thrift institutions and non-bank mortgage lenders and makes non-bank mortgage lenders subject to state law restrictions on

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[the] state court proceedings." *State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.,* CV 2000–003625, Ruling at 27, Conclusions of Law, paragraph 50 (August 25, 2003).

[72] *See In the Matter of Peoples National Bank, Paris, Texas,* Enforcement Action 2003–2; *In the Matter of First National Bank in Brookings, Brookings, South Dakota,* Enforcement Action 2003–1; *In the Matter of Goleta National Bank, Goleta, California,* Enforcement Action 2002–93; and *In the Matter of Eagle National Bank, Upper Darby, Pennsylvania,* Enforcement Action 2001–104. These orders can also be found on the OCC's Web site within the "Popular FOIA Requests" section at http://www.occ.treas.gov/foia/foiadocs.htm.

[73] A Treasury–HUD joint report issued in 2000 found that predatory lending practices in the subprime market are less likely to occur in lending by—

> banks, thrifts, and credit unions that are subject to extensive oversight and regulation. . . . The subprime mortgage and finance companies that dominate mortgage lending in many low–income and minority communities, while subject to the same consumer protection laws, are not subject to as much federal oversight as their prime market counterparts—who are largely federally supervised banks, thrifts, and credit unions. The absence of such accountability may create an environment where predatory practices flourish because they are unlikely to be detected.

Departments of Housing and Urban Development and the Treasury, "Curbing Predatory Home Mortgage Lending: A Joint Report" 17–18 (June 2000), *available at* http://www.treas.gov/press/releases/report3076.htm.

In addition, the report found that a significant source of abusive lending practices is non–regulated mortgage brokers and similar intermediaries who, because they "do not actually take on the credit risk of making the loan, . . . may be less concerned about the loan's ultimate repayment, and more concerned with the fee income they earn from the transaction." *Id.* at 40.

prepayment penalties and late fees. In *supporting* the OTS's decision to retain preemption of state laws for supervised depository institutions their subsidiaries but *not* for unsupervised housing creditors, the state Attorneys General stated:

> Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to *non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.*[74]

It is relevant for purposes of this final rule that the preemption regulations adopted by the OCC are substantially identical to the preemption regulations of the OTS that have been applicable to federal thrifts for a number of years. It does not appear from public commentary—nor have the state officials indicated—that OTS preemption regulations have undermined the protection of customers of federal thrifts. In their brief in the OTS litigation described above, the state Attorneys General referenced "the burdens of federal supervision," in concluding that there "clearly is a substantial basis for OTS's distinction"[75] between its supervised institutions and state housing creditors.

These considerations are equally applicable in the context of national banks, and were recognized, *again,* by all 50 state Attorneys General, in their comment letter to the OCC on this very regulation, which stated:

> It is true that most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks. However, most major subprime mortgage lenders are now subsidiaries of bank holding companies, *(although not direct bank operating subsidiaries).*[76]

The OCC is firmly committed to assuring that abusive practices—whether in connection with mortgage lending or other national bank activities—continue to have no place in the national banking system.

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[74] 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 (emphasis added).

[75] *Id.* at 10.

[76] National Association of Attorneys General comment letter on the proposal at 10 (October 6, 2003) (emphasis added).

VII. Regulatory Analysis

Community Development and Regulatory Improvement (CDRI) Act Delayed Effective Date

This final rule takes effect 30 days after the date of its publication in the *Federal Register,* consistent with the delayed effective date requirement of the Administrative Procedure Act. *See* 5. USC 553(d). Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 USC 4802(b), provides that regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions may not take effect before the first day of the quarter following publication unless the agency finds that there is good cause to make the rule effective at an earlier date. The regulations in this final rule require national banks to adhere to explicit safety and soundness-based anti-predatory lending standards. These standards prohibit national banks from engaging in certain harmful lending practices, thereby benefiting consumers. The final rule imposes no additional reporting, disclosure, or other requirements on national banks. Accordingly, in order for the benefits to become available as soon as possible, the OCC finds that there is good cause to dispense with the requirements of the CDRI Act.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 USC 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the *Federal Register* along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the regulations identify the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other activities. These amendments simply provide the OCC's analysis and do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (2 USC 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a federal mandate that may result in the expenditure by state,

local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

Executive Order 13132 ["Federalism"]

Executive Order 13132, titled "Federalism," (Order) requires federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has federalism implications. Under the Order, a regulation has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In the proposal, we noted that the regulation may have federalism implications. Therefore, in formulating the proposal and the final rule, the OCC has adhered to the fundamental federalism principles and the federalism policymaking criteria. Moreover, the OCC has satisfied the requirements set forth in the Order for regulations that have federalism implications and preempt state law. The steps taken to comply with these requirements are set forth below.

- *Consultation.* The Order requires that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts state law unless, prior to the formal promulgation of the regulation, the agency consults with state and local officials early in the process of developing the proposal. We have consulted with state and local officials on the issues addressed herein through the rulemaking process. Following the publication of the proposal, representatives from the Conference of State Bank Supervisors (CSBS) met with the OCC to clarify their understanding of the proposal and, subsequently, the CSBS submitted a detailed comment letter regarding the proposal. As mentioned previously, additional comments were also submitted on the proposal by other state and local officials and state banking regulators. Pursuant to the Order, we will make these comments available to the Director of the OMB. Subsequent, public statements by representatives of the CSBS have restated their concerns, and CSBS representatives have further discussed these concerns with the OCC on several additional occasions.

In addition to consultation, the Order requires a federalism summary impact statement that addresses the following:

- *Nature of concerns expressed.* The Order requires a summary of the nature of the concerns of the state and local officials and the agency's position supporting the need to issue the regulation. The nature of the state and local official commenters' concerns and the OCC's position supporting the need to issue the regulation are set forth in the preamble, but may be summarized as follows. Broadly speaking, the states disagree with our interpretation of the applicable law, they are concerned about the impact the rule will have on the dual banking system, and they are concerned about the ability of the OCC to protect consumers adequately.

- *Extent to which the concerns have been addressed.* The Order requires a statement of the extent to which the concerns of state and local officials have been met.

  a. There is fundamental disagreement between state and local officials and the OCC regarding preemption in the national bank context. For the reasons set forth in the materials that precede this federalism impact statement, we believe that this final rule is necessary to enable national banks to operate to the full extent of their powers under federal law, and without interference from inconsistent state laws; consistent with the national character of the national banks; and in furtherance of their safe and sound operations. We also believe that this final rule has ample support in statute and judicial precedent. The concerns of the state and local officials could only be fully met if the OCC were to take a position that is contrary to federal law and judicial precedent. Nevertheless, to respond to some of the issues raised, the language in this final regulation has been refined, and this preamble further explains the standards used to determine when preemption occurs and the criteria for when state laws generally would *not* be preempted.

  b. Similarly, we fundamentally disagree with the state and local officials about whether this final rule will undermine the dual banking system. As discussed in the OCC's visitorial powers rulemaking also published today in the *Federal Register,* differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather, they are the defining characteristics of it. The dual banking system is universally understood to refer to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by federal authority, the OCC. Thus, we believe that the final rule preserves, rather than undermines, the dual banking system.

  c. Finally, we stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling of consumer complaints and the pursuit of remedies, and we remain eager to do so. Moreover, as discussed in the preamble, we believe the OCC has the resources to enforce applicable laws, as is evidenced by the enforcement actions that have generated hundreds of

millions of dollars for consumers in restitution, that have required national banks to disassociate themselves from payday lenders, and that have ordered national banks to stop abusive practices. Thus, the OCC has ample legal authority and resources to ensure that consumers are adequately protected.

List of Subjects

12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

12 CFR Part 34

Mortgages, National banks, Real estate appraisals, Real estate lending standards, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, parts 7 and 34 of chapter I of title 12 of the Code of Federal Regulations are amended as follows:

PART 7—BANK ACTIVITIES AND OPERATIONS

- *The authority citation for part 7 is revised to read as follows:*

Authority: 12 USC 1 *et seq.,* 71, 71a, 92, 92a, 93, 93a, 481, 484, and 1818.

Subpart D—Preemption

- *2. A new § 7.4007 is added to read as follows:*

§ 7.4007 Deposit-taking.

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable federal law.

(b) *Applicability of state law.* (1) Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its federally authorized deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;[3] [77]

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services;[4] [78]

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[5] [79]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

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[77] [3] This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank* v. *Luckett,* 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248–249.[77] [4] State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

[78] [4] State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

[79] [5] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa,* 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. . . . But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id*. at 239 (holding that federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

- *3. A new § 7.4008 is added to read as follows:*

§ 7.4008 Lending.

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to any terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 USC 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.

(d) *Applicability of state law.* (1) Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of

the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.[6] [80]

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[7] [81]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[80] [6]The limitations on charges that comprise rates of interest on loans by national banks are determined under federal law. *See* 12 USC 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[81] [7]*See supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton* v. *Iowa,* 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

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- *4. A new § 7.4009 is added to read as follows:*

§ 7.4009 Applicability of state law to national bank operations.

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable federal law.

(b) *Applicability of state law.* Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.* (1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law;

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

Part 34—Real Estate Lending and Appraisals

Subpart A—General

- *5. The authority citation for part 34 continues to read as follows:*

Authority: 12 USC 1 *et seq.,* 29, 93a, 371, 1701j–3, 1828(o), and 3331 *et seq.*

- *6. In § 34.3, the existing text is designated as paragraph (a), and a new paragraph (b) is added to read as follows:*

§ 34.3 General rule.

* * * * *

(b) A national bank shall not make a consumer loan subject to this subpart based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 USC 45(a)(1), and regulations promulgated thereunder in connection with loans made under this part.

- *7. Section 34.4 is revised to read as follows:*

§ 34.4 Applicability of state law.

(a) Except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 USC 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1] [82]

(13) Due-on-sale clauses except to the extent provided in 12 USC 1701j–3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[2] [83]

(4) Homestead laws specified in 12 USC 1462a(f);

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[82] [1] The limitations on charges that comprise rates of interest on loans by national banks are determined under federal law. *See* 12 USC 85 and 1735f–7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not consitute interest are addressed in 12 CFR 7.4002.

[83] [2] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa,* 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. . . . But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).

Dated: January 6, 2004

John D. Hawke, Jr.
Comptroller of the Currency

Visitorial Powers Final Rule

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 7
[Docket No. 04–03]
RIN 1557–AC78
[BILLING CODE 4810–33–P]

Bank Activities and Operations

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its final rule amending its visitorial powers regulation in order to clarify issues that have arisen in connection with the scope of the OCC's visitorial powers.

EFFECTIVE DATE: February 12, 2004.

FOR FURTHER INFORMATION CONTACT: For questions concerning the final rule, contact Andra Shuster, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION: On February 7, 2003, the OCC published a notice of proposed rulemaking in the *Federal Register* (68 FR 6363) to implement the American Homeownership and Economic Opportunity Act of 2000 (AHEOA) and clarify our visitorial powers regulation (NPRM). In addition, we proposed to amend parts 5, 7, 9, and 34 of our regulations for other purposes and to make various technical changes to correct citations or footnote numbering.

On December 17, 2003, the OCC published a final rule that addressed all of the foregoing parts of the proposal except visitorial powers (68 FR 70122). This final rule relates solely to the visitorial powers proposal (Proposal).

The OCC received 55 comments on the NPRM. Of these, 53 comments addressed the visitorial powers proposal. These comments included three from national banks, one from an operating subsidiary of a national bank, six from bank holding companies, five from banking trade associations, two from bank membership organizations, one from a community group association, two from non-profit consumer groups, one from a state bank supervisors' association, 30 from state bank supervisors' offices, one from a securities administrators' membership organization, and one from a law enforcement association.

> While many of the commenters supported the proposal, some were opposed, and many offered suggestions for changes. For the reasons discussed later in this preamble, we have adopted the visitorial powers provisions of the NPRM with certain modifications also described later.

A. Background

Current 12 CFR 7.4000(a) provides that only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, subject to exceptions provided in federal law. Section 7.4000(a) goes on to define the regulatory, supervisory, and enforcement actions included within our visitorial powers, while § 7.4000(b) sets out several exceptions to our exclusive authority that are created by federal law.[1]

These provisions interpret and implement 12 USC 484. Paragraph (a) of that section states—

> No national bank shall be subject to any visitorial powers except as authorized by *Federal* law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Paragraph (b) of the statute then permits lawfully authorized state auditors or examiners to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

In recent years, various questions have arisen with respect to the scope of the OCC's visitorial powers over national banks. In general, the questions fall into two broad categories: First, what activities conducted by a national bank are subject to the OCC's *exclusive* visitorial powers? Second, what is the meaning of certain exceptions to the OCC's exclusive visitorial powers that are provided in the statute, specifically the exception for visitorial powers "vested in the courts of justice?"

The NPRM invited comments on proposed amendments to § 7.4000 to clarify the application of section 484 to both areas.

B. Description of the Proposal

The proposal contained two types of changes to § 7.4000. First, we proposed to add a new paragraph (3) to § 7.4000(a) that identifies the scope of the activities of national banks for which the OCC's visitorial powers are exclusive, pursuant to section 484. The proposal provided that the

[1] Paragraph (c) of 12 CFR 7.4000 clarifies that the OCC owns reports of examination and addresses a bank's obligations with respect to these reports. This paragraph is unaffected by this rulemaking.

OCC has exclusive visitorial authority over national bank activities that are permissible under federal law or regulation or OCC issuance or interpretation, including how those activities are conducted. Second, we proposed to revise § 7.4000(b) to clarify the OCC's interpretation of the "vested in the courts of justice" exception. The proposal provided that national banks are subject to the visitorial power inherently vested in courts and that the "vested in the courts of justice" exception did not create or expand any authority of states or other governmental entities to regulate or supervise national banks. As we will discuss in greater detail later in this preamble, both of these changes serve to clarify that federal law commits the supervision of national banks' federally authorized banking business exclusively to the OCC, (except where federal law provides otherwise), and does not apportion that responsibility among the OCC and the states; and that state authorities may not achieve indirectly by resort to judicial actions what section 484 prohibits them from achieving directly through state regulatory or supervisory mechanisms. The proposal also added an exception in proposed new § 7.4000(b)(vi) recognizing that functional regulators may exercise the authority over national banks conferred by the Gramm–Leach–Bliley Act (GLBA).[2]

C. Overview of Comments Received

Many commenters supported the proposal, noting that the clarification of the visitorial powers regulations would be helpful. One commenter said that subjecting national banks' federally authorized activities to state regulation would be inconsistent with the purposes of the National Bank Act. Others noted that additional layers of state supervision would have the effect of making the operations of national banks less efficient and more costly. Commenters also stated that they supported the proposal's clarification of the "courts of justice" exception. A number of commenters supporting the proposal suggested that, while the reference in the preamble is helpful, the OCC should add language to the regulation text to explicitly state that the OCC's exclusive visitorial authority applies to operating subsidiaries.

We also received a number of comments that opposed the proposal. These commenters advanced four principal points:

- first, that the visitorial powers amendments are inconsistent with the fundamental tenets of the dual banking system, pursuant to which national banks are subject to state regulation;
- second, that the amendments are inconsistent with the presumptive applicability of state law to national banks, as endorsed by the Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle–Neal Act)[3];

[2] Pub. L. 106–102, 113 Stat. 1338 (November 12, 1999). For example, section 301 of the GLBA (codified at 15 USC 6711) provides that national banks' insurance activities are functionally regulated by the states, subject to the applicability of state law provisions in section 104 of that law (codified at 15 USC 6701). *Id.* at section 301, 113 Stat. at 1407, codified at 15 USC 6711.

[3] Pub. L. 103–328, 108 Stat. 2338 (September 29, 1994).

- third, that the OCC's visitorial power over national banks is not exclusive; and,
- finally, that the OCC lacks authority to prevent states from exercising visitorial powers over national bank operating subsidiaries.

The following discussion addresses each of these points.

D. Discussion

1. The exclusivity of the OCC's visitorial authority is integral to—not inconsistent with—the dual banking system.

Many commenters opposed to the proposal argued that the amendments would amount to a "field preemption" that would be inconsistent with what they aver to be a fundamental tenet of the dual banking system, namely, that states have the authority to regulate the business operations of all banks, including national banks, unless Congress preempts state law in specific areas.

This argument mischaracterizes the essence of the dual banking system. Differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. As one noted commenter has observed, "[t]he very core of the dual banking system is the simultaneous existence of different regulatory options that are *not* alike in terms of statutory provisions, regulatory implementation and administrative policy."[4] The federal grant of national bank powers and the uniformity of the standards that govern their exercise, coupled with the OCC's exclusive visitorial authority, are fundamental distinctions between the national banking system and the system of state-chartered and regulated banks that comprises the other half of the dual banking system.

Neither the case law nor scholarly literature recognizes a definition of dual banking incorporating the notion that national banks are subject to state supervision and regulation of activities they are authorized to conduct under federal banking law.[5] What the case law *does* recognize is that "states retain some power to regulate national banks in areas such as contracts, debt collection, acquisi-

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[4] Kenneth E. Scott, "The Dual Banking System: A Model of Competition in Regulation," 30 Stan. L. Rev. 1, 41 (1977).

[5] The following is typical of the way the dual banking system is described in recent scholarly articles:

> Depository financial institutions in the United States, including banks, credit unions, and thrifts, are unique in that their incorporators and/or management have a choice between state and federal charters, regulatory authorities, and governing statutes. No other industry has separate and distinct laws governing its powers, regulation, and organizational structure. This phenomenon is known as the "dual banking system."

John J. Schroeder, "'Duel' Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions," 36 Ind. L. Rev. 197, at 197 (2003), citing Arthur E. Wilmarth, Jr., "The Dual Banking System—A Legal History" (September 30, 1991) (unpublished paper presented at the Education Foundation of State Bank Supervisors (EFSBS) Seminar for State Banking Department Attorneys).

tion and transfer of property, and taxation, zoning, criminal, and tort law."[6] Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the federally authorized business of banking conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks—and others—to do business.[7] In other words, these state laws provide a framework for a national bank's ability to exercise powers granted under federal law; they do not obstruct or condition a national bank's exercise of those powers.[8]

The argument that the proposed amendments generally amount to an impermissible "field preemption" is also misplaced. First, the regulatory proposal and the final regulation would not have the effect of preempting substantive state laws, but rather would clarify the appropriate agency for enforcing those state laws that are applicable to national banks. Concerns about "field preemption" are misplaced since the rule pertains only to state laws that would provide for state "visitation" of national banks. The proposal and this final rule interpret the text of a federal statute, 12 USC 484, that expressly confines the scope of permissible supervision over national banks to what is provided in federal law, including the limited exception for state inspection of certain records that is contained in section 484. Thus, Congress has spoken to the issue. Our amendments to our visitorial powers rule seek to define the terms used in the statute in order to provide greater certainty to affected parties with regard to the specific issue of visitation.

2. No presumption against preemption applies in the case of the national banking laws, a conclusion that is confirmed by the Riegle–Neal Act.

Commenters also argued that the amendments in the proposal are inconsistent with the presumptive application of state law to national banks, which they assert was specifically endorsed by Congress in the Riegle–Neal Act.[9]

However, case law, whether decided before or after Riegle–Neal was enacted, is consistent in holding that there is no presumption against preemption in the national bank context. The Su-

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[6] *Bank of America* v. *City & County of San Francisco,* 309 F.3d 551, 559 (9th Cir. 2002).

[7] The OCC is publishing in the *Federal Register* today a final rule amending parts 7 and 34 of the OCC's regulations to clarify that these state "infrastructure" statutes would generally not be preempted by federal law.

[8] *See Barnett Bank of Marion County, N.A.* v. *Nelson,* 517 U.S. 25, 33–34 (1996).

[9] Commenters rely on the legislative history of the Riegle–Neal Act as support for their assertions. This history demonstrates that Congress intended that the Riegle–Neal Act would *not* disrupt the application of traditional principles of federal preemption to questions involving national banks. We note, however, that under well-established principles of statutory construction, it is not necessary to resort to legislative history to determine the meaning of a statute unless the text of the statute is ambiguous, which is not the case here. *See, e.g., Burlington Northern R.R. Co.* v. *Oklahoma Tax Commission,* 481 U.S. 454, 461 (1987) (unless there are exceptional circumstances, judicial inquiry into the meaning of a statute is complete once the court finds that the terms of the statute are unambiguous.) (citation omitted); *see also* 2A Norman J. Singer, Sutherland, *Statutes and Statutory Construction* § 48.01, at 410 (6th ed. 2000) ("Generally, a court would look to the legislative history for guidance when the enacted text was capable of two reasonable readings or when no one path of meaning was clearly indicated.").

preme Court has said that a presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence."[10] Courts have consistently held that the regulation of national banks is an area where there has been an extensive history of significant federal presence. As recently observed by the U.S. Court of Appeals for the Ninth Circuit, "since the passage of the National Bank Act in 1864, the federal presence in banking has been significant." The court thus specifically concluded that "the presumption against preemption of state law is inapplicable."[11] Indeed, when analyzing national bank powers, the Supreme Court has interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."[12]

The relevant text of the Riegle–Neal Act is fully consistent with these conclusions. In fact, it is entirely consistent with the proposal and final rule in providing that even when state law may be applicable to interstate branches of national banks, the OCC is to enforce such laws, *i.e.,* the OCC retains exclusive visitorial authority:

> (A) In general
>
> The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, *except—*
>
> (i) *when Federal law preempts the application of such State laws to a national bank; . . .*
>
> (B) Enforcement of applicable State laws
>
> The provisions of any State law to which a branch of a national bank is subject under this paragraph *shall be enforced,* with respect to such branch, *by the Comptroller of the Currency.*[13]

[10] *U.S.* v. *Locke,* 529 U.S. 89, 108 (2000) (explaining *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947)).

[11] *Bank of America,* 309 F.3d at 558–59 (citations omitted).

[12] *Barnett,* 517 U.S. at 32. The *Barnett* Court went on to elaborate:

> [W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank,* the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained 'no indication that Congress [so] intended . . . as it has done *by express language* in several other instances.'
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> *Id.* at 34 (emphasis in original) (citations omitted).

[13] 12 USC 36(f)(1) (emphasis added).

Thus, although Riegle–Neal section 36(f) clarifies that the laws of the host state regarding community reinvestment, consumer protection, and fair lending would be applicable to branches of an out-of-state national bank located in the host state, *unless preempted*, the Riegle–Neal Act further and unambiguously provides that it is the OCC that has the authority to enforce such state laws to the extent they are *not* preempted.

3. Section 484 grants visitorial authority to the OCC, to the exclusion of the states.

Some commenters argued that the OCC's visitorial power is not exclusive because (1) the text of the statute does not contain an explicit grant of exclusive authority to the OCC; and (2) courts have permitted states to exercise concurrent authority to seek enforcement of state laws. These two contentions are addressed in turn.

a. The text of section 484

Commenters who opposed the proposal argued that the OCC may not rely on 12 USC 484 as the basis for our exclusive jurisdiction because that section is silent on precisely who has visitorial powers over national banks. A review of the history of section 484 shows that this reading of the statute is fundamentally mistaken.

In the Act of June 3, 1864, later named the National Bank Act, the visitorial powers provision appeared in the *same section* as the Comptroller's examination authority. In that context, it was clear that visitorial authority was exclusive to the Comptroller, subject to a single exception for powers "vested in the several courts of law and chancery." Section 54 of the National Bank Act provided in relevant part:

> *And be it further enacted,* That the comptroller of the currency, with the approbation of the Secretary of the Treasury, as often as shall be deemed necessary or proper, shall appoint a suitable person or persons to make an examination of the affairs of every banking association. . . . And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.[14]

These examination and visitorial provisions of section 54 were codified together in 1875 at section 5240 of the Revised Statutes of the United States. Section 5240 explicitly gave the OCC visitorial authority over national banks *and* precluded the exercise of visitorial authority by any other source, except insofar as expressly allowed by one of the exceptions, including the exception covering visitations "as authorized by federal law." In context, the meaning of the text is unmistakable. The Comptroller is given the power to examine and supervise national banks—that is, to serve as the "visitor" of the bank—and that power, as well as any other "visitorial" power is denied to any other entity unless federal law provides otherwise.

[14] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 USC 481–484.

The examination and visitorial provisions were split, slightly revised, then later reunited, in subsequent codifications,[15] but Congress has never altered the original meaning of these grants of authority to the OCC. The visitorial provision has been substantively amended only twice, once in 1913 and once in 1982.[16] Both times, the amendments were consistent with the exclusive grant of visitorial authority in the original enactment. In both cases, the legislative history, though sparse, contains no indication that Congress intended to change the exclusivity of its original grant of authority to the Comptroller. In fact, the 1982 amendment that added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws would have been unnecessary if the language of section 484 permitted state examination and enforcement of applicable state law. As codified today, the examination and visitorial provisions appear in separate sections of the United States Code. Substantive consequences do not attach to the placement of the provisions in the Code, however, and neither provision may be read in isolation to suggest a meaning that is inconsistent with the law as enacted by the Congress.

Moreover, exclusivity is inherent in the structure of the statute, both as originally enacted and today. The visitorial powers provision first sets forth a complete prohibition, then subjects that prohibition to certain exceptions.[17] The inference to be drawn from this structure is that the prohibition applies unless a visitorial power is covered by one of the enumerated exceptions. As noted above, the statute's description of the exceptions has changed—though the changes have been modest—over time. But none of these exceptions allows for the allocation of any general bank supervisory responsibility to the states.

As we discussed when we issued the visitorial powers proposal, any allocation of general supervisory authority over national banks to the states would be inconsistent with the history and purpose of the National Bank Act, as well as with the express language of the statute. Congress enacted the National Currency Act (Currency Act) in 1863 and the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the post–Civil War national economy.

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[15] The examination provision is currently codified at 12 USC 481.

[16] In 1913, the exception for Congress and its committees was added, the reference to the Act of June 3, 1864 changed to "other than such as are authorized by *law,"* and the word "bank" substituted for the word "association." Amendments in 1982 added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws, added the word "federal" before the word "law," and changed "bank" to "national bank."

[17] Commenters cited to *First Union Nat'l Bank* v. *Burke,* 48 F. Supp. 2d 132 (D. Conn. 1999), in support of their contention that the OCC's visitorial power is not exclusive. We disagree that the court's opinion is dispositive of the issues considered here. The opinion did not analyze the purpose, plain language, and structure of section 484. Moreover, we note that the *Burke* court agreed that a state may not directly enforce state law against national banks.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.[18] Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general,[19] proponents of the national banking system were concerned that states[20] would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions."[21]

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference.[22]

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[18] Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law *[i.e.,* the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong. 1st Sess. 1256 (March 23, 1864). While he did not believe that the legislation was necessarily harmful to the state bank system, Rep. Hooper did "look upon the system of State banks as having outlived its usefulness." *Id.* Opponents of the legislation believed that it was intended to "take from the States . . . all authority whatsoever over their own State banks, and to vest that authority . . . in Washington." Cong. Globe, 38th Cong., 1st Sess. 1267 (March 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over banking from the states to the federal government. Given that the legislation's objective was to replace state banks with national banks, its passage would, in Rep. Brooks's opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States." Cong. Globe, 38th Cong., 1st Sess. 1271 (Mar. 24, 1864). *See also* John Wilson Million, "The Debate on the National Bank Act of 1863," 2 J. Pol. Econ. 251, 267 (1893–94) regarding the Currency Act. ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.").

[19] *See, e.g., Tiffany* v. *Nat'l Bank of Missouri,* 85 U.S. 409, 412–413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. . . . National banks have been National favorites. They 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."); *Beneficial Nat'l Bank* v. *Anderson,* 123 S. Ct. 2058, 2064 (2003) ("[T]his 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.'") (citation omitted). *See also* Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 725–34 (1957); Paul Studenski and Herman E. Krooss, *Financial History of the United States* 154–55 (1952).

[20] For ease of reference, we use the term "state" in this preamble in a way that includes other non-federal governmental entities.

[21] Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864); *see also Beneficial Nat'l Bank,* 123 S.Ct. at 2064.

[22] In a report of the Comptroller of the Currency made pursuant to the Currency Act, Hugh McCulloch, then Comptroller, discussed the need to protect national banks from variation in interest rates among the states by making a change in the law to provide for uniform interest rates. He referred to the Supreme Court decision in *M'Culloch* v. *Maryland,* 17 U.S. 316 (1819), which prohibited the state of Maryland from imposing taxes on the Bank of the United States under the federal statute establishing the bank, as support for Congress having the authority to make this change by likening

Congress, accordingly, established a federal supervisory regime and created a federal agency within the Department of the Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination into all the affairs of [a national bank],"[23] and solidified this federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assured, among other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank, *and* protected national banks from potential state hostility by establishing that the authority to examine and supervise national banks is vested *only* in the OCC, unless otherwise provided by federal law.[24]

Courts have consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act. The Supreme Court stated in one of the first cases to address the role of the national banking system that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."[25] Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status.[26]

In *Guthrie* v. *Harkness,*[27] the Supreme Court recognized how the National Bank Act furthered the objectives of Congress:

> Congress had in mind in passing this section [section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that

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the Maryland taxation statute to a state statute on interest. Office of the Comptroller of the Currency, "Report on the Finances," November 28, 1863, at 52–53.

[23] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 USC 481.

[24] Writing shortly after the Currency Act and National Bank Act were enacted, then–Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." Letter of Secretary of the Treasury, serial set collection, CIS No. 1239 S.misdoc.100, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (April 23, 1866).

[25] *Farmers' & Mechanics' Nat'l Bank* v. *Dearing,* 91 U.S. 29, 33 (1875).

[26] *See Marquette Nat'l Bank of Minneapolis* v. *First Omaha Service Corp.,* 439 U.S. 299, 314–315 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, . . . Congress intended to facilitate . . . a 'national banking system'." (citation omitted)); *Franklin Nat'l Bank of Franklin Square* v. *New York,* 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); *Davis* v. *Elmira Sav. Bank,* 161 U.S. 275, 283 (1896) ("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.").

[27] 199 U.S. 148, 159 (1905).

> no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in *Easton* v. *Iowa,*[28] the Court stated that federal legislation affecting national banks—

> 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 as numerous as the states . . . . It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute. . . . [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and *confusion would necessarily result from control possessed and exercised by two independent authorities.*

And in *Farmers' & Mechanics' National Bank,* after observing that national banks are means to aid the government, the Court stated—

> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."[29]

Our proposed amendment clarifying the scope of the visitorial powers authorized to the OCC pursuant to section 484 is consistent with the historical meaning of the term "visitation" and with cases discussing section 484. The Supreme Court in *Guthrie* noted that the term "visitorial" as used in section 484 derives from English common law, which used the term "visitation" to refer to the act of a superintending officer who visits a corporation to examine its manner of conducting business and enforce observance of the laws and regulations.[30] "'Visitors of corporations have

[28] 188 U.S. 220, 229, 231–32 (1903) (emphasis added).

[29] 91 U.S. at 34 (citations omitted).

[30] *Guthrie,* 199 U.S. at 158, citing *First Nat'l Bank of Youngstown* v. *Hughes,* 6 F. 737, 740 (C.C.D. Ohio 1881), *appeal dismissed,* 106 U.S. 523 (1883)). Because "visitation" assumes the act of a sovereign body, private actions brought by individuals against banks in pursuit of personal claims ordinarily are outside the scope of visitorial powers rules. This point is discussed further in the analysis of the arguments asserting concurrent jurisdiction between state and federal courts over national banks, *infra.*

power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.'"[31] The *Guthrie* Court also noted that visitorial powers include bringing "judicial proceedings" against a corporation to enforce compliance with applicable law.[32]

b. Concurrent enforcement jurisdiction

Several commenters asserted that states retain jurisdiction concurrent with the OCC to enforce compliance with state laws against national banks in both state and federal court.[33] The cases cited by commenters in support of this contention are examples of the use of courts for private civil cases in pursuit of personal claims against national banks, which, unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations.[34] Other cases cited by commenters appear inapposite or outdated.[35]

A few commenters cited *First National Bank in St. Louis* v. *Missouri*[36] to support their position that states may bring enforcement actions directly against national banks.[37] In *St. Louis,* the court

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[31] *Id.* (citation omitted).

[32] *Id. See also Peoples Bank of Danville* v. *Williams,* 449 F. Supp. 254, 259 (W. D. Va. 1978) (visitorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs). For a detailed discussion of the historical scope and content of visitorial powers generally, *see* Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity,* 49 Harv. L. Rev. 369 (1935–36).

[33] We note that the National Bank Act did confer jurisdiction on both state and federal courts over actions against national banks. *See* Act of June 3, 1864, § 57. Nothing in the grant of jurisdiction says or implies that state authorities may use the judiciary as the medium to supervise, examine, or regulate the business of national banks, as commenters have asserted.

[34] *First Nat'l Bank of Charlotte* v. *Morgan,* 132 U.S. 141 (1889) (private action for usury against national banks may be brought in state court); *Bank of Bethel* v. *Pahquioque Bank,* 81 U.S. 383 (1872) (private creditors may sue national bank in state court).

[35] *See, e.g., Guthrie,* 199 U.S. 148 (private civil action by a stockholder to compel, by writ of mandamus, the directors of a national bank to permit a stockholder to inspect the bank's books; private civil action, no state executive visitation involved); *Colorado Nat'l Bank of Denver* v. *Bedford,* 310 U.S. 41 (1940) (action for declaratory judgment; consistent with the OCC's final regulation, which does not regard actions for declaratory judgment as visitorial); *Waite* v. *Dowley,* 94 U.S. 527 (1877) (substantive preemption case that did not involve visitorial powers); and *First Nat'l Bank of Youngstown,* 6 F. at 741 (no visitation involved where state taxation authorities used court to compel production of bank's records in aid of taxation of individual depositors; state actions did "not contemplate inspection, supervision, or regulation of [the bank's] business, or an enforcement of its laws or regulations.").

[36] 263 U.S. 640 (1924).

[37] In *St. Louis,* the state of Missouri brought a *quo warranto* action to stop a national bank from operating a branch in the state. The state had a law prohibiting branch banking. The Supreme Court held that the state statute was applicable to national banks and could be enforced by the state. *Quo warranto* is "[a] common law writ designed to test whether a person exercising power is legally entitled to do so. An extraordinary proceeding, prerogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted. . . . It is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers." *Black's Law Dictionary* (6th ed. 1990) (citation omitted). Today, such an issue would be raised via an action for a declaratory judgment.

upheld a state's ability to preclude, through an action *quo warranto,* a national bank's exercise of a power that was not then authorized to it, namely, intrastate branching.

St. Louis presents a unique set of circumstances, now outdated, and did not discuss the scope of section 484; thus the case provides little help in construing section 484. The principal issue in the case was whether a national bank had the power to branch intrastate despite a state law prohibition on branching. The Court looked for express authority to branch intrastate in the text of the National Bank Act and, finding none, concluded that the activity was not authorized. The Court then went on to permit Missouri to enforce its intrastate branching prohibition against the national bank. To the extent that *St. Louis* is still relevant, the case holds that a state may enforce a prohibition against a national bank where: (a) the national bank is found to lack the fundamental authority to engage in an activity;[38] (b) the state has a law prohibiting the activity entirely; and (c) no federal enforcement mechanism is available to preclude the bank from violating the applicable state law.

The principal means in use today for testing the application of state law to national banks—declaratory judgment—was unavailable to the states prior to the enactment of the Declaratory Judgment Act in 1934, 28 USC 2201 through 2202. If this type of action had been available at the time of the *St. Louis* case, there would have been no need for the state to bring a *quo warranto* action. Subsequent cases concerning the power of national banks to branch have typically been brought as declaratory judgments.[39]

Moreover, the OCC has enforcement authority today that did not exist when *St. Louis* was decided. Congress authorized the OCC to bring enforcement actions predicated on, *inter alia,* violations of state law in 1966.[40] Thus, if state law that would regulate an aspect of a national bank's federally authorized banking business is not preempted, it would be enforced by the OCC, not the states.[41]

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[38] The power to branch intrastate was subsequently authorized for national banks by the McFadden Act in 1927. Act of February 25, 1927, c. 191, § 7, 44 Stat. 1228, codified at 12 USC 36.

[39] *See, e.g., Jackson* v. *First Nat'l Bank of Valdosta,* 349 F.2d 71 (5th Cir. 1965); *State of Utah, ex rel., Dep't of Financial Institutions* v. *Zions First Nat'l Bank of Ogden, Utah,* 615 F.2d 903 (10th Cir. 1980).

[40] Pub. L. 89–695, section 202, 80 Stat. 1028 (Oct. 16, 1966). For a violation of an applicable state law, the OCC may issue cease and desist orders, exercise its removal and prohibition authority, or impose civil money penalties. *See* 12 USC 1818(b), (e), and (i)(2).

[41] *See Nat'l State Bank, Elizabeth, N.J.* v. *Long,* 630 F.2d 981, 988 (3rd Cir. 1980). *See also State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.,* CV 2000–003625, Superior Court of Arizona, Ruling at 27–28, Conclusions of Law, paragraphs 46–55 (August 25, 2003). In this action involving a national bank defendant, the court found that restitution and remedial action ordered by OCC pursuant to its visitorial powers was comprehensive and significantly broader than that available through state court proceedings and that it provided more relief to consumers than the court found a legal basis for imposing under state law. The court also noted that ordering the remedies requested by the state would impermissibly affect the exercise of the OCC's administrative enforcement powers.

The essential elements of *St. Louis* thus are entirely consistent with our construction of the "courts of justice" exception as proposed. Moreover, our construction is consistent with the text and history of section 484, the purpose of that section in the context of the national banking laws, and with other U.S. Supreme Court and lower federal court precedents. The exception preserves the powers that are inherent in the courts. As we noted in the preamble to the proposal, Congress clearly did not intend to create new visitorial authority that could be exercised by state authorities when it recognized the authority of courts of justice. It would be completely contrary to the express purposes of section 484 to read the "vested in the courts of justice" exception as a new federal authorization for state authorities to accomplish exactly what Congress deliberately and expressly intended states *not* to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

This purpose is effectuated by the plain language of the statute. The exception permits the exercise of "visitorial powers" that are *"vested* in the courts of justice," powers, in other words, that *courts possess.* Section 484 does not create new powers for state executive, legislative, or administrative authorities to supervise and regulate national banks. It grants no *new* authority and thus does not authorize states to bring suits or enforcement actions that they do not otherwise have the power to bring.

To read the *exception* as an authorization to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to *create* a visitorial power that states do not otherwise possess under federal law. Section 484 by its express terms simply does not create such boundless visitorial powers for state authorities. Where section 484 *does* recognize visitorial authority for states in section 484(b), by contrast, it is specific and narrow, and expressly stated as an *exception* to the general exclusivity of the OCC's visitorial powers recognized in section 484(a).

Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the federally authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank's compliance with a law that would govern the content or the conditions for conduct of a national bank's federally authorized banking business is within the OCC's exclusive purview.[42] In addition, it does not preclude actions brought by other governmental entities pursuant to a federal grant of authority.[43]

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[42] *See Nat'l State Bank, Elizabeth, N.J.,* 630 F.2d at 988 ("[W]e find ourselves unable to agree with the district court's determination that state officials have the power to issue cease and desist orders against national banks for violations of the [state's] anti-redlining statute. Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency."); *see also First Union Nat'l Bank,* 48 F. Supp. 2d at 145–46.

[43] *See, e.g., Bank of America Nat'l Trust & Savings Ass'n* v. *Douglas,* 105 F.2d 100 (D.C. Cir. 1939) (service of subpoenas on a national bank by the SEC in connection with an investigation under the Securities Exchange Act of 1934).

4. The OCC has exclusive visitorial authority over national bank operating subsidiaries to the same extent as it has that authority over the parent national bank.

Commenters also asserted that the OCC lacks the authority to prevent states from exercising visitorial authority over national bank operating subsidiaries because they are state-chartered corporations and because section 484 does not specifically refer to operating subsidiaries. Some suggested that a curtailing of state authority over state corporations violates the 10th Amendment to the Constitution.[44] These points are discussed in order, however, it is important to note that the issue of the application of state law to national bank operating subsidiaries is dealt with in a different, preexisting regulation, 12 CFR 7.4006, which we did not propose to change. For the reasons discussed below, we continue to hold the view that under 12 USC 24(Seventh) and 12 CFR 7.4006, the standards of section 484 apply to national bank operating subsidiaries to the same extent as their parent national bank, and such a result is entirely consistent with Constitutional principles.

a. The OCC's exclusive visitorial authority over operating subsidiaries

Pursuant to their authority under 12 USC 24(Seventh), national banks have long used separately incorporated entities as a means to engage in activities that the bank itself is authorized to conduct. When established in accordance with OCC regulations and approved by the OCC, an operating subsidiary is a federally authorized and federally licensed means by which a national bank may conduct federally authorized activities. Courts have consistently treated operating subsidiaries as equivalent to national banks in determining their powers and status under federal law, unless *federal* law requires otherwise.[45] Operating subsidiaries are consolidated with—that is, their assets and liabilities are indistinguishable from—the parent bank for accounting purposes, regulatory reporting purposes, and for purposes of applying many federal statutory or regulatory limits.[46] They are, in essence, no more than incorporated departments of the bank itself.[47]

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[44] The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[45] *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.,* 513 U.S. 251 (1995) (sale of annuities by operating subsidiary); *Clarke* v. *Securities Industry Ass'n,* 479 U.S. 388 (1987) (securities brokerage operating subsidiary); *American Ins. Ass'n* v. *Clarke,* 865 F.2d 278 (D.C. Cir. 1988) (bond insurance subsidiary); *M & M Leasing Corp.* v. *Seattle First Nat'l Bank,* 563 F.2d 1377 (9th Cir. 1977) (auto leasing subsidiary); and *Valley Nat'l Bank* v. *Lavecchia,* 59 F. Supp. 2d 432 (D. N.J. 1999) (title insurance subsidiary); *Budnik* v. *Bank of America Mortgage,* 2003 U.S. Dist. LEXIS 22542 (N.D. IL 2003) (mortgage subsidiary).

[46] *See* 12 CFR 5.34(e)(4) (requiring application of, *e.g.,* statutory lending limit and limit on investment in bank premises to a national bank and its operating subsidiaries on a consolidated basis).

[47] The authority of national banks to conduct business through operating subsidiaries has been recognized for many years. For example, rulings published in the *Comptroller's Manual* in the mid 1960s permitted national banks to own, *e.g.,* mortgage companies and finance companies. A July 30, 1965, letter by Comptroller James J. Saxon concluded that the prohibition on stock ownership by national banks in 12 USC § 24(Seventh) does not apply "when such ownership is a proper incident to banking," as is the case with operating subsidiaries. *See also* 12 CFR 250.141, an interpretation by the Board of Governors of the Federal Reserve System adopted in 1968, which reaches the same conclusion regarding state member banks.

As a matter of federal law, operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent bank, including being subject to the exclusive visitorial authority of the OCC.[48] Where Congress wanted a different result, it specifically provided for it. For example, section 111 of GLBA makes provision for state regulation of functionally regulated bank subsidiaries conducting securities and insurance activities, treating such subsidiaries as if they were instead subsidiaries of the institution's holding company.[49] Similarly, section 133 of GLBA seeks to clarify the status of bank and thrift subsidiaries and affiliates for purposes of any provisions of the Federal Trade Commission Act applied by the Federal Trade Commission.[50]

Our regulations make clear that activities conducted in operating subsidiaries must be permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking.[51] Moreover, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[52] This includes state laws that purport to govern the activities conducted in the operating subsidiary. OCC regulations specifically provide that "[u]nless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[53] Our regulations reflect express Congressional recognition in section 121 of the GLBA that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[54] The "terms and conditions" that govern the conduct of operating subsidiary activities referenced in this provision include how, and by whom, the operating subsidiary is examined and supervised. Thus, operating subsidiaries are licensed, examined, and supervised by the same federal banking agency—the OCC—that examines and supervises national banks, using the same methodology as in the case of national banks.

Courts that have recently considered the issue have confirmed this conclusion. In *Wells Fargo Bank, N.A.* v. *Boutris,*[55] a federal district court issued a permanent injunction enjoining the Cali-

[48] 12 CFR 5.34(e)(3); 12 CFR 7.4006.

[49] 12 USC 1844(c)(4).

[50] 15 USC 41 note. *See Minnesota* v. *Fleet Mortgage Corp.,* 181 F. Supp. 2d 995 (D. Minn. 2001). In addition, in the case of national bank "*financial* subsidiaries," which engage in activities *beyond* those permissible for the bank itself, Congress provided special standards regarding the application of state laws. Pub. L. 106–102, section 104, 113 Stat. 1338, 1352 (1999), codified at 15 USC 6701.

[51] *See* 12 CFR 5.34(e)(1).

[52] 12 CFR 5.34(e)(3).

[53] 12 CFR 7.4006.

[54] Pub. L. 106–102, section 121, 113 Stat. 1338, 1373 (1999), codified at 12 USC 24a(g)(3)(A).

[55] 265 F. Supp. 2d 1162 (E.D. Cal. 2003).

fornia Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. The court noted the existing case law and concluded that the OCC's operating subsidiary regulation is within the agency's authority delegated to it by Congress and is a reasonable interpretation.[56]

Section 7.4006 of our rules already provides that state law applies to national bank operating subsidiaries to the same extent as it applies to the parent bank.[57] Thus, state laws purportedly forming the basis for the exercise of state regulatory or supervisory authority over national bank operating subsidiaries, which are inapplicable to the parent national bank, are similarly inapplicable to the bank's operating subsidiary. This conclusion is reinforced by the holdings of the court in the *Wells Fargo* and *National City* cases, just described.

b. The Tenth Amendment

Recent case law also confirms that the final rule does not conflict with the 10th Amendment. In the *Wells Fargo* case, *supra,* the California commissioner argued that the OCC was interfering with the state's sovereignty under the 10th Amendment by taking away its power to regulate and enforce laws against state-chartered corporations. The court held that once the OCC authorized the operating subsidiary of the national bank, it ceased being subject to the visitorial power of the state commissioner and that this change was not shown to infringe on California's rights under the 10th Amendment. The court noted that "the Constitution authorizes Congress to establish national banks" and that "*[t]he National Bank Act's effect of 'carving out from state control supervisory authority' over an OCC-authorized operating subsidiary of a national bank does not violate California's Tenth Amendment rights."*[58]

A few commenters cite *Hopkins Federal Savings & Loan Association* v. *Cleary,*[59] as support for the assertion that the 10th Amendment prohibits the federal government from interfering with a state's jurisdiction over corporations created under that state's laws. In that case, the court held that a federal statute (HOLA), which permitted the conversion of state savings associations into

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[56] *See also National City Bank of Indiana* v. *Boutris,* 2003 WL 21536818 (E.D. Cal. July 2, 2003) (also enjoining California officials from exercising visitorial powers over a national bank operating subsidiary); *Budnik supra* note 45, at 5–7 citing the *Wells Fargo* case with approval.

Moreover, the Office of Thrift Supervision (OTS) takes the same approach with respect to operating subsidiaries of federal thrifts that we take for national banks. 12 CFR 559.3(n) of the OTS regulations provides that state law applies to federal savings associations' operating subsidiaries to the extent that the law applies to the parent thrift. This OTS regulation has been upheld by both federal and state courts. *See WFS Financial Inc.* v. *Dean,* 79 F. Supp. 2d 1024 (W.D. Wis. 1999); *see also Chaires* v. *Chevy Chase Bank, F.S.B.,* 748 A.2d 34, 44 (Md. App. 2000).

[57] 12 CFR 7.4006.

[58] *Wells Fargo,* 265 F. Supp. 2d at 1170, (citing *M'Culloch,* 17 U.S. at 424–25 and *First Union Nat'l Bank,* 48 F. Supp. 2d at 148 (emphasis added). *See also Nat'l City Bank of Indiana,* 2003 WL 21536818 at 3 and 4.

[59] 296 U.S. 315 (1935).

federal savings associations notwithstanding state law to the contrary, was unconstitutional because it conflicted with the 10th Amendment.

The essence of the *Hopkins* case was that Congress had attempted to confer rights on a state-chartered entity that were greater than those conferred by the state, namely a more liberal voting requirement for a conversion. As stated by the *Hopkins* Court, "[t]he critical question [was] whether along with such a power [of the U.S. Congress to create federal building and loan associations] there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation."[60] The Court's characterization of the issue highlights the distinction between the state-chartered building and loan associations in the *Hopkins* case and national bank operating subsidiaries. The Court found the law—unconstitutionally—attempted to displace a preexisting state interest by permitting the abandonment of a state bank charter notwithstanding contrary state law. After discussing why the state should retain the right to determine when and how a state thrift is dissolved, the court noted that it would be "an intrusion for another government to regulate by statute or decision, *except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred."*[61]

Hopkins is thus factually inapposite for two reasons. First, nothing in this final rule addresses changes in charter type or *corporate* status by state-chartered entities. Second, as we have explained, once it is established or acquired, a national bank operating subsidiary is a means by which the national bank exercises federally authorized powers. The operating subsidiary conducts its activities pursuant to a license granted under OCC regulations, which also constitutes a federal "license" under the Administrative Procedure Act.[62] In contrast to the state-chartered thrift institutions in *Hopkins,* its operation and activities are thus properly within the purview of federal regulation.[63]

Later, the Court stated "[w]e are not concerned at this time with the applicable rule in situations where the central government is at liberty *(as it is under the commerce clause when such a purpose is disclosed)* to exercise a power that is exclusive as well as paramount . . . . *No question is here as to the scope . . . of the power to regulate transactions affecting interstate or foreign*

[60] *Id.* at 336.

[61] *Id.* at 337 (emphasis added).

[62] Under the Administrative Procedure Act, federal agencies may grant licenses after following certain procedures. 5 USC 558(c). National banks must comply with licensing requirements contained in 12 CFR 5.34(b) in order to establish or acquire an operating subsidiary. These requirements are consistent with the Administrative Procedure Act.

[63] Where a state entity is not within the purview of federal regulation, the OCC's rules require consideration of state law before any approval or changes in corporate form. For example, where a state-chartered nonbank affiliate of a national bank wishes to merge with a national bank (with the resulting entity being a national bank), the law of the state in which the nonbank affiliate is organized must permit the state entity to engage in the merger. *See* 12 CFR 5.33(g)(4)(i) as set forth in a final rule published on December 17, 2003, 68 FR 70122.

commerce."[64] Thus, *Hopkins* explicitly does not address the limits of state and federal government authority, respectively, when a state corporation is engaged in activities that are carried out under federal law subject to federal authority.

Case law since *Hopkins* has clarified the interplay between the 10th Amendment and the Commerce Clause. As noted by the Supreme Court in *United States* v. *Lopez,* 514 U.S. 549 (1995), the Supreme Court in the first half of the 19th century viewed the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. Now, however, the Commerce Clause is viewed more as a grant of authority to Congress. *Id.* at 556. That power has its limits; it "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557, quoting *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). But if an activity fits within one of the categories of activity that Congress may regulate under its commerce power,[65] or other Constitutional authority, the regulation will be upheld.

This year the U.S. Supreme Court affirmed *per curiam* that the Commerce Clause permits Congress to regulate activity affecting intrastate lending. In *Citizens Bank* v. *Alafabco Inc.,* 123 S. Ct. 2037 (2003), the Court found that a debt restructuring agreement, involving a national bank located in Alabama and an Alabama corporation, had a sufficient nexus with interstate commerce to make an arbitration provision in that agreement enforceable under the Federal Arbitration Act, 9 USC 2. The Court stated, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Citizens Bank,* 123 S. Ct. at 2040 (emphasis in original) (citations omitted). After articulating the reasons why the debt restructuring agreements involved commerce within the meaning of the Commerce Clause, the Court stated "[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."[66]

Clearly, national bank operating subsidiaries, licensed by the OCC, engaging in activities permissible for their parent national banks and subject to the same terms and conditions are on the same

[64] *Id.* at 338, 343 (emphasis added) (citations omitted).

[65] Those categories were articulated in *Lopez* as follows: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce." *Id.* at 558–59 (citations omitted).

[66] *Citizens Bank,* 123 S. Ct. 2041. *See also Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 38–39 (1980) ("[B]anking and related financial activities are of profound local concern . . . . Nonetheless, it does not follow that these same activities lack important interstate attributes"); *Perez* v. *United States,* 402 U.S. 146, 154 (1971) ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce").

footing for purposes of the 10th Amendment. Given that they, like their parent banks, engage in activities that have a substantial effect on interstate commerce, regulation of the subsidiaries' activities would be within Congress' authority under the 10th Amendment.

E. Description of the Final Rule

Based upon the foregoing discussion and analysis, the OCC has adopted the final rule with certain modifications that do not alter the fundamentals of the rule as proposed. We have amended the language in § 7.4000(a)(3) slightly to simplify it. In addition, we have amended the regulation text in the final rule in § 7.4000(b)(2). This provision no longer makes reference to the specific powers of the courts of justice "to issue orders or writs compelling the production of information or witnesses" since this is implicit. In addition, we have simplified the language which states that the exception for courts of justice does not authorize states or other governmental entities to exercise visitorial powers over national banks.

F. Regulatory Analysis

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 USC 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the *Federal Register* along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the regulations simply identify the scope of activities for which the agency's visitorial powers are exclusive and clarify how an exception to such powers applies. These amendments do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (2 USC 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in

any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

Executive Order 13132

Executive Order 13132, titled "Federalism," (Order) requires federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has federalism implications. Under the Order, a regulation has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In the proposal, we noted that the regulation may have federalism implications. It is not clear that the Order applies in situations where an agency is implementing a statute that has preemptive effect. Nevertheless, in formulating the proposal and the final rule, the OCC has adhered to the fundamental federalism principles and the federalism policymaking criteria.

Moreover, the OCC has satisfied the requirements set forth in the Order for regulations that have federalism implications and preempt state law. The steps taken to comply with these requirements are set forth below.

- *Consultation.* The Order requires that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts state law unless, prior to the formal promulgation of the regulation, the agency consults with state and local officials early in the process of developing the proposed regulation. We have consulted with state and local officials on the issues addressed herein through the rulemaking process. Following the publication of the proposed rule, representatives from the Conference of State Bank Supervisors (CSBS) met with the OCC to clarify their understanding of the proposal and, subsequently, the CSBS submitted a detailed comment letter regarding the proposal. Thirty-two additional comments were also submitted on the proposal by other state and local officials and state banking regulators. Pursuant to the Order, we will make these comments available to the Director of the OMB. Subsequent public statements by representatives

of the CSBS have restated their concerns, and CSBS representatives have further discussed these concerns with the OCC on several additional occasions.

The Order requires a federalism summary impact statement which addresses the following in addition to the consultation discussed above:

- *Nature of concerns expressed.* The Order requires a summary of the nature of the concerns of the state and local officials and the agency's position supporting the need to issue the regulation. The nature of the state and local official commenters' concerns and the OCC's position supporting the need to issue the regulation are set forth in the preamble, but may be summarized as follows. Broadly speaking, the states disagree with our interpretation of the applicable law, they are concerned about the impact the proposal will have on the dual banking system, and they are concerned about the ability of the OCC to protect consumers adequately.

- *Extent to which the concerns have been addressed.* The Order requires a statement of the extent to which the concerns of state and local officials have been met. The concerns are addressed in order.

  a. There is fundamental disagreement between state and local officials and the OCC regarding the meaning of section 484 as well as the Congressional intent behind the statute. The nature of the disagreement is discussed at length in the materials that precede this federalism impact statement. For the reasons set forth in those materials, we believe that the language of section 484, its legislative history, and the application of that section by courts lead to the conclusion that the OCC has exclusive visitorial authority to enforce applicable state laws. The concerns of the state and local officials could only be fully met if the OCC were to take a position that is contrary to the express provisions of the statute and judicial precedent. Nevertheless, to respond to some of the issues raised, the language in the final regulation has been refined, and this preamble further explains that the OCC's visitorial powers are exclusive with respect to the federally authorized banking business of national banks.

  b. Similarly, we fundamentally disagree with the state and local officials about whether this proposal will undermine the dual banking system. As set forth in the preamble, differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. The dual banking system is universally understood to refer to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by federal authority, the OCC. Thus, we believe that the final rule preserves, rather than undermines, the dual banking system.

  c. Finally, we stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling of consumer complaints and the pursuit of remedies, and we remain eager to do so.

We believe the OCC has the resources to enforce applicable laws, as is evidenced by the enforcement actions that have generated hundreds of millions of dollars for consumers in restitution, that have required national banks to disassociate themselves from payday lenders, and that have ordered national banks to stop abusive practices. These actions are listed on the OCC's website at *http://www.occ.treas.gov/enforce/enf_search.htm*. Indeed, as recently observed by the Superior Court of Arizona, Maricopa County, in an action brought by Arizona against a national bank, among others, the restitution and remedial action ordered by the OCC in that matter against the bank was "comprehensive and significantly broader in scope that that available through [the] state court proceedings." *State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.,* CV 2000–003625, Ruling at 27, Conclusions of Law, paragraph 50 (Aug. 25, 2003). Thus, the OCC has ample legal authority and resources to ensure that consumers are adequately protected.

List of Subjects in 12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

Authority and Issuance

For the reasons set forth in the preamble, the OCC amends part 7 of chapter I of title 12 of the Code of Federal Regulations as follows:

PART 7—BANK ACTIVITIES AND OPERATIONS

- *1. The authority citation for part 7 continues to read as follows:*

Authority: 12 USC 1 *et seq.,* 71, 71a, 92, 92a, 93, 93a, 481, 484, 1818.

Subpart D—Preemption

- *2. In § 7.4000:*
- *a. Add a new paragraph (a)(3); and*
- *b. Revise paragraph (b) to read as follows:*

§ 7.4000 Visitorial powers.

(a) * * *

(3) Unless otherwise provided by federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under federal law.

(b) *Exceptions to the general rule.* Under 12 USC 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by federal law.* National banks are subject to such visitorial powers as are provided by *federal* law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other *federal* officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 USC 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 USC 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 USC 3305(c));

(iv) Ascertain the correctness of *federal* tax returns (26 USC 7602);

(v) Enforce the Fair Labor Standards Act (29 USC 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm–Leach–Bliley Act, Pub. L. 106–102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under *federal* law.

(3) *Exception for Congress*. National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Dated: January 6, 2004

John D. Hawke, Jr.
Comptroller of the Currency

Questions and Answers on the Preemption Rulemaking

January 7, 2004

I. INTRODUCTION

What action is the OCC taking today?

The OCC is issuing a final rule amending its regulations to add provisions clarifying the applicability of state law to national banks' lending, deposit-taking, and other operations. The final rule identifies types of state laws that are preempted by federal law and therefore not applicable to national banks. Most of these laws have already been found to be preempted by a federal court, the OCC, or the Office of Thrift Supervision in its comparable rules applicable to federal thrifts.[1]

In addition, the final rule identifies types of state laws that are not preempted. These types of laws generally create the legal infrastructure that enables or facilitates the exercise of a federal banking power.

Along with these preemption provisions, we are also adopting important new anti-predatory-lending standards governing national banks' lending activities—nationwide.

What action is the OCC not *taking today?*

The OCC is not authorizing any new national bank activities or powers, such as the ability to engage in real estate brokerage.

In addition, although we believe the statute authorizing national banks' real estate lending activities (12 USC § 371) could permit the OCC to occupy the field of national bank real estate lending through regulation, we have declined to announce such a position in the final rule.

Finally, the final rule makes no changes to the OCC's rules governing the activities of operating subsidiaries. As already set out in 12 CFR 5.34, 7.4006, and 34.1(b), national bank operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent banks. Therefore, *by virtue of regulations already in place*, the final rule applies equally to national banks and their operating subsidiaries.

What types of state laws will be preempted under the final rule?

The final rule sets out types of state statutes that are preempted in the areas of real estate lending, other lending, and deposit-taking. For lending, they include licensing laws, laws that address the

[1] See attached chart comparing the OCC's regulations with the regulations of the OTS and NCUA.

terms of credit, permissible rates of interest, escrow accounts, and disclosure and advertising. For deposit-taking (in addition to laws dealing with disclosure requirements and licensing and registration requirements), they include laws that address abandoned and dormant accounts, checking accounts, and funds availability. These lists reflect OCC opinions, court decisions, comparable rules applicable to federal thrifts, and the application of traditional, judicially recognized standards of preemption. These lists are not intended to be exhaustive—the OCC may identify, and address on a case-by-case basis, other types of state laws that are preempted.

In addition, with regard to bank operations, the final rule states that except where made applicable by federal law, state laws that obstruct, impair, or condition a national bank's exercise of powers granted under federal law do not apply to national banks. This provision applies to any national bank power or aspect of a national bank's powers that is not covered by another OCC regulation specifically addressing the applicability of state law.

What types of state laws will not *be preempted under the final rule?*

The final rule also sets out examples of the types of state laws that are *not* preempted and would be applicable to national banks to the extent that they only incidentally affect the lending, deposit-taking, or other operations of national banks. These include laws on contracts, rights to collect debts, acquisition and transfer of property, taxation, zoning, crimes, and torts. In addition, any other law that the OCC determines to only incidentally affect national banks' lending, deposit-taking, or other operations would not be preempted under the final rule.

What changes have been made in the final rule that differ from the proposal?

The final rule makes several changes to the anti-predatory-lending standard. First, the final rule revises the anti-predatory-lending standard so that it expressly prohibits national banks from engaging in unfair and deceptive trade practices under Section 5 of the Federal Trade Commission (FTC) Act in making any loans. In addition, the final rule revises the anti-predatory-lending standard to clarify that it applies to consumer loans only (those for personal, family, and household purposes). Finally, it clarifies that the anti-predatory-lending standard is not intended to prohibit legitimate collateral-based loans, such as reverse mortgages, where the borrower understands that it is likely or expected that the collateral will be used to repay the debt.

The final rule states that except where made applicable by federal law, state laws that "obstruct, impair, or condition" a national bank's exercise of powers granted under federal law do not apply to national banks. These terms, which are drawn directly from Supreme Court precedents, differ somewhat from the wording in the proposal, but the substantive effect—which is to encapsulate the preemption standards used by the Supreme Court—is the same.

The lists of the types of state laws that are and are not preempted in the final rule are substantially the same as the lists in the proposal.

II. REASONS AND AUTHORITY FOR THIS RULE

Why is the OCC taking this action now?

Markets for credit, deposits, and many other financial products and services are now national, if not international, in scope, as a result of technological innovations, erosions of legal barriers, and our increasingly mobile society. These changes mean that now, more than ever, the imposition of an overlay of state and local standards and requirements on top of the federal standards to which national banks already are subject, imposes excessively costly, and unnecessary, regulatory burdens.

In recent years, this burden has been getting worse, as states and localities have increasingly tried to apply state and local laws to national bank activities that are already subject to federal regulation, curtailing national banks' ability to conduct operations to the full extent authorized by federal law.

These state and local laws—including laws regulating fees, disclosures, conditions on lending, and licensing—have created higher costs, potential litigation exposure, and operational challenges. As a result, national banks must absorb the costs, pass the costs on to consumers, or discontinue offering various products in jurisdictions where the costs or exposure to uncertain liabilities are prohibitive.

When national banks are unable to operate under uniform, consistent and predictable standards, their business suffers, which negatively affects their safety and soundness. This rulemaking will enable national banks to exercise fully their federal powers pursuant to uniform standards, applied by the OCC. As a result, national banks will be able to operate with more predictability and efficiency, consistent with the national character of the national banking system, and in furtherance of the safe and sound operations of all national banks.

What authorizes the OCC to issue the final rule?

The OCC's authority to issue the preemption regulation comes from both 12 USC § 93a (for all activities) and 12 USC § 371 (specifically relating to real estate lending). In *CSBS* v. *Conover*, the D.C. Circuit expressly held that the Comptroller has the authority under § 93a to issue regulations preempting state laws that are inconsistent with the activities permissible under federal law for national banks and under § 371 to issue a regulation that preempts aspects of state laws regarding real estate lending.[2]

[2] *CSBS* v. *Conover,* 710 F.2d 878 (D.C. Cir. 1983).

Does the OTS have broader authority under the Home Owners' Loan Act to preempt the application of state laws to federal thrifts than the OCC has for national banks?

No. While the Home Owners' Loan Act (HOLA) uses a different formulation to describe the authority of the OTS, we believe those differences are not material for purposes of our rulemaking authority.

The HOLA directs the OTS to "provide for the examination, safe and sound operation, and regulation of savings associations," and authorizes the OTS to issue "such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director or the Office." Elsewhere, the HOLA states that the Director is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations and to issue charters therefore, giving primary consideration of the best practices of thrift institutions in the United States."

The National Bank Act, at 12 USC § 93a, states that, "Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title [governing branching] or to securities activities of National Banks under the Act commonly known as the 'Glass–Steagall Act.'"

In addition to the general authority vested by section 93a, other statutes vest the OCC with authority to issue regulations to implement a specific statutory grant of authority. For instance, 12 USC § 371 vests the OCC with the authority to impose "restrictions and requirements" on national banks' authority to make real estate loans. The general rulemaking authority vested in the OCC by section 93a, coupled with the more specific grants of authority in section 371 and elsewhere, provide the OCC with rulemaking authority that is comparably broad to that of the OTS.

Won't the OCC's preemption rule have the effect of giving national banks a competitive advantage over state-chartered institutions?

Our actions are part of the OCC's ongoing effort to ensure that national banks are able to meet the needs of their communities in the most effective and efficient manner possible. As part of that effort, we periodically see a need to respond to attempts by states and municipalities to regulate the exercise of federal powers permitted under the National Bank Act.

States remain free to be the laboratories of change that have led to many significant improvements in the delivery of financial products and services. Each of us is responsible for ensuring that the institutions we regulate remain financially strong and competitive. However, when the states act in a way that conflicts with the powers granted to national banks by federal law, the Supremacy Clause of the United States Constitution dictates that the state law is preempted.

III. PREEMPTION STANDARDS

Is the OCC occupying the field with regard to national banks' real estate lending activities?

No. Part 34 of our rules implements 12 USC § 371, which provides a broad grant of authority to national banks to engage in real estate lending. The only qualification in the statute is that these federal powers are subject "to section 1828(o) of this title [which requires the adoption of uniform Federal safety and soundness standards governing real estate lending] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."

As originally enacted, § 371 contained a limited grant of authority to national banks to engage in real estate lending. Over the years, Congress broadened § 371, giving the OCC the wide-ranging regulatory authority it has today. While we believe the history of § 371 indicates that Congress left open the possibility that the OCC would occupy the field of national bank real estate lending through regulation, the OCC has not exercised the full authority inherent in § 371 in the final rule. Thus, in the proposal, we invited comment on whether it would be appropriate to assert occupation of the entire field of real estate lending.

Upon further consideration of this issue and careful review of comments submitted pertaining to this point, we have concluded that the effect of such labeling is largely immaterial, and thus we decline to attach a particular label to the approach reflected in the final rule. We rely on our authority under both §§ 93a and 371, and to the extent that an issue arises concerning the application of a state law not specifically addressed in the final regulation, we retain the ability to address those questions through interpretation of the regulation, issuance of orders pursuant to our authority under § 371, or, if warranted by the significance of the issue, by rulemaking to amend the regulation.

How does the preemption standard included in the final rule—"obstruct, impair, or condition"—fit with the United States Supreme Court precedents?

The preemption standard in the final rule is a distillation of the many preemption standards applied by the Supreme Court over the years. These include "obstruct," "stands as an obstacle to," "impair the efficiency of," "condition the grant of power," "interfere with," "impair," "impede," and so on. Courts have recognized that no one phrase necessarily captures the full range of conflicts that will lead to a preemption of state law. We are not applying a standard that is inconsistent with those applied by the Supreme Court. Rather, we are adopting a standard that captures the essence of the tests used in various Supreme Court decisions. The preamble to the final rule expressly states that we are not trying to create a standard different from what the Court has expressed.

Is the final rule consistent with the standards of the Riegle–Neal Act, where Congress endorsed the application of state laws to national banks?

Yes. The Riegle–Neal Act sorted out *which* state's laws—host state or home state—regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, would apply to interstate branches of national banks, and provided that the host state's laws in those areas would apply to national banks *"except when Federal law preempts the application of such State laws to a national bank."* Potential preemption of state laws thus was expressly recognized as possible in the Riegle–Neal legislation itself.

Legislative history of the Riegle–Neal Act indicates that Congress expected the OCC to apply traditional, recognized preemption standards in deciding preemption issues, which is exactly what the OCC is doing.

The Riegle–Neal Act also specifically provided that the provisions of any state law to which a branch of a national bank is subject under the Act *"shall be enforced, with respect to such branch, by the Comptroller of the Currency."*

IV. IMPACT ON THE DUAL BANKING SYSTEM

What impact will this rule have on the dual banking system?

This rule will enhance the dual banking system. This system refers to the chartering, powers, and supervision of state-chartered banks by state authorities and the chartering, powers, and supervision of national banks by federal authority, the OCC. By its very nature, the dual banking system represents and embraces differences in national and state bank powers and in the supervision and regulation of national and state banks.

One of the key differences between national and state banks is that national banks operate pursuant to a federal grant of national bank powers, subject to uniform national standards, administered by a federal regulator. Preemption is a key principle that enables national banks to operate nationwide, under uniform national standards, subject to the oversight of a federal regulator, just as Congress intended it. This distinction between national and state banks is one of the defining characteristics of the dual banking system.

The national and state charters each have their own distinct advantages. But many national banks engage in multi-state businesses that require the efficiency of a uniform, nationwide system of laws and regulations. Customers of national banks enjoy protections that are as strong as—and in some cases stronger than—those available to customers of state banks. But they also benefit from the efficiencies of the national banking system, which lead to lower costs and expanded product offerings. It is important to remember that the dual banking system offers American consumers a choice—those who believe the state system offers greater protections can vote with their pocketbooks.

V. IMPACT ON CONSUMERS

Isn't federal preemption of state laws inconsistent with consumer protection?

Absolutely not. Today's action is fully consistent with the twin goals of promoting consumer protection and ensuring a safe, sound, and competitive national banking system. Because of the Supremacy Clause of the U.S. Constitution, many state standards do not apply to national banks. The OCC's action will not leave a void, but instead promote consumer protections for customers of national banks.

Rather than being subject to varying state standards, when they exist, under the new OCC regulations, all national banks and their operating subsidiaries are made subject to uniform, consistent, and predictable rules of fair conduct wherever they do business throughout the United States. National banks and their operating subsidiaries are subject to comprehensive supervision, OCC-administered supervisory standards (for example to prevent predatory, unfair, or deceptive lending practices), and vigorous and effective enforcement of these consumer protection laws, rules, and standards. The OCC's new regulations and supervisory approach offer real benefits to consumers. State consumer protection laws, by contrast, cannot effectively protect consumers in a similarly comprehensive, uniform, or nationwide basis.

As a result of the OCC's regulations, consumers will benefit from consistent, comprehensive protection against predatory, unfair, or deceptive lending practices, regardless of the state in which they live, *when they do business with a national bank or national bank operating subsidiary*. The OCC's recent actions also are complementary to state protection of consumers who deal with state-regulated lenders: while customers of national banks will be protected under the uniform federal consumer protections adopted by the OCC, customers of state-regulated lenders will continue to be protected to the extent that consumer protection laws exist in their home state that apply to their transactions.

Predatory lending is said by many to be an inherently local issue. Why is a national standard better in this area? Aren't states in a better position than is the OCC to understand the problems consumers encounter with abusive lending practices and, therefore, better able to fashion responses that are tailored to particular problems?

If taken to its logical conclusion, this position would lead to the regulation of abusive lending practices at the municipal level. However, many state anti-predatory-lending laws—such as the Georgia Fair Lending Act—prohibit municipalities from regulating in areas covered by the state law. In this way, a state is able to avoid subjecting institutions within its jurisdiction to inconsistent obligations, an objective shared by the OCC for national banks.

In the few instances where national banks have engaged in abusive lending practices, the problems have been specific to the bank in question and were not prevalent throughout a geographic region. Thus, we believe it is appropriate to focus on a given institution's lending practices to

determine whether there are problems that require attention. This bank-specific focus, against the backdrop of an extensive array of federal consumer protections, enables the OCC to identify and respond to consumer problems when they arise.

To the extent that it is a local issue, it is worth remembering that the OCC's examination staff of more than 1,800 is housed in field offices in every state in the country and on-site in our largest banks, giving us a very strong local presence.

How do the OCC's new regulations protect consumers?

First, the OCC regulations *prohibit* a national bank from making *any* consumer loan —including any form of mortgage loan, automobile loan, and student loan—that is based predominantly on the bank's expectation that it will be repaid through foreclosure or liquidation of collateral that the consumer used to secure the loan. This rule targets a fundamental characteristic of predatory lending—lending to consumers who cannot be expected to be able to make the payments required under the terms of the loan, and will be effective in ensuring that home equity stripping, auto title lending, and other forms of abusive credit practices that injure individual consumers and communities will not occur in the national banking system.

As a result of this regulation, national banks are subject to the most comprehensive federal anti-predatory-lending standard in existence today: unlike the Home Ownership and Equity Protection Act (HOEPA), the OCC rules are not limited to "high cost" home mortgages, but instead apply to all types of consumer loans and mortgages made by national banks. Consequently, they will have a substantially broader reach than not only HOEPA, but also state predatory lending laws.

Second, the OCC regulations also explicitly prohibit a national bank from engaging in unfair or deceptive practices that violate the Federal Trade Commission Act (FTC Act) in connection with any consumer loan, including mortgages. While the OCC does not have the authority under the Federal Trade Commission Act to adopt rules defining particular acts or practices as unfair or deceptive under that act (that authority is only conferred on the Federal Reserve Board), we do have authority to take enforcement action where we find unfair or deceptive practices. OCC case-by-case enforcement actions under the FTC Act have had a real and meaningful impact on correcting abuses and helping consumers by providing hundreds of millions of dollars in restitution to consumers who have been harmed by unfair, deceptive, or abusive lending practices. The OCC's new regulations provide greater clarity to the application of this prohibition to all lending by national banks and their operating subsidiaries.

What federal consumer protection standards apply to national banks and national bank operating subsidiaries in the absence of state laws?

National banks and national bank operating subsidiaries are subject to extensive federal consumer protection laws and regulations, administered and enforced by the OCC. OCC examinations of national banks and national bank operating subsidiaries are conducted to ensure and enforce

compliance with these laws and regulations, and supplemental OCC supervisory standards. Federal consumer protection laws and regulations that apply to national banks and to national bank operating subsidiaries include the following:

- 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 Fund Transfer Act
- Expedited Funds Availability Act
- Flood Disaster Protection Act
- Home Mortgage Disclosure Act
- Fair Housing Home Loan Data System
- Credit Practices Rule
- Fair Credit Reporting Act
- Federal privacy laws
- Fair Debt Collection Practices Act
- OCC anti-predatory-lending rules in Parts 7 and 34
- OCC rules imposing consumer protections in connection with the sales of debt cancellation and suspension agreements
- OCC standards on unfair and deceptive practices (http://www.occ.treas.gov/ftp/advisory/2002-3.doc.)

- OCC standards on preventing predatory and abusive practices in direct lending and brokered and purchased loan transactions (http://www.occ.treas.gov/ftp/advisory/2003-2.doc. and http://www.occ.treas.gov/ftp/advisory/2003-3.doc.)

What will protect consumers who receive real estate loans from national banks now that various state laws are preempted?

Consumers will continue to be protected by an extensive array of federal protections, enforced by the OCC (see above). Preemption of state laws governing national banks' real estate lending certainly *does not* mean that such lending would be unregulated. On the contrary, national banks' real estate lending is highly regulated under federal standards and subject to comprehensive supervision. In addition to the many standards that apply to national banks under various federal laws, the OCC recently issued comprehensive supervisory standards to address predatory and abusive lending practices, OCC Advisory Letter 2003–2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" and OCC Advisory Letter 2003–3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans."

Moreover, the final rule adds an explicit safety-and-soundness–based anti-predatory-lending standard to the general statement of authority concerning lending. The regulation states that a national bank shall not make a consumer loan subject to 12 CFR part 34 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources. The regulation further provides that, in making any real estate loan, a national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act and regulations promulgated thereunder. As described in the preamble to the regulation, the OCC's pioneering commitment to using the FTC Act to address consumer abuses is demonstrated by a number of recent actions against national banks that have resulted in the payment of hundreds of millions of dollars in restitution to consumers.

The new anti-predatory-lending standard and the multitude of other existing federal laws such as the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and the Equal Credit Opportunity Act (ECOA), ensure that national banks are subject to consistent and uniform federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety-and-soundness–based criteria for their real estate lending activities.

What does the rule mean for consumer protection in non–real estate loans?

The final rule regarding non–real estate lending contains the same safety-and-soundness–based anti-predatory-lending standard included in the real estate lending portion of the final rule. Together, this new prudential standard, and federal laws such as TILA and the FTC Act, ensure that national banks are subject to consistent and uniform federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety-and-soundness–based criteria for their lending activities.

How does the OCC supervise national banks and national bank operating subsidiaries for compliance with consumer protection laws and standards?

The OCC supervises national banks' compliance with consumer protection laws and anti-predatory-lending standards through programs of ongoing supervision that are tailored to the size, complexity, and risk profile of different types of banks, and through targeted enforcement actions. National banks and national bank operating subsidiaries are subject to comprehensive—and, in the case of the largest banks, *continuous*—supervision. With a network of approximately 1,800 examiners, the OCC conducts risk-based examinations of national banks and national bank operating subsidiaries throughout the United States. Thus, for example, whether a national bank conducts its mortgage lending business in a department of the bank, in a branch, or in an operating subsidiary, OCC supervision focuses on that line of business wherever and however the bank conducts it.

The OCC's Customer Assistance Group (CAG) in Houston, Texas, also plays an important role in helping to identify potential violations of consumer protection law and unfair or deceptive practices. CAG provides immediate assistance to consumers and also collates and disseminates complaint data that help direct OCC examination resources to banks, activities, and products that present compliance risks and that require further investigation. In addition to information obtained in on-site examinations and through consumer complaints, the OCC evaluates information about abusive lending and illegal practices by national banks and their subsidiaries that it obtains from other sources, including community organizations and state enforcement agencies.

Where violations of law are found, the OCC takes appropriate action to remedy the problem and to address consumer harm. In this regard, the OCC is the first and only federal banking agency to take action to combat unfair and deceptive lending practices by enforcing the Federal Trade Commission Act. For example, the OCC recently entered into a consent agreement with a bank that the OCC concluded had engaged in predatory mortgage lending practices, including making a loan without regard to the borrower's ability to repay the loan, "equity stripping," and "fee packing." *See* "In the Matter of Clear Lake National Bank, San Antonio, TX," Enforcement Action 2003–135 (November 6, 2003), available at http://www.occ.treas.gov/ftp/eas/ea2003-135.pdf. No

other federal banking agency has taken enforcement action to address predatory mortgage lending or deceptive marketing practices affecting subprime borrowers. The OCC's enforcement actions have provided over $300 million in restitution thus far to consumers of modest means and limited or impaired credit histories who have been harmed by abusive practices.

It also is our hope that states will cooperate with the OCC to try to maximize the protection of consumers. If the states and the OCC work together, we can leverage all of our resources to combat abusive financial providers. The OCC has adopted special procedures to expedite referrals of consumer complaints regarding national banks from state Attorneys General and state banking departments, and we have offered to enter into formal information-sharing agreements with states to formalize these arrangements. We recently concluded the first of these arrangements and hope that other states will soon follow suit.

How can the OCC assure that customers of national bank operating subsidiaries are adequately protected if the OCC has not provided a list of those operating subsidiaries?

The OCC supervises the activities of national banks and their operating subsidiaries based on a line of business approach, not based on the corporate form in which it is conducted. For example, the OCC will apply a comprehensive approach to supervising a bank's mortgage banking activities whether they are conducted in departments of the bank, branches, or one or more operating subsidiaries. We do not maintain an aggregate count of national bank operating subsidiaries just as we do not maintain an aggregate count of the number of departments banks use to do business. Operating subsidiary information is available to OCC supervisors at the individual bank level, is included in our supervisory data system for community and Mid-Size banks, and for Large Banks, all significant subsidiaries are listed in the quarterly risk analysis prepared by each bank's examiner-in-charge.

Most national bank operating subsidiaries use names that clearly identify them with their parent bank, thus a customer with a complaint would know they are dealing with a bank-related business and could expect that he or she could lodge the complaint by contacting the OCC's Customer Assistance Group. In some instances, however, the operating subsidiary may have a name that does not readily connect it with its parent bank. In order to better address those situations, the OCC will be establishing a link from the Consumer Assistance web page to a searchable database of national bank subsidiaries that do business directly with consumers, and that are *not* functionally regulated by other regulators. We are compiling this information from our various databases and will begin with a listing of these types of subsidiaries of our Large Banks.

The OCC's traditional mission has been to audit banks for safety and soundness. How does the OCC's preemption rule further safety and soundness?

To the extent that the question implies that preemption will result in a lack of consumer protections, we would disagree. It is not a question of whether national banks will be subject to consumer protection laws, but only a question of which laws apply. National banks are subject to a comprehensive regimen of federal consumer protection laws and regulations, including the new anti-predatory-lending standard included in this rulemaking.

We examine our banks to ensure that they are complying with these protections and, where we find that a bank is not, we take appropriate action against that bank. This approach enables us to tailor the regulatory response to the problem, rather than impose a one-size-fits-all rule that prohibits all national banks from offering certain financial products. In this way, banks are free to offer products and services that meet the needs of their customers and communities, in a manner that is consistent with safe and sound banking practices.

Questions and Answers on the Visitorial Powers Rulemaking

January 7, 2004

I. INTRODUCTION

What are "visitorial powers"?

The term "visitorial powers" refers to the power of a regulator or superintendent to inspect, examine, supervise, and regulate the affairs of an entity.

What is the effect of your recently published final rule amending your visitorial powers regulation?

The final rule clarifies two points concerning our *existing* regulation regarding the OCC's exclusive visitorial authority under 12 USC § 484. The federal statute that addresses this area, 12 USC § 484, states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

Our regulation clarifies 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 the exclusive supervisor of a national bank's banking activities; the OCC does not enforce fire codes, environmental laws, etc.

Our final rule also clarifies that the exception to the OCC's exclusive visitorial powers for "visitorial powers . . . vested in the courts of justice" in section 484 pertains to powers inherent in the judiciary and does not grant state or other governmental authorities any right that they do not otherwise possess to inspect, superintend, direct, regulate, or compel compliance by a national bank with any law regarding the content or conduct of activities authorized for national banks under federal law.

What changes have been made in the final rule that differ from the proposal?

We have amended the language in § 7.4000(a)(3) to simplify it. This provision clarifies that the OCC has exclusive visitorial powers just with respect to the content and conduct of activities that are authorized for national banks under federal law.

We have also amended the regulation text in the final rule concerning the "visitorial powers . . . vested in the courts of justice" exception. This provision no longer makes reference to specific powers of the courts of justice "to issue orders or writs compelling the production of information or witnesses" since that description may be too limiting. This provision now simply states that the

exception pertains to powers inherent in the judiciary. The language that stated that the exception for courts of justice does not authorize states or other governmental entities to exercise visitorial powers over national banks also has been simplified.

What does the final rule not *do?*

The rule does not prevent state officials from enforcing state laws that do not pertain to a national bank's banking activities, such as environmental laws, fire codes, zoning ordinances or criminal laws of general applicability.

The final rule makes no change to the treatment of operating subsidiaries. An existing OCC regulation, 12 CFR § 7.4006, states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Thus, states generally can exercise visitorial powers over operating subsidiaries only to the extent that they could exercise visitorial powers over a national bank.

The final rule does not change the ability of states to seek a declaratory judgment from a court as to whether a particular state law applies to the federally authorized business of a national bank or is preempted.

II. IMPACT ON DUAL BANKING SYSTEM

Isn't the final rule inconsistent with the dual banking system?

No. The dual banking system refers to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by federal authority, the OCC. By its very nature, the dual banking system represents and embraces differences in national and state bank powers and in the supervision and regulation of state and national banks. Dual banking does not mean that national banks are subject to state supervision or regulation of activities they are authorized to conduct under federal banking law.

Is it the case, as certain state officials suggest, that this rule would disrupt the current system under which states enforce consumer compliance laws?

No. There may have been some misunderstanding over the years about the limits of state visitorial authority. For 140 years, the national banking statutes have said that no national bank shall be subject to any visitorial powers except as authorized by federal law. Federal law—at 12 USC § 484—clearly vests the OCC with exclusive visitorial powers over the business of banking conducted by national banks. Equally clearly, courts have stated that visitorial powers include the power to enforce compliance with applicable law. With certain narrow exceptions, federal law does not grant visitorial authority over national banks to the states. In fact, in the area of consumer protection, Congress stated explicitly, in the Riegle–Neal Act, that *the OCC* enforces any state consumer protection law that applies to interstate branches of national banks.

Recent debate about enforcement has centered recently on the ability of states to enforce their laws against operating subsidiaries of national banks. Operating subsidiaries are federally authorized means through which national banks can conduct business. The only court cases to decide the issue of the OCC's visitorial authority over national bank operating subsidiaries have held that our exclusive visitorial authority—including the authority to enforce compliance with applicable law—extends to operating subsidiaries. Thus, while states are free to enforce consumer compliance laws as they apply to institutions within their primary jurisdiction, they are not free to do so in the context of national banks or their operating subsidiaries, except where federal law authorizes them to do so.

What role may states play under the final rule?

The states have a crucial role to play. It is our hope that states will cooperate with the OCC to try to maximize the protection of consumers. If the states and the OCC work together, we can leverage all of our resources to combat abusive financial providers. The OCC has adopted special procedures to expedite referrals of consumer complaints regarding national banks from state Attorneys General and state banking departments, and we have offered to enter into formal information-sharing agreements with states to formalize these arrangements. We recently concluded the first of these arrangements and hope that other states will soon follow suit.

Isn't it true that the Household *case recently concluded by the New York Attorney General would not have been possible if the preemption rule had been in effect?*

No. There have been several actions against financial entities that are within the Household corporate family. One such action was brought by the OCC, against Household Bank (SB), N.A. In that action, the court stated that "[t]he restitution and remedial action ordered by the OCC is comprehensive and significantly broader in scope than that available through these state court proceedings. The OCC Agreement [with the bank] provides significantly more relief to Arizona consumers than this Court finds a legal basis for imposing under state law."

The State of New York also recently concluded an action against Household International, the parent company of Household Finance Corporation and Beneficial Finance Corporation. Those entities are outside the jurisdiction of the OCC, and will remain so after this rule becomes effective. Thus, our actions in this rulemaking *will not affect in any way* the state's ability to bring the enforcement action in question.

III. AUTHORITY FOR THE RULE

A. National banks

On what does the OCC base its conclusion that its visitorial authority is exclusive?

Federal law. Section 484 explicitly states that "[n]o national bank shall be subject to any visitorial powers except as authorized by federal law, vested in the courts of justice or such as shall be,

or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." The statute first sets forth a complete prohibition, then subjects that prohibition to certain exceptions. In other words, the prohibition applies unless a visitorial power is covered by one of the enumerated exceptions. *None* of the exceptions in the statute allows for the allocation of any general bank supervisory responsibility to the states. Further, such an allocation to the states would be inconsistent with the history and purpose of the National Bank Act and judicial precedent interpreting the Act.

B. Operating subsidiaries

By what authority do you claim that the OCC has exclusive visitorial power over national bank operating subsidiaries?

Federal law. Pursuant to their authority under 12 USC § 24(Seventh), national banks have long used separately incorporated entities as a means to engage in activities that the bank itself is authorized to conduct. When established in accordance with OCC regulations and approved by the OCC, an operating subsidiary is a federally authorized, federally licensed means by which a national bank may conduct federally authorized activities.

Courts have consistently treated operating subsidiaries as equivalent to national banks, unless *federal* law requires otherwise. As a matter of federal law, operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent bank, including being subject to the exclusive visitorial authority of the OCC.

Courts that have considered the issue have confirmed recently that the OCC has exclusive visitorial authority over national bank operating subsidiaries. In *Wells Fargo Bank, N.A. v. Boutris*, a federal district court issued a permanent injunction enjoining the California Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. The court noted the existing case law and concluded that the OCC's operating subsidiary regulation is within the agency's authority delegated to it by Congress and is a reasonable interpretation.

Didn't the Gramm–Leach–Bliley Act (GLBA) make clear that operating subsidiaries are explicitly not *to be treated as part of their parent bank?*

No, to the contrary. Section 121 of GLBA recognizes the authority of national banks to own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted *subject to the same terms and conditions that govern the conduct of such activities by national banks*." This underscores the point that an operating subsidiary is treated, for regulatory and supervisory purposes, the same as its parent bank.

Why shouldn't states have jurisdiction over entities that are created under state law—namely, operating subsidiaries?

States *do* have jurisdiction over operating subsidiaries for matters concerning the corporate existence or corporate governance of operating subsidiaries. However, the states' jurisdiction stops at the point of regulating federally authorized banking activities that the operating subsidiary conducts.

Under federal law, a national bank may exercise the federal banking powers available to it either directly in the bank or indirectly through an operating subsidiary. If the bank elects to use an operating subsidiary, the bank is required to obtain a federal license to do so pursuant to the procedures set forth in the OCC's regulations. Once the license is obtained, the activity will be subject to the same terms and conditions that would apply if the bank conducted the activity directly.

IV. IMPACT ON CONSUMERS

Why isn't it better to have more than one cop on the beat looking out for consumers? The OCC has relatively little experience in investigating banks for compliance with consumer protection laws. Why not accept help from the state Attorneys General, who have a great deal of experience in this area?

Under federal law, only the OCC can examine or bring action against a national bank. And, in fact, the system works best when we each focus on our separate jurisdictions, as was demonstrated recently by a joint action taken against Security Trust Company and three of its executives by the OCC, the New York Attorney General, and the Securities and Exchange Commission.

The OCC is well equipped to handle enforcement matters for entities within our jurisdiction. Through a network of approximately 1,800 examiners located throughout the United States, we monitor conditions and trends in individual banks and groups of banks. Our supervisory activities home in on risks identified by surveillance tools and subject matter experts. In the consumer area, consumer complaint information is used to identify potential problems in a bank's dealings with customers.

As part of our ongoing supervision of national banks, examiners look at bank policies and procedures. These policies and procedures are reviewed to evaluate if they adequately address the particular risks that the bank may face, given the nature and scope of its business. Depending on the nature of that business, we would expect bank policies and controls to reflect the considerations we have identified in our two advisories on how national banks should avoid becoming involved in predatory lending practices.

Our Customer Assistance Group (CAG) in Houston, Texas, plays an important role in helping to identify potentially unfair and deceptive practices. In addition to providing immediate assistance to consumers, the CAG collates and disseminates complaint data that help point our field examiners toward banks, activities, and products that require further investigation.

We obtain additional valuable insight and surveillance from community and consumer groups, internal and external auditors, other federal, state and local authorities, and competing banks.

Thus, national banks' compliance with applicable laws is subject to comprehensive—and in the case of the largest national banks, *continuous*—supervision. Where violations of law are found, we take appropriate action to remedy the problem and to address consumer harm.

As previously noted, it is our hope that states will cooperate with the OCC to try to maximize the protection of consumers. We have encouraged states to work with us to expedite referrals of consumer complaints regarding national banks from state Attorneys General and state banking departments, and have offered to enter into formal information-sharing agreements with states to formalize these arrangements.

Has the OCC ever brought a case charging predatory lending?

In fact, we are the first—and thus far, only—federal banking regulator to bring enforcement actions under section 5 of the Federal Trade Commission (FTC) Act against financial institutions for abusive lending practices. The most recent case, against Clear Lake National Bank, involved home equity loan terms that we considered to be unfair to consumers. We required the bank to reimburse the borrowers in question. We have brought five other cases since 2001 under the FTC Act that have led to restitution of affected consumers. Moreover, we have moved aggressively to require national banks to terminate their relationships with "payday lenders." We share the states' concerns about the impact of predatory and abusive lending practices on consumers, and have moved aggressively to stop it whenever it is located in an institution we supervise.

Even the state Attorneys General have acknowledged that it has not been a widespread problem inside the regulated banking industry. Having said that, however, the OCC has a strong track record of taking quick and decisive action against lenders that engage in abusive practices.

The OCC's traditional mission has been to audit banks for safety and soundness. How does the OCC's visitorial powers rule further safety and soundness?

To the extent that the question implies that preemption will result in a lack of consumer protections, we would disagree. It is not a question of *whether* national banks will be subject to consumer protection laws, but only a question of *which* laws apply. National banks are subject to a comprehensive regimen of federal consumer protection laws and regulations, including the new anti-predatory-lending standard included in this rulemaking.

We examine our banks to ensure that they are complying with these protections and, where we find that a bank is not, we take appropriate action against that bank. This approach enables us to tailor the regulatory response to the problem, rather than impose a one-size-fits-all rule that prohibits all national banks from offering certain financial products. In this way, banks are free to offer products and services that meet the needs of their communities, in a manner that is consistent with safe and sound banking practices.

Tables 1a and 1b: Comparison of the OCC's Preemption Rules with the Office of Thrift Supervision's and the National Credit Union Administration's Current Rules, by Type of State Laws Generally Preempted and Generally *not* Preempted

January 7, 2004

Table 1a

Types of State Laws Generally Preempted	OCC Rules	OTS Current Rules	NCUA Current Rules
Abandoned and dormant accounts (deposit-taking)	✔	✔	✔
Aggregate amount of funds that may be lent on the security of real estate	✔ *		
Checking/share accounts (deposit-taking)	✔	✔	✔
Covenants and restrictions necessary to qualify a leasehold as security property for a real estate loan	✔ *		
Access to, and use of, credit reports	✔	✔	
Terms of credit	✔ *	✔	✔
Creditor's ability to require or obtain insurance of collateral or other risk mitigants /credit enhancements	✔	✔	
Due-on-sale clauses	✔	✔	✔
Escrow, impound, and similar accounts	✔	✔	
Funds availability (deposit-taking)	✔	✔	
Interest rates	✔ **	✔	✔
Fees	✔ ***	✔	✔
Licensing, registration, filings, and reports	✔	✔	
Loan-to-value ratios	✔ *	✔	✔
Mandated statements and disclosure requirements	✔	✔	✔
Mortgage origination, processing, and servicing	✔	✔	
Disbursements and repayments	✔ *	✔	✔
Savings account orders of withdrawal (deposit-taking)	✔	✔	
Security property, including leaseholds	✔	✔	✔
Special-purpose saving services (deposit-taking)	✔	✔	

* Already preempted by the OCC's existing real estate lending regulation at 12 CFR Part 34.
** National banks' authority to charge interest is established by 12 USC § 85, and the OCC's existing regulation at 12 CFR § 7.4001.
***National banks' authority to charge fees is already addressed by the OCC's existing regulations at 12 CFR § 7.4002.

Table 1b

Types of State Laws Generally *not* Preempted	OCC Rules	OTS Current Rules	NCUA Current Rules
Contracts	✔	✔	
Commercial	✔	✔	
Torts	✔	✔	
Criminal law	✔	✔	
Homestead laws specified by federal statute	✔	✔	
Debt collection	✔		
Acquisition and transfer of real property	✔	✔	✔
Taxation	✔		
Zoning	✔		
Collections costs and attorneys' fees			✔
Plain language requirements			✔
Default conditions			✔
Insurance			✔
Incidental effect only	✔	✔	

Recent Licensing Decisions

Recent Licensing Decisions

CRA Decisions

On October 16, 2003, the OCC approved the application by Citibank USA, National Association, Sioux Falls, South Dakota, to purchase substantially all the assets of Sears National Bank, Tempe, Arizona. The OCC received letters from four commenters expressing Community Reinvestment Act (CRA) compliance concerns with entities that were not involved in the transaction. The OCC's investigation into the concerns disclosed no information that was inconsistent with approval. [CRA Decision No.117]

On October 24, 2003, the OCC approved the merger of Bank One Delta Trust Company, National Association, Columbus, Ohio (In Organization), Bank One Epsilon Trust Company, National Association, Columbus, Ohio (In Organization), and Bank One Zeta Trust Company, National Association, Chicago, Illinois (In Organization), with and into J.P. Morgan Trust Company, National Association, Los Angeles, California. The OCC received a letter from one commenter expressing concerns with the Community Reinvestment Act (CRA) of entities that were not parties to this transaction. The OCC's investigation into these concerns disclosed no information that was inconsistent with approval. [CRA Decision No. 119]

On November 4, 2003, the OCC approved the application by Sun National Bank, Vineland, New Jersey, to purchase certain assets and acquire certain liabilities of eight southern New Jersey branches of New York Community Bank, Westbury, New York. The OCC received letters from two commenters expressing concerns with Sun National Bank's record of lending to minorities and minority-owned businesses in the Atlantic City area. The OCC's investigation into these concerns disclosed no information that was inconsistent with approval. [CRA Decision No. 120]

On November 6, 2003, the OCC granted approval to the application to consolidate 18 affiliated banks of Wells Fargo with and into Wells Fargo Bank, National Association, San Francisco, California, with the resulting bank's headquarters located in Sioux Falls, South Dakota. The OCC received letters from two commenters expressing concerns that Wells Fargo & Company's national banks and its nonbank finance company, Wells Fargo Financial, engage in predatory lending practices. The OCC's investigation into these concerns disclosed no information that was inconsistent with approval. [CRA Decision No. 118]

On December 3, 2003, the OCC approved the merger of UnitedTrust Bank with and into PNC Bank, National Association. The OCC received a letter from one commenter expressing concerns

with PNC Bank's decline in home purchase mortgage lending since the sale of its mortgage subsidiary, PNC Mortgage Corporation, in early 2001. The OCC's investigation into these concerns disclosed no information that was inconsistent with approval. [CRA Decision No. 121]

Change in Bank Control

On October 29, 2003, the OCC determined not to object to the Change in Bank Control notice by Lehman Brothers Holding Inc., New York, New York, to acquire control of Neuberger Berman Trust Company, National Association, New York, New York. This acquisition is part of a larger transaction involving Lehman Brothers Holding, Inc.'s acquisition of Neuberger Berman, Inc. In reaching its decision, the OCC considered agreements it entered into with Lehman Brothers and Neuberger Berman Trust Company, National Association, to ensure the continued maintenance of adequate capital and liquidity levels of the bank and to require the bank to give the OCC prior notice of any significant change or deviation in its business plan. [Corporate Decision No. 2004–2]

Federal Branches

On November 6, 2003, the OCC granted conditional approval to a proposal by HBOS Treasury Services plc, London, England, to establish a federal branch in New York, New York. Approval was granted subject to conditions involving consent to jurisdiction, access to information, and a requirement to provide notice to OCC for any significant deviation or change in the branch's business plans. [Conditional Approval No. 609]

Mergers

On November 21, 2003, the OCC approved the application by National Bank of Commerce, Memphis, Tennessee, to purchase the assets and assume the liabilities of the Norcross and Roswell, Georgia, branches of Flag Bank, Atlanta, Georgia, which were known as "El Banco" branches. The OCC also approved National Bank of Commerce's application to acquire a noncontrolling investment in Nuestra Tarjeta de Servicios, Inc., Atlanta, Georgia, the company that operated the El Banco branches for Flag Bank. The approval was subject to the standard conditions for a noncontrolling investment in an operating subsidiary. [Conditional Approval No. 612]

On November 26, 2003, the OCC approved the application by Providian National Bank, Tilton, New Hampshire, to purchase substantially all the assets and assume all of the deposits of Providian Bank, Salt Lake City, Utah. The OCC also approved an application to merge Providian Bank, Salt Lake City, Utah, into Providian National Bank upon consummation of the purchase-and-assumption transaction. Prior to consummation, Providian National Bank was required to confirm that the merger would enhance its balance sheet structure. [Corporate Decision No. 2003–12]

Corporate Reorganization

On December 22, 2003, the OCC approved or conditionally approved a series of applications to effect six separate transactions (an affiliated merger, a 215a–3 merger, two charters, a capital request, and a dividend request) for F.N.B. Corporation and its subsidiary banks. The purpose of these transactions was to divide F.N.B. Corporation into two public bank holding companies, one in Florida and one in Pennsylvania. [Conditional Approval No. 617]

Special Supervision and Enforcement Activities

Special Supervision and Enforcement Activities

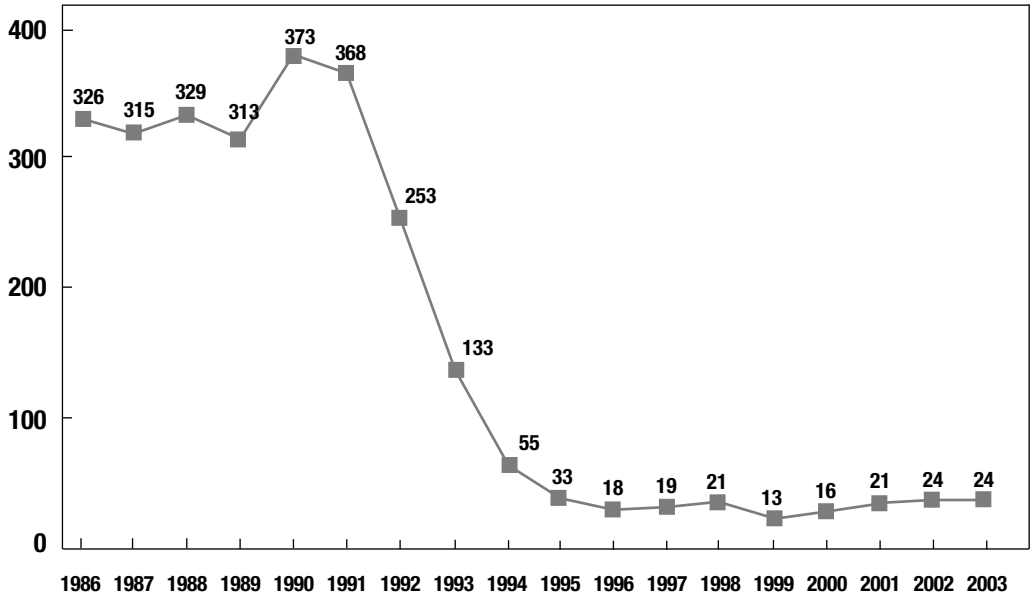
The Special Supervision Division of the Mid-size/Community Bank Supervision department supervises critical problem banks through rehabilitation or through other resolution processes such as orderly failure management or the sale, merger or liquidation of such institutions. The Special Supervision Division monitors the supervision of delegated problem banks, coordinates safety and soundness examinations, provides training, analyzes and disseminates information, and supports OCC supervisory objectives as an advisor and liaison to OCC management and field staff on emerging problem bank related issues.

This section includes information on problem national banks, national bank failures, and enforcement actions. Data on problem banks and bank failures is provided by OCC's Special Supervision department and the FDIC's Department of Resolutions in Washington. Information on enforcement actions is provided by the Enforcement and Compliance Division (E&C) of the law department. The latter is principally responsible for presenting and litigating administrative actions on the OCC's behalf against banks requiring special supervision.

Problem National Banks and National Bank Failures

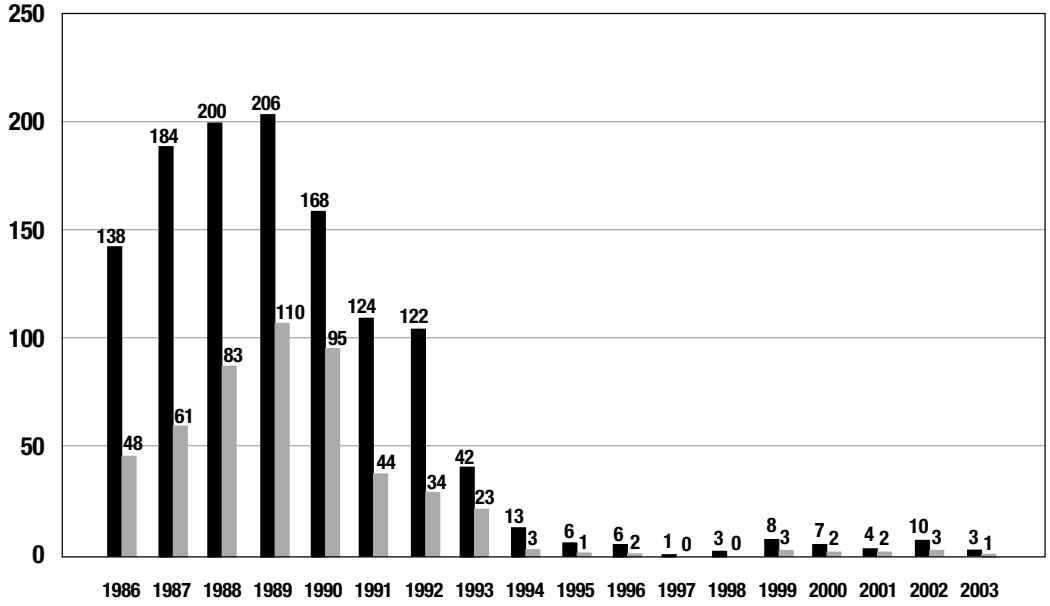
Problem banks represented approximately 1 percent of the national bank population as of December 31, 2003. The volume of problem banks, those with a CAMELS rating of 4 or 5, has been stable for several years. The CAMELS rating is the composite bank rating based on examiner assessment of capital, asset quality, management, earnings, liquidity, and sensitivity to market risk. The total number of problem banks is 24 at December 31, 2003, and is the same as the number reported at December 31, 2002. This low volume of problem banks reflects the stable economy and generally favorable economic conditions enjoyed for the past several years. One national bank failure occurred during 2003 out of the three commercial bank failures.

Figure 1—Problem national bank historical trend line



Source: Special Supervision

Figure 2—Total Bank Failures Compared to OCC Failures



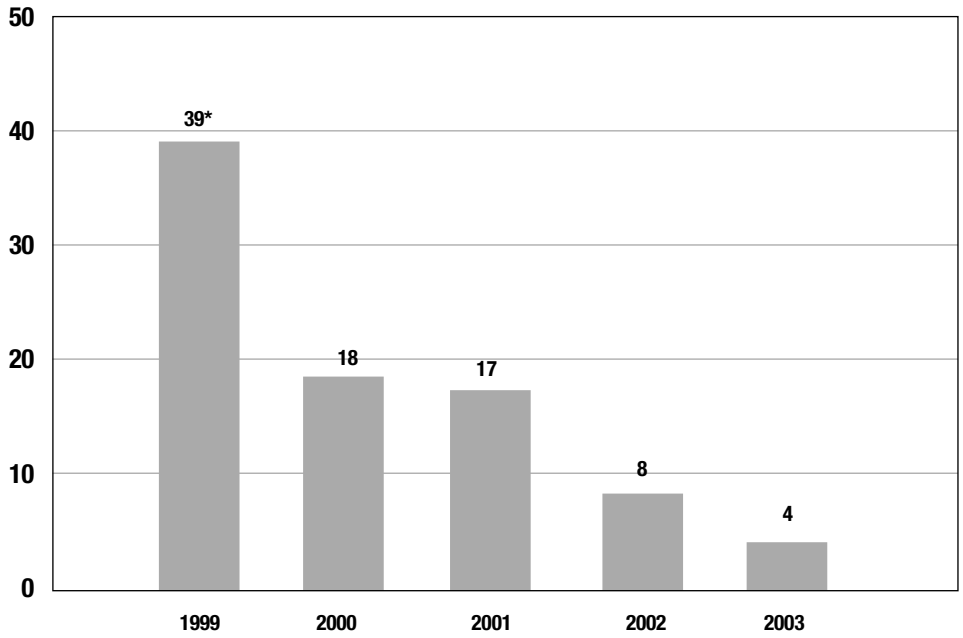
Source: Federal Deposit Insurance Corporation

Enforcement Actions

The OCC has a number of remedies with which to carry out its supervisory responsibilities. When it identifies safety and soundness or compliance problems, these remedies range from advice and moral suasion to informal and formal enforcement actions. These mechanisms are designed to achieve expeditious corrective and remedial action to return the bank to a safe and sound condition.

The OCC takes enforcement actions against national banks, parties affiliated with national banks, and servicing companies that provide data processing and other services to national banks. The OCC's informal enforcement actions against banks include commitment letters and memorandums of understanding (MOUs). Informal enforcement actions are meant to handle less serious supervisory problems identified by the OCC in its supervision of national banks. Failure to honor informal enforcement actions will provide strong evidence of the need for the OCC to take formal enforcement action. The charts below show total numbers of the various types of informal enforcement actions completed by the OCC against banks in the last several years. (Year-2000–related actions taken in 1999 are noted in the figure footnotes.)

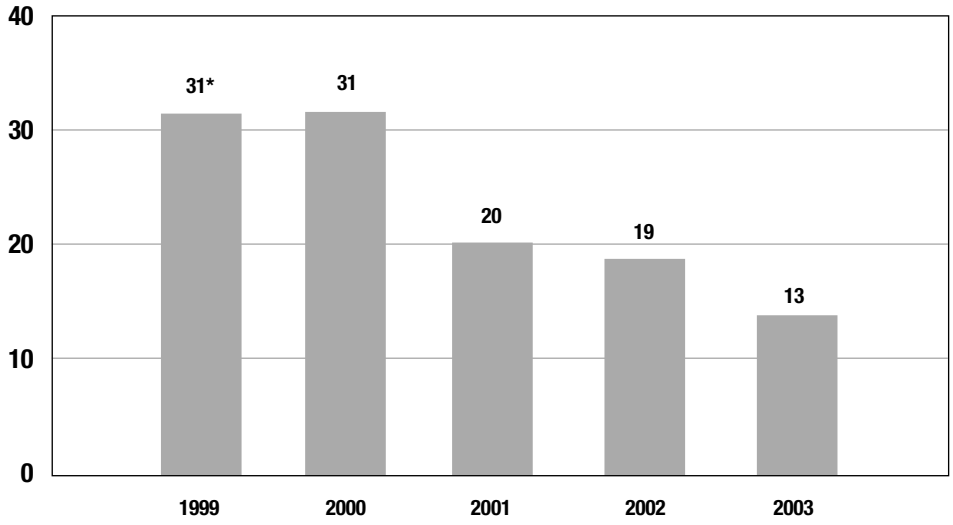
Figure 3—Commitment letters



Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

*6 of which are for year-2000 problems

Figure 4—Memorandums of understanding

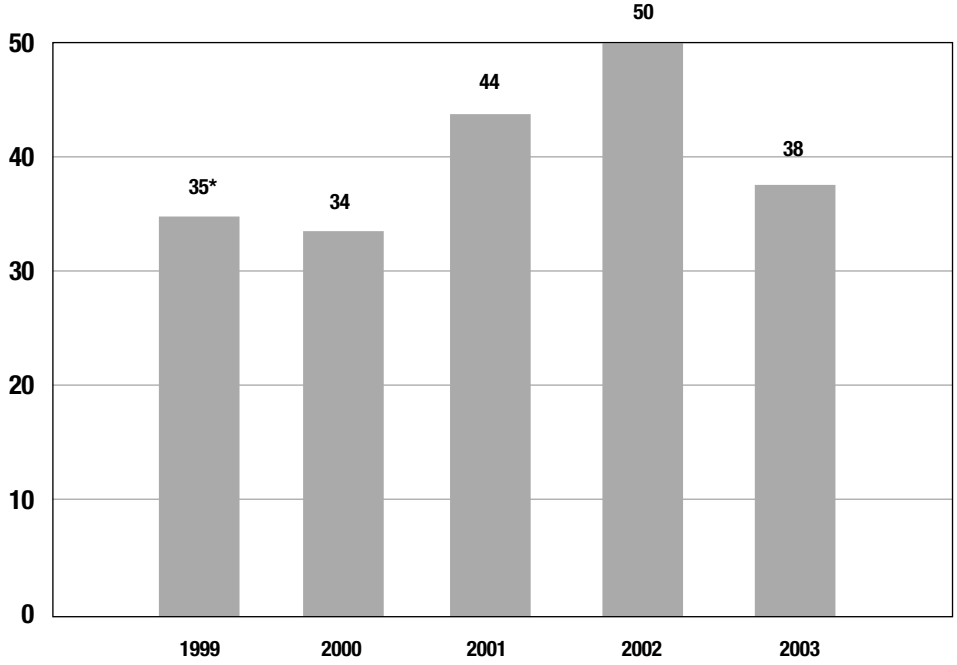


Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

*6 of which are for year-2000 problems

The most common types of formal enforcement actions issued by the OCC against banks over the past several years have been formal agreements and cease-and-desist orders. Formal agreements are documents signed by a national bank's board of directors and the OCC in which specific corrective and remedial measures are enumerated as necessary to return the bank to a safe and sound condition. Cease-and-desist orders (C&Ds), sometimes issued as consent orders, are similar in content to formal agreements, but may be enforced either through assessment of civil money penalties (CMPs) or by an action for injunctive relief in federal district court. The OCC may also assess CMPs against banks, and in calendar year 2003, the OCC assessed CMPs against nine banks.

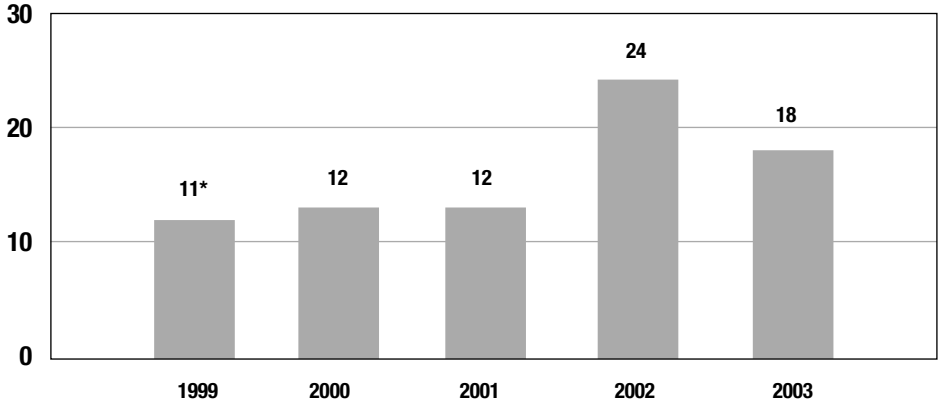
Figure 5—Formal agreements



Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

*2 of which are for year-2000 problems

Figure 6—Cease-and-desist orders against banks

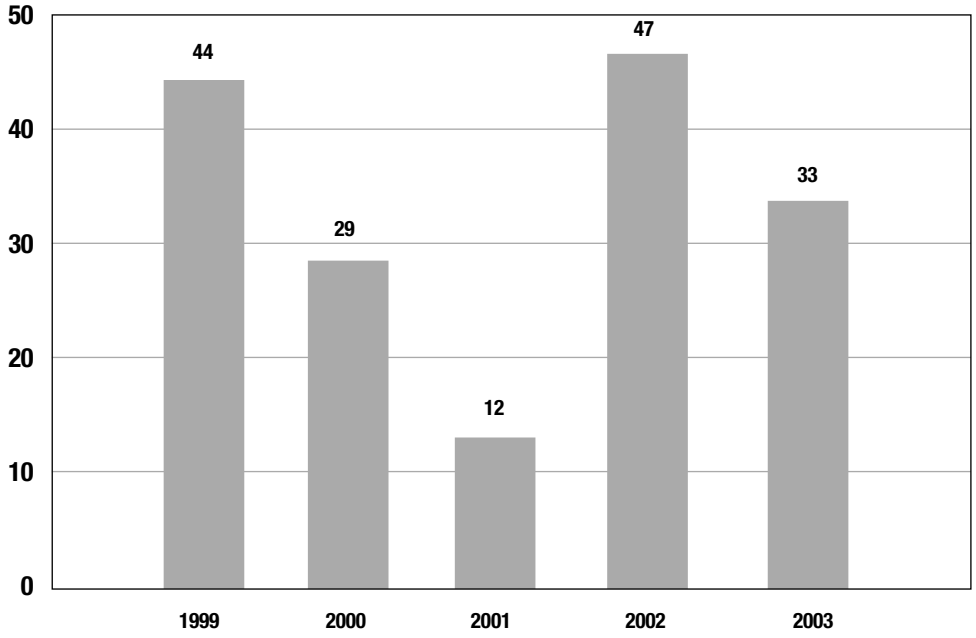


Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

*1 of which is for year-2000 problems

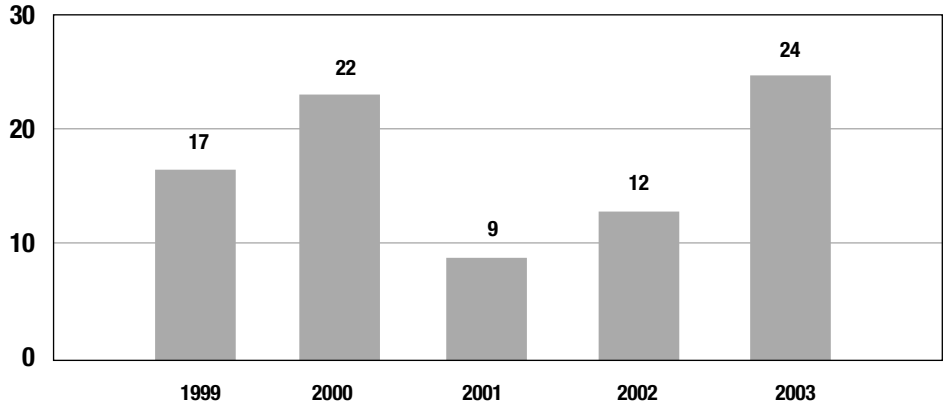
The most common enforcement actions against individuals and other institution-affiliated parties are CMPs, personal C&Ds, and removal and prohibition orders. CMPs are authorized for violations of laws, rules, regulations, formal written agreements, final orders, conditions imposed in writing, unsafe or unsound banking practices, and breaches of fiduciary duty. Personal C&Ds may be used to restrict activities, order payment of restitution, or require institution-affiliated parties to take other affirmative action to correct the results of past conduct. Removal and prohibition actions, which are used in the most serious cases, result in lifetime bans from the banking industry.

Figure 7—Civil money penalties against institution-affiliated parties



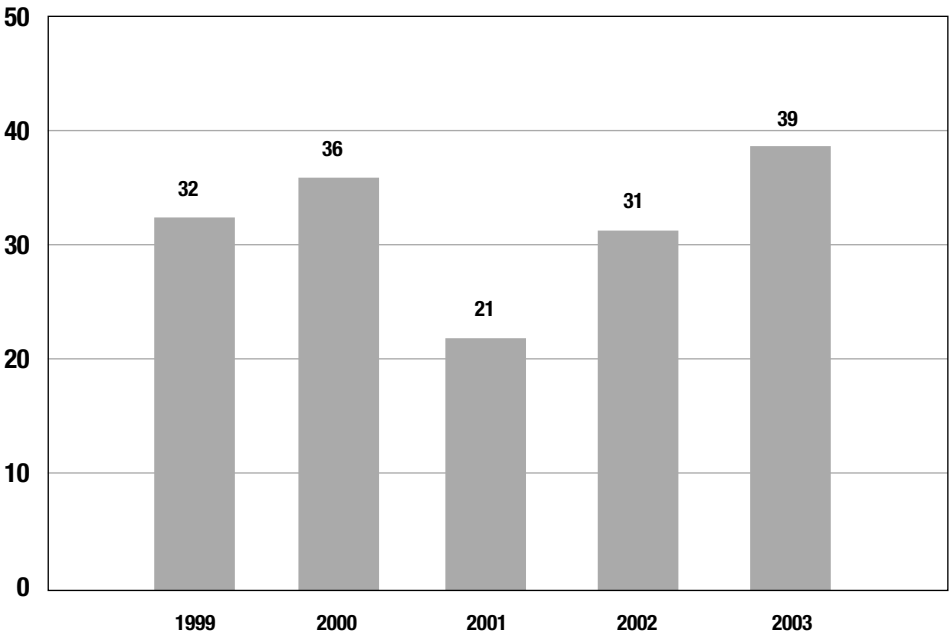
Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

Figure 8—Cease-and-desist orders against institution-affiliated parties



Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

Figure 9—Removal and prohibition orders



Source: OCC Systems. Note that totals for previous years' completed enforcement actions may be adjusted to reflect revised aggregates.

Recent Enforcement Cases

Below are summaries of the significant cases completed between July 1 and December 31, 2003:

A. Consumer Protection

OCC brings first unfair practices case under the FTC Act; restitution ordered. In November 2003, the OCC issued a consent cease-and-desist order in connection with a Texas bank predecessor's abusive tax lien loans to subprime borrowers. The loans involved violations of the Truth in Lending Act, Home Ownership Equity Protection Act, and Real Estate Settlement and Procedures Act, and unfair practices under section 5 of the Federal Trade Commission Act. The unfair practices included fees that were charged for services that were never performed, duplicative fees, and, in some cases, fees far above the fees charged to other customers for the services provided. The OCC ordered the bank to make full restitution to tax lien customers for all fees and interest charged on the loans, and to review a mortgage loan portfolio considered at-risk for similar violations. The OCC ordered the bank to pay additional restitution to any customers in this mortgage loan portfolio who were victims of violations of law or unfair practices. The OCC also issued a consent cease-and-desist order to the partnership that originated and collected the bank's tax lien loans, requiring the partnership to seek the OCC's non-objection prior to entering into agreements with other national banks. Finally, in connection with the tax lien loans, the OCC issued a consent personal cease-and-desist order against a former officer of the predecessor bank restricting her future lending activity and assessing a $10,000 civil money penalty. *In the Matter of Clear Lake National Bank, San Antonio, Texas*, Enforcement Action No. 2003–135 (November 7, 2003); *In the Matter of Sedona Pacific Housing Partnership, D/B/A Sedona Pacific Properties, San Antonio, Texas*, Enforcement Action No. 2003–149 (November 19, 2003); *In the Matter of Nancy Kinder,* Enforcement Action No. 2003–153 (October 20, 2003).

Troubled bank fined for violation of consumer protection statutes; ordered to take corrective action. In May and July 2003, the OCC issued consent cease-and-desist and civil money penalty orders against a Florida-based bank. The consent order terminated a litigated enforcement proceeding that had been initiated by the OCC in 2002. The OCC's 2003 cease-and-desist order was intended to remedy a number of serious safety and soundness concerns. If certain triggers are met, the order may also require the bank to submit a plan to sell, merge, or liquidate at no cost to the Federal Deposit Insurance Fund. The bank was also ordered to pay a $25,000 civil money penalty for violation of a variety of consumer protection statutes or their implementing regulations, including the Real Estate Settlement Procedures Act, Federal Trade Commission Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, and Truth in Lending Act. In the Matter of *Guaranty National Bank of Tallahassee, Tallahassee, Florida*, Enforcement Action Nos. 2003–37 (May 2, 2003) and 2003–81 (July 10, 2003).

Restitution of annual and over-the-limit fees mandated for credit card customers. The OCC required a credit card bank to sell, merge, or liquidate, pursuant to a consent cease-and-desist order issued in 2002. Pursuant to this consent order, on December 28, 2002, the bank entered into a

contractual agreement whereby the bank knew or should have known that its credit card customers likely would not have use of their cards for an entire year from the date of this December 28 agreement. Yet, the bank continued to charge annual fees on account holders' monthly credit card statements in January and February 2003. In some cases, these fees caused several bank customers' accounts to exceed their credit limit, thereby generating additional "overlimit fees." The bank then terminated its credit card program on March 7, 2003, making the credit cards useless to consumers. The OCC found these practices to violate section 5 of the Federal Trade Commission Act. In a July 2003 formal agreement, the OCC required the bank to refund the pro rata share of the annual fees it charged customers on or after December 28, 2002. Any overlimit fees generated by these annual fees were also subject to a full refund. *In the Matter of First Consumers National Bank, Beaverton, Oregon*, Enforcement Action No. 2003–100 (July 31, 2003).

B. Early Intervention for Problem Banks

OCC issues orders against uninsured trust bank and nonbank holding company relating to improper mutual fund trading, mandating resolution of the trust bank. During the fall of 2003, the OCC issued a number of orders resulting in the trust bank's cessation of business. In October 2003, the OCC issued consent orders against the trust bank and its nonbank holding company. The bank's consent order required the cessation of questionable mutual fund trading activity, preservation of its assets, prohibition of certain expenditures, development of a business/liquidation plan, and maintenance of adequate capital and liquidity. The holding company's consent order required the immediate infusion of $4 million into the bank, execution of a capital adequacy liquidity maintenance agreement ("CALMA"), and a pledge and preservation of assets. In November 2003, the OCC issued an amended consent order requiring the bank's submission, within ten days, of a plan to sell, merge, or liquidate. The plan resulted in the bank's cessation of business by March 2004. Finally, in December 2003, the OCC issued a consent order requiring the bank to transfer all virtually all assets through a bulk transfer to a third party. *In the Matter of Security Trust Company, NA, Phoenix, Arizona,* Enforcement Action No. 2003–136 (October 29, 2003); *In the Matter of Capital Management Investors Holdings, Inc., Chicago, Illinois,* Enforcement Action No. 2003–137 (October 29, 2003); *In the Matter of Security Trust Company, NA, Phoenix, Arizona,* Enforcement Action No. 2003–138 (November 24, 2003); *In the Matter of Security Trust Company, NA, Phoenix, Arizona,* Enforcement Action No. 2003–160 (December 30, 2003).

C. Anti-Money Laundering Efforts

Midsize national bank ordered to improve compliance with anti-money laundering provisions. In July 2003, the OCC issued a consent cease-and-desist order requiring a midsize bank to address its compliance with federal anti-money laundering requirements. Among other things, the OCC ordered the bank to employ an independent external consultant to conduct a study of the bank's compliance with the Bank Secrecy Act and regulations, including amendments from the USA PATRIOT Act, and the rules and regulations of the Office of Foreign Assets Control ("OFAC"). The order also requires that the bank develop and implement a program of policies and procedures to

provide for Bank Secrecy Act and OFAC compliance, expand the bank's existing Bank Secrecy Act audit procedures, and develop and implement a comprehensive Bank Secrecy Act training program for specified bank employees. *In the Matter of Riggs Bank, N.A., McLean, Virginia*, Enforcement Action 2003–79 (July 16, 2003).

Federal branch official ordered to comply with anti-money laundering and OFAC requirements. In October 2003, the OCC issued a consent cease-and-desist order requiring an official of a federal branch of a Shanghai, China, bank to take precautions when dealing with multiple bills of lading and prohibiting him from engaging in any trade settlement transactions involving false documentation or a violation of OFAC provisions. *In the Matter of Stephen Lee,* Enforcement Action No. 2003–145 (October 29, 2003).

D. Actions to Combat Bank Insider Abuse

$1.3 million in fines and restitution from former officials of failed Florida bank. During 2003, the OCC initiated removal, restitution, and civil money penalty actions against numerous insiders associated with a failed Florida bank. In April 2003, the OCC issued consent orders against three former officers and directors of the bank—two personal cease-and-desist orders, one prohibition, and a total of $60,000 in civil money penalties. In May 2003, the OCC filed notices of charges against another four former officers and directors—one personal cease-and-desist action and three prohibitions—demanding restitution and civil money penalties. Concurrent with the commencement of these enforcement actions, the OCC issued temporary cease-and-desist orders against three of these former officers and directors, ordering certain assets frozen. In opposition to the asset freeze, the former officers and directors filed a challenge in U. S. District Court for the Southern District of Florida, and the OCC cross-moved for enforcement of the temporary orders. After significant motions practice and oral argument before the court, a U. S. magistrate judge issued a report and recommendation that the former officers' challenge to the asset freeze be dismissed and that the OCC's motion to enforce the asset freeze be granted. While on appeal to the district judge, two former officers subject to the asset freeze entered into consent orders issued by the OCC. As a condition of the OCC's motion to dismiss its injunctive action to enforce the asset freeze, the OCC required one former officer to consent to the district judge entering a judgment enforcing the consent order; the consent order was "so ordered" on December 29, 2003. Finally, in November 2003, the OCC initiated an enforcement action against another bank insider, seeking a personal cease-and-desist order and civil money penalty. During 2003, the total amount of fines and restitution ordered from these OCC enforcement actions approximates $1,310,000. *In the Matter of Eduardo Masferrer*, Enforcement Action No. 2003–150, (December 22, 2003); *In the Matter of Carlos Bernace*, Enforcement Action No. 2003–122 (October 31, 2003); *In the Matter of Ronald Lacayo*, Enforcement Action No. 2003–52 (May 15, 2003); *In the Matter of Antonio Arbulu*, Enforcement Action No. 2003–60 (May 15, 2003); *In the Matter of Alina Cannon*, Enforcement Action No. 2003–41 (April 24, 2003).

Indictment against officials who caused the failure of Arkansas bank. During 2003, the OCC rendered assistance and support to criminal authorities in their continuing criminal investigation into the failure of an Arkansas community bank. This assistance contributed to the guilty plea of a former outside counsel to the bank. In November 2003, the former chairman and vice-chair of the bank, along with the former president of a Missouri-based consumer finance company, were indicted for conspiracy, making false statements to the OCC, illegal participation, obstruction of the OCC's examination, misapplication of bank funds, and bank fraud. Their criminal trials are now scheduled for July 2004. *United States* v. *Damian Sinclair, Susan Wintermute and Clarence Stevens* (W.D. Mo. November 20, 2003) (superceding indictment).

Prohibition, restitution, and civil money penalties entered against two bank officers who violated lending limit and made nominee loans. In January 2003, the OCC prevailed before an administrative law judge in its litigated removal, restitution, and civil money penalty case against two former senior officers of a California community bank. The OCC alleged that the two officers violated legal lending limit laws and regulations and engaged in unsafe or unsound practices, leading to significant losses for the bank. After a full hearing on the record, and significant post-hearing briefing and reply, the administrative law judge issued a decision recommending orders of prohibition, restitution, and significant civil money penalties. The respondents objected to these recommendations to the Comptroller of the Currency as to civil money penalties and restitution, and to the Board of Governors of the Federal Reserve System as to prohibition. In September 2003, the Comptroller of the Currency upheld the findings of fact of the administrative law judge, ordered restitution of $232,000, and assessed civil money penalties against the two officers of $20,000 and $35,000, respectively. In October 2003, the Board of Governors of the Federal Reserve System upheld the recommendation of the administrative law judge to ban each former officer from the business of banking. The former officers have now appealed the final decisions to the U. S. Court of Appeals for the Ninth Circuit. *In the Matter of Susan Diehl McCarthy,* Enforcement Action No. 2000-40 (September 2, 2003, for CMP and restitution; October 15, 2003, for prohibition)*; In the Matter of Eugene Ulrich,* Enforcement Action No. 2000–40 (September 2, 2003, for CMP and restitution; October 15, 2003, for prohibition).

Fine and prohibition against banker engaged in self-dealing. In August 2003, the OCC issued a consent prohibition and $100,000 civil money penalty order against the former president of a California community bank. He participated in a scheme to have the bank make a $1.2 million loan to a customer who then paid debts owed to the bank president and his son. *In the Matter of Andrew Rossi*, Enforcement Action No. 2003–80 (August 1, 2003).

E. Fast Track Enforcement Cases

The OCC continued its Fast Track Enforcement program, initiated in 1996, which ensures that bank insiders who have engaged in criminal acts in banks, but who are not being criminally prosecuted, are prohibited from working in the banking industry. As part of the Fast Track En-

forcement program, the OCC secured 11 consent prohibition orders against institution-affiliated parties between July 1 and December 31, 2003. One of these orders incorporated restitution to the appropriate bank for losses incurred, and one of the orders incorporated a civil money penalty. During the same period, the OCC sent out notifications to 107 former bank employees who were convicted of crimes of dishonesty, informing them that under federal law they are prohibited from working again in a federally insured depository institution.

Quarterly Journal

Speeches and Congressional Testimony

Speeches and Congressional Testimony—October 1 to December 31, 2003

Remarks by John D. Hawke, Jr., Comptroller of the Currency before the American Academy in Berlin, on Basel II, December 15, 2003

Basel II: A Brave New World for Financial Institutions?

The American Academy in Berlin has attracted a remarkable succession of speakers and presenters from various fields of accomplishment—people united by the world standard of their own work and a common commitment to German–American friendship and international cooperation. I am honored to follow them to this podium.

In light of the principles to which the Academy has dedicated itself, I can think of no better place to discuss the work we are doing in the Basel Committee on Banking Supervision to craft a new international accord on regulatory capital requirements for banks. That is my subject today.

I think it's quite appropriate that we discuss this subject in this splendid building, which I'm told was once the home of the eminent banker Hans Arnhold. Bankers have long been among the most international—and indispensable—of business people. When the absolute monarchs of centuries ago felt overwhelmed by the financial burdens of maintaining armies and appearances, they turned to private bankers. Indeed, the power of bankers came to rival—and in some cases to surpass—that of the sovereigns they served. It was the Duc de Richelieu, prime minister under Louis XVIII, who was supposed to have observed, "there are six great powers in Europe: England, France, Russia, Austria, Prussia, and Baring Brothers." These may have been the words of an obsequious loan-seeker or those of a resentful debtor. But they also were not that far from the literal truth.

Skip ahead two centuries and bankers were still playing a primary political role as well as a financial one. In the 1920s and early '30s, through their formal and informal networks, bankers were at pains to prop up the international order when economic nationalism and political paralysis threatened to send the whole structure careening into crisis. Ultimately that crisis could not be averted; but in retrospect it's remarkable that bankers were able to sustain capital flows, international ties, and political stability in the face of an increasingly dysfunctional world order as long as they did.

Although we need no longer count on bankers to fill such systemic vacuums of political leadership, they continue to perform many functions essential to international stability and economic growth. Indeed, the globalization of capital markets may be considered as one of the defining developments of the whole post–World War II era, and we assign it significant responsibility for some of the great economic successes of our times—and the success we hope to achieve in the future. As Walter Wriston memorably put it, capital today goes where it is wanted and stays where it is well treated. That doesn't mean governments are passive bystanders in the process: meeting today's daunting financial challenges requires a sound, competitive, and effectively supervised international banking system.

While the international integration of banking and financial markets has been a source of enormous strength to the world economy, it also exposed it to vulnerabilities from unexpected sources. The 1974 failure of the Bankhaus Herstatt—a modest sized bank that I'm sure would not have appeared on any global problem bank list, had one existed—sent shock waves through the financial sector, demonstrating that weakness in the banking system or the supervisory regime in a single country may have the potential to cause disruption not only within that country but also internationally. Herstatt became a catalyst for the G–10 nations to establish the Basel Committee a year later, with a view to promoting common standards and best practices of prudential supervision, and assuring that no internationally active banking establishment should escape competent supervision.

Much of the committee's work over the past two decades has focused on capital adequacy standards for internationally active banks. The principal objective has been to articulate a common set of rules for those banks confronting one another as competitors around the world, and to relate capital rules, as far as possible, to the varying risks presented in the asset make-up of these banks.

The committee's landmark Capital Accord issued in 1988—what we now refer to as Basel I—ran little more than two dozen pages and was adopted within seven months after the committee's first (and only) consultative paper was published for comment. Basel I established the framework for the risk-based capital adequacy standards for counter-party credit risk used by all G–10 countries and by most other banking authorities around the world. The first Capital Accord represented an important convergence in the measurement of capital adequacy, a strengthening in the stability of the international banking system, and a removal of a source of competitive inequality arising from differences in national capital requirements.

The shortcomings in Basel I have been recognized for a number of years. Principal among them is that it established capital requirements that were only remotely related to actual risks, and that were susceptible to significant arbitrage. Moreover, since Basel I the banking industry has become exceedingly more complex. Increasing use has been made of sophisticated funding tools, such as securitizations, and of complex derivatives to reduce capital requirements and to hedge and manage risk, and the state of the art of risk measurement and modeling has advanced very significantly.

These changes led the Basel Committee five years ago to embark on an effort to improve and modernize Basel I—an initiative we now call Basel II. That effort has absorbed an incalculable amount of time, energy, and resources on the part of the Basel Committee, its member agencies and their staffs, and the banking industry worldwide. The committee has published three consultative papers detailing a new approach to capital determination, together with volumes of supporting research and position papers. Its various task forces and working groups have spent countless hours in debate, deliberation, and drafting. Three "quantitative impact" studies have been performed in an attempt to estimate the effect of a new approach on the capital of our banks, and the committee itself has met in plenary session at least quarterly to review progress and discuss is-

sues. The most recent consultative paper—CP–3—runs more than 200 pages, and is mind-numbing in its complexity.

While I don't propose to address the details of Basel II this evening, it may be helpful to describe its structure in broad outline.

The new approach would be built on three "pillars"—the first, a set of formulas for determining regulatory capital requirements; the second, a set of principles for the exercise of supervisory oversight; and the third, a set of disclosure requirements intended to enhance market discipline.

Pillar I basically sets out three means for calculating capital requirements:

1) The "standardized" approach—essentially, a set of refinements to the Basel I risk buckets—which provides for the use of external ratings in certain circumstances, and gives some weight to risk mitigation devices.

2) The "foundation internal ratings–based (IRB)" approach, which sets forth a methodology for using a bank's own internal risk rating system, including its calculated probabilities of default (PD), as a base for calculating capital, using a factor for loss given default (LGD) provided by supervisors.

3) The "advanced IRB" approach, which bases capital calculations on the bank's own supervisory-validated credit risk rating systems, including bank-calculated PDs and LGDs.

In each of the three approaches there would be a separate calculation for determining capital to cover operational risk. In measuring their operational risk, banks would be able to choose between a basic approach based on gross income of the company, a standardized approach that looks at gross income within individual business lines, and an internal models-based advanced measurement approach.

One might infer from CP–3 that the pressures for revision of Basel I have not evolved solely from the original accord's technical shortcoming, or from the changes in the business of banking and risk management that have occurred since 1988. CP–3 and the deliberations that generated it reflect a disposition in the Basel Committee to define a far broader and more prescriptive role for itself.

For one thing, the committee has devoted significant attention to the interests of non-G–10 countries. Not only has the "standardized" approach been formulated with the intention of making it suitable for use by less complex banks in less developed economies throughout the world, but the committee itself has engaged in increased outreach to and consultation with banking authorities in these countries.

For another, in proposing a set of highly detailed rules, the committee has evidenced a strong distrust of supervisory discretion in the process of capital determination, and has sought to confine the role of discretion in the establishment of regulatory capital requirements.

To be sure, there are good reasons to be concerned about discretionary supervision that is not strongly anchored to solid principles. We have all seen examples of supervisory forbearance where serious problems—indeed, chronic insolvencies—have been left to fester while supervisors have hoped for economic reversals or political bailouts—generally with disastrous consequences. The U.S. savings and loan crisis of the 1980s is a compelling reminder of the dangers of unbridled discretion.

But, bank supervision does not lend itself well to a "black box" treatment. My view, at least, is that there is too much in the operation of complex banking institutions that requires subjective analysis, evaluation and expert judgment—the quality of management, the adequacy of internal controls, the extent of compliance with laws and regulations—and the very "culture" of the organization itself. Yet, the monumental prescriptiveness of Basel II seems, at times, to be motivated by a conviction that, if only the rules can be made sufficiently detailed and escape-proof, the Holy Grail of competitive equality can be discovered.

While I have enormous regard for my colleagues on the committee, I must confess that I am very concerned about this approach. I am concerned that the level of prescriptiveness reflected in the current version of Basel II does not mesh well with the traditional U.S. approach to bank supervision and threatens to change it in a way that could be very unhealthy. Not only do we place substantial importance on the expert judgments of experienced bank examiners, but, under legislative mandate, we have grounded our system of supervision on the concept of prompt corrective action—that is, we place very heavy emphasis on supervisory actions that force restoration of capital well before real net worth turns negative. To this end, we have attributed significant importance to the maintenance of a specified minimum leverage ratio—a practice that is not common in many other supervisory regimes. Basel II is not grounded in a similar requirement for prompt corrective action, and it remains to be seen how a more formulaic approach will fit with our traditional approach.

I am also concerned that the effort to homogenize capital rules across the world may do serious damage to certain markets in which U.S. banks—particularly national banks—have been world leaders, such as credit cards and securitizations. We have to exercise great caution that we do not, in the name of achieving international uniformity, needlessly disrupt settled banking practices and established, well-functioning markets.

Finally, I am concerned that the Basel II process does not mesh well with the traditional U.S. approach to rulemaking. Indeed, much of the criticism that has been aimed at the United States in recent months reflects a lack of understanding of both our supervisory process and our domestic rulemaking process.

Because the very purpose of the American Academy in Berlin is to foster international understanding and the sharing of differing points of view, I'd like to use this occasion to discuss three of the major issues on which our views—and I speak now solely for the OCC—have caused some consternation among our colleagues and as to which some elaboration may contribute to international understanding. They are complexity, scope of application, and timing and process.

Complexity

I suppose that in describing CP–3 as "mind-numbing" in its complexity I have already tipped my hand on this issue. In my view, CP–3 is complex far beyond reason. Aspects of it—the formulas relating to securitizations, for example—are so complex that the mere visual depiction of them has been cause for ridicule, which serves only to undermine public regard for the committee.

When I have made this point in the past, the rejoinder has been a rather patronizing dismissal. "We live in a complex world," the apologists for Basel II's complexity say. But, I believe that the complexity of Basel II has far exceeded what is reasonably necessary to deal with the complexity of today's banking industry. There are viable alternative approaches in addressing, from a practical standpoint, the complexities of today's financial marketplace. Had there been greater willingness in the committee to tolerate greater exercise of supervisory discretion, a more "principles-based" approach could have been taken. One might think that our experience with the accounting standard-setters would have led us in a different direction, for in the field of accounting we have seen how efforts to be comparably prescriptive have resulted in more, rather than fewer, loopholes.

But complexity has more insidious implications for the goal of competitive equality in light of the vast differences in the nature of bank supervision among the countries participating in Basel II. The OCC has full-time resident teams of examiners on-site in our largest banks—as many as 35 or 40 at the largest. Supervision of these banks is truly continuous. In some of the other member countries comparably sized banks may be visited by examiners only every other year, or even less frequently. In some countries much of the responsibility for supervision is relegated to outside auditors. A recent OCC survey showed that we have by far the lowest ratio of banking assets per supervisory staff member of any G–10 country—perhaps the best indicator of a supervisory system's capacity to assure compliance with supervisory mandates. Can anyone reasonably assume that a mandate of the complexity of Basel II will be applied with equal forcefulness across such a broad spectrum of supervisory regimes? I am tremendously concerned that, given such disparity and the complexity of the mandate, banks in our system could be placed at a serious competitive disadvantage.

I recognize that this argument may prove too much—that if complex rules cannot be evenly applied across a broad variety of supervisory regimes, then how can we expect more discretionary rules to be evenly applied? The answer, of course, is to put greater emphasis on the attainment of parity among supervisory regimes. Uniformity of application and competitive quality will remain

elusive goals, irrespective of the prescriptiveness of the rules, so long as we have wide variations in the nature and content of supervision itself.

Moreover, complexity imposes a whole range of costs, not the least of which is a loss of both credibility and a broad base of support. What people cannot understand they are unlikely to trust, and I suspect that the lukewarm reception Basel II has received in some quarters can be attributed to that factor alone. There is also little doubt that exhaustive efforts to dictate details and eliminate opportunities for the exercise of supervisory discretion has unduly prolonged the production process and tried the patience of those who have taken responsibility for bringing Basel II to a conclusion. I am still hopeful, however, that we can achieve a better balance between hard-wired rules and the exercise of informed supervisory judgment.

Scope of Application

Basel II, by its very terms, is intended to apply to "internationally active" banks, just as was Basel I. In the United States we have more than 9,000 federally insured banks and thrift institutions, of which little more than 100 exceed $10 billion in size. And even among that number, all but a handful are local or regional banks with virtually no international operations. Thus, U.S. regulators have been faced with a choice: Do we apply Basel II across the board, imposing on all of our banks the rigidity and complexity of the new accord? Or do we attempt to identify those banks that are truly "internationally active" and of sufficient size to be systemically important and apply Basel II only to them?

The latter approach was a clear choice for us. We defined the scope of application of Basel II by setting dollar thresholds of asset size and international exposures, and by that means identified about 10 banks that we would treat as mandatorily subject to Basel II. We also made the judgment that these banks had sufficiently substantial resources and sophistication to move immediately to the advanced IRB approach, and thus we saw no useful purpose to be served by offering our banks the option of using either the foundation IRB or standardized approaches.

We will permit, but not require, other U.S. banks to apply the advanced approaches of Basel II, under the same standards that must be met by the group of mandatory banks. To borrow a phrase from our British colleagues at the FSA [Financial Services Authority], our approach to those banks will be one of "no compulsion, no prohibition." Our expectation is that a number of banks in the next tier below the 10 mandatory banks, whether or not "internationally active," would likely seek supervisory approval to become "Basel II" banks, for a variety of reasons. We estimate that the mandatory Basel banks plus those that we expect to opt in to Basel II will account for close to 99 percent of the foreign exposures of all U.S. banks. Thus, we believe we are completely in harmony with the intent of Basel II.

Some have been critical of the United States for refusing to subject our smaller banks to even the standardized approach—particularly some of those countries that intend to apply Basel II to all of their banks. They seem to suggest that it is hypocritical of the United States, as a Basel Commit-

tee member, to participate in the promulgation of capital standards intended to be usable by the rest of the world while refusing to apply those standards to its own banks.

This criticism, to be charitable, is simply uninformed. While I fully support the committee's objective of framing capital rules that can be adopted well beyond the G–10 countries, I believe that smaller banks in the United States are both better capitalized and more robustly regulated than their counterparts anywhere else in the world—indeed, they are generally better capitalized than our larger banks. They already bear substantial cost burdens imposed by the extensive complex of laws and regulations under which they operate, and we see absolutely no useful purpose to be served in adding to the burdens of our community banks by subjecting them to the complexities of Basel II.

It may well be that in some countries, simply by reason of their size or geography, many smaller banks might be considered to be internationally active, and, therefore, properly includable within the scope of Basel II. We also appreciate that the European Union may decide, in the name of pan-European uniformity, that Basel II should apply to all banks in the EU, and we certainly respect that decision. But, in joining in the work of the Basel Committee we did not surrender our discretion to supervise our banking system in the way that we deem most appropriate, and just as we do not criticize those countries that have opted for a regime of supervision much less demanding than ours, we think it inappropriate for us to be criticized for the choice of supervisory approaches that we make with regard to our small, non–internationally active banks.

Timing and Process

The deliberations over Basel II have been going on for about five years now, and there are many observers who are extremely concerned that further delay in the promulgation of a "final" document may threaten the prospects for achieving a new accord. Some have argued that delay simply provides an opportunity for more issues to be raised and for more special pleading by affected interest groups. Others have expressed concern that if the European Parliament recesses without adopting the new rules, we may be back to square one when that body is reconstituted after elections. Even some bank executives have argued that their ability to get continued funding from their boards for Basel II preparation may be endangered if directors sense that Basel II will not occur.

These are undeniably significant concerns, and I think it behooves the committee to convey a strong sense of purpose and momentum. To this end, we concurred in the announcement made by the committee after its last meeting that it would work towards resolving outstanding issues by the middle of next year. We will work assiduously to meet that target so as to permit national implementation processes of Basel members to commence.

But my personal view is that we cannot afford to ignore substantial issues, or to sweep recognized problems under the rug, simply to be able to issue a document by some target date. It is far more important to get the new accord *right* than to get it done on some predetermined schedule.

One clear lesson we should have learned over the past five years is that this is an exceedingly complicated and difficult process, and that new issues tumble out of the deliberations at every turn. Indeed, even though we resolved some major issues at the last meeting of the committee in Madrid, we have encountered new issues in the implementation of that resolution. Moreover, in the committee's announcement following the Madrid meeting several other issues were identified that remain to be resolved. Our work, to date, on those issues makes quite clear that we still have some difficult choices ahead.

To those who say that delay will simply allow others—legislators, interest groups, and financial institutions—to raise more issues, I respond that if we have not anticipated or dealt with the important issues that might be raised, we run a serious risk of having a seriously flawed product or a product that will not command the broad base of support that a proposal as far reaching as Basel II must have.

One of the industry's most serious criticisms of Basel II, to date, has been that it does not contemplate full credit-risk modeling—that is, that it does not take into account portfolio effects of the mitigation of risk through diversification. The new chairman of the committee has stated publicly that this is a subject to which the committee will soon turn its attention.

Given the complexity of this issue—which, in fairness, was not simply overlooked by the committee, but put on a back burner in order to move ahead on other fronts—would involve significant delay. Yet, at least one trade group that has been vociferous in its criticism of the committee's failure to move to full modeling has been equally vociferous in urging the committee to act expeditiously in adopting Basel II. I do not see how we can have it both ways.

Earlier this year, following the issuance of CP–3 by the committee, we in the United States published an Advance Notice of Proposed Rulemaking, or ANPR, which described CP–3 and solicited comment on a number of important questions. That comment period closely followed the comment period set by the committee itself for CP–3. We received extensive comments in response to both CP–3 and the ANPR, many of them highly critical of the proposal. It became absolutely clear to me that some significant changes were needed in CP–3 if we hoped to avoid a train wreck, and, at its last meeting, the committee agreed to some of these—most notably a change that provided for capital to be calibrated only against unexpected losses, rather than the sum of expected [EL] and unexpected losses [UL], as CP–3 had provided—the so-called EL–UL issue.

When we responded to these comments by urging the committee to make changes we were accused by some of trying to "renegotiate the deal"—a charge that seemed to me to betoken a fundamental misunderstanding of not only the committee's process, but the U.S. domestic process as well. CP–3 was *not*, of course, a "deal"; it was a proposal—a significantly incomplete proposal, at that. The very purpose of soliciting comments was to identify potential problem areas, and the EL–UL issue stood out like a sore thumb. Indeed, the alacrity with which the committee agreed to

a change in this area reflected its own recognition that a change was required. The most significant reservations related to concerns about what such a change might imply for the timetable.

We have also found that some of the outcries about timing have displayed a lack of understanding of the process that we in the United States must go through before we can give final assent to Basel II. Our capital requirements are promulgated in agency regulations that have the force of law, and our Administrative Procedure Act requires that, before we adopt final implementing regulations, we must publish proposed regulations and provide opportunity for public comment. It may be beneficial to describe, in practical terms, the milestones we must meet prior to final implementation of Basel II.

First, we obviously cannot initiate formal implementation efforts until the Basel Committee, itself, has come out with a definitive paper. As noted earlier, it is our hope that we will resolve outstanding issues so as to meet the committee's goal of issuing such a paper by mid-year 2004. With that said, however, the list of issues the committee identified in the post-Madrid press release—including the treatment of retail credit, securitizations, and credit risk mitigation—are significant and challenging.

Second, we in the United States have expressed the intention to conduct a fourth quantitative impact study, or QIS, based on the final Basel document. While the committee conducted QIS–3 late last year, I believe that study had significant shortcomings—not the least of which was that CP–3 was seriously incomplete at the time. Moreover, there was virtually nothing in the way of supervisory validation of the process by which the banks participating in the study made their estimates of capital impact. It was essentially a unilateral process that did not reflect the kind of rigorous oversight role that supervisors would play when Basel II actually goes into effect. I do not believe that any responsible bank supervisor can or should make a judgment about the impact of Basel II on the capital level of the banks it supervises, based on QIS–3. And that means that at present we have really no sound basis, whatsoever, for assessing capital impact. I would hope that the committee, itself, would see the wisdom of conducting its own QIS–4, but, whether it does or not, we intend to do so.

Third, the Administrative Procedure Act requires that the U.S. agencies publish and provide an opportunity for comment on proposed regulatory language on Basel II in the form of a Notice of Proposed Rulemaking, or NPR. Assuming no significant issues are encountered in the preceding stages, the drafting process of the NPR, together with the comment period and the analysis of comments, will take us well into 2005. It is at that point that we can publish final implementing rules.

Let me turn for a moment to the role of our Congress in this process. Over the course of the Basel II process we have provided informal briefings to congressional staff on the progress of the effort, but it has only been fairly recently—as the committee's proposals have become more fully fleshed out—that members of Congress have engaged significantly on the specifics of the proposal. This is in marked contrast, I should say, to some of the other member countries, such as

Germany, where legislators have been involved in influencing, even dictating, some of the positions of their representatives from the very outset of the Basel process.

We have heard a number of concerns expressed from members of Congress. Some have borne down on the proposed treatment of operational risk, reflecting the anxieties of important institutions in their constituencies who believe they may be very adversely affected. Others have expressed concern about competitive inequities between regulated and unregulated institutions, between U.S. and foreign banks, or between large and small institutions. Still, others have raised questions about the decision-making process—how U.S. positions are arrived at, how the Basel Committee, itself, reaches decisions, and what the role of Congress should be.

In my view, these are perfectly appropriate concerns. U.S. supervisory agencies are, after all, creatures of the Congress, and our authority to set capital requirements for banks derives from statutes enacted by the Congress. The process of legislative oversight is as important to the integrity and legitimacy of the final product as the process of public comment, itself. While we have heard some rather thoughtless and unhelpful comment about the involvement of our Congress from some offshore observers—to the effect that members are simply reflecting the interests of their political constituents—these observers reflect a fundamental lack of understanding of the democratic process and, really, should know better.

We have given the Congress strong assurances that our domestic rulemaking process will have real integrity to it—that we will not only provide opportunity for comment, but that we will give serious consideration to those comments, and, if need be, come back to the Basel Committee when? we believe additional change is necessary to make the final product acceptable to us.

This has obvious implications for the future course of Basel II. As I have said, we have given the committee a commitment to work diligently toward the goal of producing a "final" version of the accord by mid-year 2004. However, no one should underestimate the difficulty of the issues that remain to be resolved or the very high potential for new issues emerging, as we move forward. QIS–4, which will follow the committee's definitive paper, will be an especially important event for us, since it should give us a far clearer picture of how Basel II is going to impact the capital of our banks. Should QIS–4 lead us to project that there might be wide or unwarranted swings in the capital of our banks, either up or down, that will present us with a very significant decision point, and we would feel compelled to bring that concern back to the committee.

I am much more skeptical about the currently stated goal of achieving implementation of Basel II by the end of 2006. There is a staggering amount of work confronting both us and our banks before Basel II can be implemented, and I am absolutely confident, based on past experience, that, as we move into the implementation phase, we will uncover a myriad of issues not previously thought of or addressed. The committee has established an Accord Implementation Group composed of highly qualified supervisors to address implementation issues, and the work of that group will be of enormous importance, as we move ahead. Once again, I believe it is far more important that we get these decisions right than that we adhere to some preestablished schedule,

and while I fully understand the anxieties and pressures that have come to bear with respect to the promulgation of Basel II, I think there should be far less concern about the actual date of implementation. It is obviously premature to address the implementation date, but I would simply observe that having at least another year of data upon which to base the models that our banks will be using should be viewed as a strong plus.

* * *

When the Basel Committee on Banking Supervision was founded nearly three decades ago, its goal was to develop standards, guidelines, and principles that its member countries would implement in ways best suited to their unique national arrangements—political as well as supervisory. That approach, based on the spirit of consultation, respect for sovereign differences, and recognition of the limitations of the committee's authority as a consultative body, has been one of the committee's great strengths over the years. In tackling the formidable challenges of bringing a new capital accord to fruition, we should draw as much as possible upon those strengths and those experiences.

From the very beginning, it was clear that the committee's success in virtually everything it undertook would turn on its ability to reconcile widely varying national supervisory practices. I believed then—and believe just as fervently today—that the better able we are to harmonize and accommodate those differences, the more likely we are to achieve the common supervisory excellence and global financial stability to which all nations aspire.

Remarks by Julie L. Williams, Chief Counsel and First Senior Deputy Comptroller, before the Consumer Federation of America 15th Annual Consumer Financial Services Conference, on preemption, Washington, D.C., December 5, 2003

Let me first extend my sincere thanks to Steve Brobeck and the Consumer Federation of America for inviting me to take part in this 15th Annual Consumer Financial Services Conference. I am honored to be here, and I truly appreciate that you have asked me to address a very timely topic—"Financial Services Regulation: What Should Be the Role of the States?" I also welcome the chance for some give-and-take after these prepared remarks.

This is an opportunity to address some very important issues—and, I believe, some key misperceptions—that have arisen in connection with positions of the Office of the Comptroller of the Currency concerning the application of state laws to national banks, and the role of state authorities in enforcing those laws.

At the heart of these issues are constitutional principles of federal preemption. We are acutely aware that, in many quarters, the very concept of preemption is unpopular. In some respects, the fact that federal preemption arises from the federal charter of national banks seems to put us, inescapably, at odds with some state authorities. This is unfortunate, because the OCC and the states do not have fundamentally different goals.

We probably do, however, have different ways of getting to them, consistent with our different sources of statutory authority and our respective authorities thereunder. But, that does *not* mean that we cannot work together.

To start, it is helpful to provide just a bit of background on the issue of federal preemption of state law in the context of the operations of national banks. But notwithstanding this beginning, I want to give away the ending:

- Standards of federal preemption applicable to activities of national banks are derived from the Supremacy Clause of the U.S. Constitution and are well established.
- Those standards have repeatedly been reaffirmed by the courts.
- The OCC did not invent preemption and we are not the only ones that can assert it.
- Sparring over the *extent* of federal preemption of state laws applicable to operations of national banks is counterproductive.
- Protection of consumers can be maximized if states and the OCC look for ways to spread their oversight to provide the most efficient, broadest coverage for consumers.

Let me now turn to a little background. The constitutional doctrine of preemption, which holds that federal authorities prevail over conflicting restraints or conditions imposed by state laws, is a subject that has been addressed by successive generations of legal scholars going back to the 19th century.

The OCC has issued many preemption rulings over its 140-year history, but it has never done so except after careful study, and scrupulous consideration of Supreme Court precedents and the intent of Congress. Importantly, the latter includes recognition of the original intent of Congress to establish a *uniform*, nationwide system of federally chartered financial institutions. That intent was first reflected in the National Currency Act of 1863, repeatedly elaborated and reaffirmed by subsequent Congresses, and upheld in a remarkably consistent and supportive series of Supreme Court rulings.

It is also material in the present context to recall the considerations that prompted Congress and President Lincoln to create the national banking system in 1863. It was part of a broader vision of economic development and financial stability, designed to put an end to the monetary confusion, disunion, and the pervasive sense that America had, until then, failed to deliver the goods, so to speak, for too many of its people.

The national banking system, along with other enactments of that period, including the Pacific Railroad Act, the Land-Grant Colleges Act, and lots more, were integral parts of a plan to deliver on America's economic promise. Integral to our mission then—and today—is assuring that national banks' standards of operation are of the highest caliber. This includes not just their financial stability, but also the integrity with which they conduct their business and deal with their customers. Some recent history in this regard is instructive.

Thirty years ago, the OCC established a consumer affairs division, reporting directly to the Comptroller.

The OCC was the first federal banking agency to conduct regular, separate, full-scope consumer examinations, using specially trained consumer examination specialists, and to produce consumer examination manuals and policy guidelines for bankers. That was in 1976.

Also in 1976, the OCC implemented a consumer-complaint information system to track complaints systematically. That early attempt to assemble a consumer database has evolved into our world-class Customer Assistance Group, headed by our Ombudsman, who reports directly to the Comptroller.

Where we have found that national banks have engaged in abusive practices, we have not only acted with dispatch to end those practices, but have also used every legal and supervisory tool available—and have developed new tools—in order to secure restitution to consumers and penalize the institutions involved.

We have pioneered the use of section 5 of the Federal Trade Commission (FTC) Act as a basis to take enforcement action where we found instances of unfair or deceptive practices by national banks.

In August of this year, the OCC entered into a formal agreement that required a national bank in Oregon to refund various credit card fees to customers.

Several weeks ago, we announced a precedent-setting agreement that requires the complete reimbursement of fees and interest charged by a Texas national bank in a series of abusive loans that we considered "unfair" within the meaning of the FTC Act.

We have thwarted payday lenders in their "rent-a-charter" designs to use national banks as a cover for evading state consumer protection laws.

We have taken the lead in raising concerns about abusive practices in connection with so-called "bounce protection products" and in urging the other federal banking agencies to adopt standards to address those practices.

And, we have issued the most comprehensive supervisory guidance ever issued by any federal banking agency, defining and describing predatory lending and warning banks about the supervisory consequences of engaging, directly or indirectly, in such practices.

Just last month, the OCC joined the Securities and Exchange Commission, the Labor Department, and the New York State Attorney General in taking a series of actions against the Arizona-based Security Trust Company, N.A., which had participated in mutual-fund late trading and market-timing schemes. In announcing the actions, New York Attorney General Eliot Spitzer praised the OCC and the other federal agencies for their "excellent assistance and cooperation," noting that "coordination by regulators is imperative" and "this case shows how that can be accomplished."

In light of all this, you need to appreciate why it's so frustrating to the hundreds of dedicated consumer and community development specialists, compliance examiners, and attorneys at the OCC—and to all of us who work with them and support them—to hear our motives impugned or our commitment or competence in regard to consumer protection questioned. It is regrettable that this type of allegation and innuendo seems to have become standard fare, disparaging the efforts of federal regulators to carry out their responsibilities under federal law.

For example, in the case of the Texas national bank and its illegal loans that I mentioned a moment ago, not only did an organization that had taken strenuous exception to our view of preemption of state predatory lending laws *not* come out in support of our enforcement actions, but actually used the occasion to criticize us further.

That kind of sniping is unconstructive—and it is surely unproductive for consumers.

Unfortunately, the fact that we at the OCC are responsible for administering a system of *national* banks, operating under *national* standards, has led some to suggest that we and state authorities have different *goals* regarding fair treatment of bank customers and high integrity of bank conduct. That is simply not so.

We implement different statutory authorities, and thus we may have different approaches. For the OCC, our approach reflects, as it must, the fact that we administer a system composed of federally chartered entities whose powers and the restraints on them flow from federal law. That being the case, certain results follow under doctrines of federal preemption. But make no mistake: our fundamental goals are the same.

Misperceptions persist, however, and they seem to turn us into adversaries when we should be allies. That is a terrible waste. Instead of dissipating energy and resources, there is a way that states could be combining efforts with the OCC and leveraging resources to combat abusive financial providers.

Continuing an adversarial approach drains resources as well as good will —resources that all of us must husband carefully. Given the budget difficulties many states face, protracted legal battles over jurisdiction would seem harder and harder to defend at a time when some of them are reportedly considering the possibility of discharging convicted felons in order to cut costs.

Indeed, there has even been a proposal to impose a surcharge on each loan transaction—it sounds like the borrowers' version of a gas tax—to establish a special enforcement fund to augment state budgets for consumer protection activities. Surely there is a better approach than charging consumers extra to ensure that they are treated fairly.

Yet, in contesting for the ability to subject national banks to various state laws—laws that the courts repeatedly have held to be preempted as applied to national banks—states are spending time and money that *could* be directed at practices by entities—unlike banks—that are not already subject to comprehensive regulation.

The OCC has adopted special procedures to expedite referrals of consumer complaints regarding national banks from state attorneys general and state banking departments, and we have offered to enter into formal information-sharing agreements with the states to formalize these arrangements. Recently we concluded the first of these arrangements, with the Office of Consumer Credit Regulation of the State of Maine. We hope that this is the first of many.

By coordinating our resources and working cooperatively with the states, the OCC and the states can cover more ground. We can maximize the benefit to consumers, help to close loopholes in existing consumer protection laws, and better target those financial providers who prey on vulnerable members of our society.

We are committed to those goals. We stand ready to work with the states to achieve them.

Thank you.

Remarks by Mark A. Nishan, Chief of Staff and Public Affairs, before the Midwest National Bank Conference, on preemption, St. Louis, Missouri, October 9, 2003

St. Louis is one of America's friendliest and most sophisticated cities—a city that's long made a proud contribution to America's growth and greatness. I do have one regret, though: my good friend Larry Beard and his OCC colleagues here in our Central District have been so preoccupied with organizing this conference and making sure that it's a valuable conference for you, that they've pretty much left me to my own devices after hours, and that means I've missed some of the best of what St. Louis has to offer. Larry, I'll take that rain check—and I promise you, I *will* be back to collect.

Speaking of rain checks, this is an especially fine time of the year if you happen to be a baseball fan whose team is in the playoffs, with dreams of the World Series dancing in your head. For the rest of us—and I'm speaking here as a longtime New York Mets fan, who feels your pain—it's a time to embrace a longer and more philosophical view of sports and the world. It's the test of how seriously you mean what you used to tell your kids, that what really matters is how you play the game—that the pride you take in what you do means more than the numbers you put up on the board.

Whether you think that's just another cliché—or a rule that guides your every day—one thing, I think, *is* beyond dispute. In any competitive business, whether it's baseball or banking, the team that's consistently successful is likely to be the team that has focused most consistently and resolutely on fundamentals. I've long believed that what separates the leaders from the followers in this industry is the degree to which they have internalized the three "Cs": controls, customers, and culture.

I'm referring, of course, to a rigorous environment of internal controls; a strong customer service orientation; and, perhaps most important in this day and age, an organizational culture that stresses high ethical standards and accountability.

That third "C" may be the most fundamental of all. And yet, there's evidence that inadequate attention to the ethical dimensions of organizational culture has been responsible for some of the setbacks that banks have lately suffered in their external relations—setbacks that have had profound *practical* consequences for banking in America.

People are sometimes amazed when I tell them that it wasn't all that long ago or all that uncommon for the average American to put the average banker on a pedestal usually reserved for the average baseball superstar. But it's a fact. People used to look up to bankers as paragons of integrity, high moral character, and incorruptibility.

But to a considerable degree—and most regrettably—that's not the way it is anymore. The industry's reputation has fallen, and pride in the banking profession has fallen with it. That concerns us at the OCC. And, I know it concerns you.

One reflection of the industry's diminished prestige is the surge in the number—and noisiness—of the attacks on banks. State and local legislatures around the country have enacted, or are considering enacting, new laws to regulate various aspects of the business; state law enforcement officials are making dramatic headlines announcing large dollar settlements; federal regulators are issuing regulations and guidance; consumer activists are leveling broadside barbs; and committees of Congress are holding hearings and conducting investigations aimed at determining whether new federal laws are needed to curb abusive practices.

I find this curious. Given the impressive performance of the banking system during a time of such widespread uneasiness in the general economy, this is a time when you might have expected public confidence in the industry—which has helped to prop up the economy—to be at an all-time high. Instead, the opposite seems to be the case.

Certainly these attacks take a heavy toll. They hurt morale and make it harder to attract bright young people into the industry, thus compromising its future prospects. It hurts retention, too. We've even heard some bankers question their decision to choose the career in the first place—or, worse, to decide that the career is no longer worth the trouble. When an experienced and knowledgeable banker takes his or her talents to another line of work not because there's any great desire to leave, but because there seems to be no other way of recapturing that essential pride and self-respect, it's deeply unfortunate for all concerned.

But at worst, criticism of the sort that has lately befallen the industry can have a direct affect on your ability to run your business. It can result in new regulatory burdens and costs, new constraints on your relationship with your customers, and new limitations on the kinds of products and services you offer.

An *interesting* question is, "what has emboldened the industry's critics to take the offensive in this way?" The *practical* question is what the industry can do to counteract this criticism—and what it can do to bolster that important sense of pride.

I suspect that the industry's public relations problems may be partly the result of guilt by association. There are plenty of unsavory characters in the financial services business, and always have been. But, increasingly, they're offering products that look like those traditionally offered by banks, and vice versa. As the lines between financial services providers become blurred, it may be more difficult for financial consumers to differentiate among them, and banks are more likely to be tarred by the same unsavory reputation that has clung to their nonbank, less supervised—in some cases, unsupervised—competitors.

Certainly the motives of the industry's critics may also be called into question, and it would be easy to conclude that bankers have merely been scapegoats or stalking horses for people with political ambitions. Of course, kicking banks around has been something of a national pastime at least since the days of Andrew Jackson, and so it would be easy to conclude that politics is what this latest round of bank bashing has largely been all about.

But, we draw that conclusion at our peril, for it ignores some of the underlying problems for which banks and other financial providers bear more than a passing responsibility. History teaches that when Congress acts to pass regulatory legislation dealing with financial institutions, it's almost always in response to real abuses that have been festering over a long period of time—time that financial providers could have used productively—but didn't—to implement remedial steps on their own. That the banking industry has sometimes been its own worst enemy in this regard is a truth that unfortunately cannot be denied.

Back in the 1960s, for example, banks and other lenders utilized so many different and incompatible methods for computing interest rates that consumers, trying to comparison shop, didn't stand a chance. There was plenty of public outrage—and plenty of opportunity for the industry to clean up its act—but no one was willing to take the lead. So Congress did—not because it wanted to, but again, because the industry left it with no choice. The result was the Truth in Lending Act of 1968. The industry has been living with it—and other laws like it—ever since.

Arguably, all of the consumer protection laws with which you're so familiar could have been avoided, or at least softened, with some proactive industry self-policing. The point is, it's not too late to start—because the steps the industry takes today to demonstrate leadership—to weed out industry abuses, protect consumers from the actions of a misguided few, defend the industry's reputation, and develop standards of good practice—are the steps that might spare it from the Truth in Lending Acts of the future.

That's essentially the message Comptroller Jerry Hawke delivered last month to the ABA conference in Hawaii. Perhaps some of you were there to hear him. You have to admire Jerry—and I would be among his biggest admirers even if he weren't my boss. He's been a leader in this industry for four decades. When it comes to bank regulation, he's pretty much seen it and done it all. In all those years, from his various positions in the government and private sector, in literally hundreds of speeches and dozens of articles, he's been exhorting the industry to clean house in its own interest. For many of those years, he was a lonely voice in the wilderness. And through it all, he never lost hope that the industry would see the light and take the steps that would set it free to better serve the banking public.

Now there are signs that his patience and persistence may at last be paying off.

At the ABA convention, he called for the creation of a new committee on banking standards and practices, to be composed of a group of the most respected people in the industry, whose job it would be to articulate and promote the adoption of principles of fair dealing and best practices.

The initial reaction—not only from ABA—has been promising. Many people have expressed interest in Jerry's idea, and we're hoping that interest is followed by action. Although we have no illusion that the path to salvation runs through any committee, this could be an important step toward reversing the tide of regulatory measures that has lately been threatening the industry.

In the final analysis, however, the responsibility for fair and ethical conduct—and for the consequences of that conduct—rests not with a trade group or with some faceless entity we call the "industry." The responsibility rests with the hundreds of thousands of individual bankers and bank employees who come to work in its offices each and every day. Their actions—your actions—will determine whether Congress, state legislators, regulators, consumer advocates, state attorneys general, and the public—turn the focus elsewhere or keep the spotlight squarely on the banking community.

Needless to say, we're delighted and encouraged by the favorable response to the Comptroller's proposal. But, I can understand that there might be some skepticism about this "heal thyself" approach. Some will say that we're expecting too much of human nature; that a value system that encourages businesses to be innovative and to push the envelope cannot be reconciled with the kind of internal restraint that our approach requires; and that only a punitive remedy with teeth, imposed by government, can ever succeed in preventing and rooting out abusive practices.

Yet, we also know that some financial organizations are chronic abusers while some banks have operated for decades—even tens of decades—without ever having their reputation besmirched. What sets them apart? I believe that takes us back to our third "C"—a culture of ethics and accountability, nurtured and reinforced by senior managers over time.

As the Comptroller said in Hawaii, "the ultimate protection for all of our banks, and for the people responsible for running them, is to instill in all employees a dedication to the highest standards of fairness and ethical dealing; to make clear that no loan, no customer, no profit opportunity, is worth compromising those standards for; and to take swift and decisive corrective action where those standards are violated."

That's all any one banker can do to uphold the industry's standards—and to bolster that pride.

For me, the words "high standards and pride" have always triggered a mental association with the national bank charter, and I trust that many of you feel as strongly about that as I do—or some of you wouldn't be here today. We keep getting unsolicited letters from bankers telling us how much the national charter means to them, and one very recently from a community banker in Indiana whose views, I think, are worth quoting at some length in the current context.

This banker said that he'd always viewed the national charter as a "value proposition." "The cost [in assessments] may be higher" and the OCC's exams were "much tougher than [those of] state regulators," but "I saw great value in having . . . highly qualified examination personnel assist[ing] by pointing out best practices and challenging my thought processes. They are a

resource that we consult frequently." And as for the result, "I am certain that we would not be as successful today if we had decided to go the state charter route."

Obviously, this is one satisfied national banker.

I mention this not to toot our own horn, but because this banker's experience seems relevant to my earlier observation on history and human nature. I daresay that those who are pessimists about the human condition—who believe that people will always take the paths of quick gratification and least resistance if they're allowed to—would have trouble figuring out how the national banking system managed to survive and thrive for these past 140 years.

From their perspective, it makes no sense that capitalists would opt to pay more—twice as much, in some instances—for the privilege of more rigorous government scrutiny when they could easily pay a lot less and avoid the inconvenience of having a government inspector looking over their shoulders. Yet, at last count, 2,100 national bankers were making what we might call the inexpedient choice, and many quite happily and successfully, if that Indiana community banker is to be believed.

That should give us hope that banks and the groups that represent them might yet rise to the leadership challenges spelled out in Hawaii by Comptroller Hawke.

An interesting sidebar to all this is that the congressional founders of the national banking system were themselves worried that bankers would take the expedient course every time if given the choice. Their response was to try to deny bankers the choice. That's why they considered abolishing state banks outright and then, in 1865, passed the so-called "death tax" on state bank notes, which was intended to accomplish the very same goal. Only by eliminating state banks, with their notoriously lax—and low cost—examinations, the founders believed, could a banking system, built on advanced principles of safety and soundness be sustained. So much for the notion that Congress "created" the dual banking system.

It's one of those historical ironies that the national banking system succeeded, even though what the system's founders considered to be the essential condition for its success—a single high standard of bank supervision, with no options or opportunities for evasion—was never achieved. It has succeeded, in that sense, for one reason only: because national bankers have been wise enough to figure out that in bank supervision, as in all things, there's no free lunch.

The national charter offers pride of membership in a select club and it offers value that comes from rigorous examinations that assess the safety and soundness of your institution and test the quality of your systems and your judgment. But it also offers more. And no attribute of the charter has garnered more attention of late than the immunity it provides from most state laws that would interfere or prevent a national bank from engaging in an authorized activity.

I bring this up because there's been a lot of sound and fury of late from what can only be called

a cabal of state supervisors and state attorneys general, suggesting that the OCC's invocation of the preemption power represents some novel and dangerous assault on the dual banking system, the separation of powers, the ability of the states to protect consumers, and who knows what else. Each of these allegations, I believe, is wholly without merit.

The charge that our actions are incompatible with the dual banking system is particularly baseless, and we'll soon be releasing a paper that will consider that argument in considerable detail. We plan to send you a copy, along with one of the Comptroller's speeches on the subject, in the very near future.

In the meantime, let me make a couple of points that our critics have conveniently overlooked about preemption. The first pertains to *why* the OCC occasionally preempts state laws. Preemption is simply the means by which national banks are enabled to operate under the uniform national standards that Congress intended from the very outset of the national banking system. When the states attempt to impose their legislative and enforcement authority over national banks, it's the states that are actually violating the intent of Congress.

I would couch the second point in the form of a question. Which side in the preemption controversy embodies the true spirit of the dual banking system? The essence of dual banking, after all, is choice: charter choice, choice in supervisory philosophy, regulatory approach, and so forth. When choice ceases to exist, then the system will be dual in name only.

Yet, by attempting to impose their laws on national banks, the states that do so are not only violating nearly two hundred years of constitutional precedent, which holds federal creations immune from such interference; they are also obliterating distinctions that make the dual banking system meaningful.

I cannot guarantee that these efforts on the states' part will fail. I can say that they have consistently failed in the past. Over the past seven years, in fact, only once has an OCC preemption determination been overturned in court—and that one, the *Barnett* decision, was itself overturned by the Supreme Court of the United States.

Of one thing I *can* assure you: no effort to interfere with you in the proper exercise of your authority as a national bank will go unanswered. We will challenge—with all of the resources available to us—any attempt to interfere with your serving your customers within the limits of federal law. That is our solemn commitment to you.

So, I would say again that it's a great day to be in St. Louis. And we're working to make sure that it's *always* a great day to be a national banker in America.

Quarterly Journal

Interpretations—October 1 to December 31, 2003

Interpretations—October 1 to December 31, 2003

Interpretive Letters

975—October 14, 2003

12 USC 24(7)

Dear [ ]:

This letter responds to your request for a legal opinion regarding the authority of [ ] ("bank"), to dispose of old coin and cash found in several of the bank's office vaults. Your request indicates that some of the coins may be "rare," that is, their numismatic value exceeds their face or metallic value. The bank wishes to dispose of, and receive fair market value for, the found coin and cash. For the reasons discussed below, we believe that the bank may dispose of the found coins for their fair market value.

Discussion

Your request represents that the facts are as follows. The bank has discovered old coin and cash found in several of the bank's office vaults. This coin and cash has been in the bank's vaults for years, but the bank does not know when or why it acquired the coin and cash. A number of the coins are likely "rare" coins—i.e., they have a numismatic value beyond their face or metallic value—though they likely were not "rare" coins at the time the bank acquired them. To the best of your knowledge, the coins were not acquired for speculative purposes. The bank now wishes to dispose of the found coins, including the "rare" coins, for their fair market value.

Twelve USC 24(Seventh) expressly authorizes national banks to buy and sell coins. In pertinent part the statute states that a national bank may "carry on the business of banking" by, for example, "buying and selling exchange, coin, and bullion." Banking Circular No. 58 (Rev.) (November 11, 1981) ("circular") sets forth general guidelines that apply to national banks' coins and bullion activities. The circular makes it clear that banks may not speculate by purchasing coins, such as "rare" coins, the value of which is based upon such factors as rarity, age, condition, a mistake in the minting or other intangible factors.

Here, the bank is not engaging in the impermissible speculation addressed by the circular. Rather, the bank has simply found some old coins in its vaults. Several of the coins, in their years in dormancy, have acquired a value beyond their face or metallic value. Yet the bank, to the best of its knowledge, acquired these coins in the normal course of its banking business. Because the bank did not acquire the coins with the intent to speculate in "rare" coins, the bank should now be permitted to dispose of the coins at their fair market value.

This situation is analogous to a national bank that has acquired and used real estate for bank premises and now wishes to dispose of that property at fair market value. National banks have express statutory authority to acquire real estate for use as bank premises. 12 USC 29(First).

The OCC has long taken the position that, once a bank ceases to use premises to engage in the business of banking and must dispose of the property, the bank may dispose of premises for fair market value, even if that value exceeds the price the bank originally paid for the property.[1] In the present situation, the bank has discovered coins in its vaults that, while originally acquired pursuant to the "coin and bullion" authority in section 24(Seventh), have acquired numismatic value. As national banks are permitted to dispose of bank premises even in cases where the premises have appreciated in value, so should the bank be permitted to dispose of the "rare" coins even though the coins have acquired numismatic value.

If you have any questions, please feel free to contact me at (202) 874–5300.

Steven V. Key
Senior Attorney
Bank Activities and Structure Division

[1] *See* letter from J.T. Watson, deputy comptroller (February 7, 1974) (unpublished). *Cf.* letter from John D. Gwin, deputy comptroller (August 10, 1972) (bank may sell other real estate owned ("OREO") at fair market value). Indeed, from a supervisory perspective, disposal of former bank premises at a less than fair market value may adversely impact a bank's safety and soundness. While disposal of the found coins for face or metallic value may not adversely impact the bank's safety and soundness, disposal of the coins for fair market value most certainly will enhance the bank's position.

976—October 15, 2003

12 USC 24(7)
12 CFR 4

Re: Request for Opinion

Dear [ ]:

I am writing in response to your request, dated September 10, 2003, for a legal opinion addressing the contractual relationship between *[Bank, City and State]* ("bank") and your clients, [ ], a *[State]* corporation ([ ]), and [ ]'s principals ("principals") bank, Your request comes as the parties attempt to resolve a dispute concerning the profits earned by [ ] and disbursed, pursuant to an agreement between the parties, to the bank. We understand that for the last year, the bank and [ ] have been pursuing voluntary mediation to resolve the dispute. Such mediation efforts are still ongoing. At the same time, the parties have been preparing for binding arbitration, as required by the agreement. We understand that the parties have agreed upon a three-arbitrator panel to hear the dispute, likely sometime in January 2004.

We addressed the permissibility of the bank's activities in Interpretive Letter No. 956 ("IL 956").[1] In IL 956, we concluded that the bank's lending arrangement with [ ] constituted a permissible shared appreciation mortgage pursuant to 12 CFR 7.1006; that the lenders' covenants imposed by the bank constituted permissible prudential measures designed to protect the bank's interests; and that the nature and amount of the bank's compensation to [ ] are consistent with Office of the Comptroller of the Currency (OCC) precedent.

Your letter requests that we now consider the information you have submitted and employ [ ]'s characterization of the facts underlying IL 956 to reconsider and to opine anew on the nature of the relationship between the bank and [ ]. The information you have presented does not differ fundamentally in key respects from the information on which our previous opinion was based, thus we decline to reconsider our previous opinion. That opinion relied on facts represented to us by the bank. In contractual disputes between a national bank and a third party, the OCC typically does not assume the role of fact finder. Instead, this role would best be taken on by a decision-making body—a mediator, an arbitration panel, or a court—with expertise in weighing different factual characterizations.

There are two additional matters that I should note. In an earlier telephone conversation with the OCC you raised the possibility of seeking depositions from various OCC employees. The OCC will not permit the deposition of any current OCC employees in this matter. As the facts

[1] Reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–481 (January 31, 2003).

are essentially undisputed, testimony from any OCC employee would be in the form of an expert opinion. The OCC does not provide expert opinions for private parties except in rare cases under circumstances not present here.

Second, as to former OCC employees, the OCC must grant permission to former OCC employees before they may disclose information obtained in the course of their OCC employment. Your letter cites three former OCC employees as experts. Given the geographic scope of their OCC service, there may be an issue as to whether these individuals furnished fact information resulting from their OCC employment. In this regard, all requests for OCC information from past and present OCC employees must comply with 12 CFR part 4.

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

977—October 24, 2003

12 USC 30A

Ms. Beth Whitehead
Associate Counsel
National Commerce Financial Corporation
One Commerce Square
Memphis, TN 38150

Dear Ms. Whitehead:

This is in response to your letter seeking the Office of the Comptroller of the Currency's (OCC's) concurrence in your opinion that the operation by National Bank of Commerce ("NBC") of certain NBC branches located in Wal-Mart stores under the trade name "Wal-Mart Money Center by National Bank of Commerce" ("the trade name"), would be consistent with the Interagency Statement on Branch Names ("the interagency statement").[1] Our response addresses solely that issue. As we understand it, all of the branches to be operated under the trade name are currently operated in the Wal-Mart stores as branches of NBC under the NBC name.

The interagency statement permits depository institutions to operate branches under a trade name provided that the institution takes reasonable steps to ensure that customers will not become confused and believe that different facilities of the same institution are separate institutions or that deposits in different facilities are separately insured by the Federal Deposit Insurance Corporation (FDIC). The interagency statement provides a non-exclusive list of steps that depository institutions may take to avoid customer confusion.

Your request represents that NBC will take the following steps to avoid customer confusion:

1) Branch personnel will be employees of NBC and will not be dual employees of Wal-Mart.

2) Branch personnel will be trained to counsel customers on FDIC insurance issues (including aggregation issues), in the event that a customer holds an account at an existing NBC branch. Branch personnel will be trained to call customers' attention to the fact that the branch is a division of NBC.

3) The name "Wal-Mart Money Center, a division of National Bank of Commerce," will appear in all legal documents. The signature card for deposit accounts also will contain the following language, in bold, immediately above the customer's signature: "The undersigned hereby acknowledge that they understand that Wal-Mart Money Center is a division of National

[1] 4 Fed. Banking L. Rep. (CCH) para. 45–511A. The interagency statement was issued by the OCC, the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision on May 1, 1998.

Bank of Commerce ("NBC"), and that Wal-Mart Money Center accounts and other NBC accounts are not separately insured by the FDIC." Marketing materials will use the trade name.

4) The Wal-Mart Money Center Internet site will be established and operated solely by National Bank of Commerce for the benefit and use of the customers of the Wal-Mart Money Center branches of NBC. Those customers may also access their accounts through National Bank of Commerce's Web site, NBC.com. Customers will not be able to access their accounts through Wal-Mart's Web site, Wal-Mart.com.

5) All documentation, including Internet screens, will be subject to the prior approval of either the National Commerce Financial Corporation Legal or Compliance Departments to ensure that the customers are given full and conspicuous disclosure that they are doing business with National Bank of Commerce and to ensure compliance with the interagency statement.

6) All NBC branch personnel will be trained to answer questions regarding the relationship between the customer and NBC. All Wal-Mart personnel will be trained to refer all banking questions to the branch personnel.

7) A customer notification will be provided to all existing branch customers thirty days prior to the name change. For customers who open new accounts within the thirty-day period, the notice will be provided to them at the time of account opening. The notification will include a question-and-answer brochure that will explicitly state that "you will continue to bank with National Bank of Commerce" and that "Wal-Mart Money Center, by National Bank of Commerce" continues to be part of National Bank of Commerce and is not a separate institution for purposes of FDIC insurance coverage.

Based on your representations with respect to the steps that NBC will take to mitigate any customer confusion that may arise as a result of the use of the trade name for certain NBC branches located in Wal-Mart stores, I conclude that the use of the trade name by NBC would be consistent with the Interagency Statement on Branch Names.

I hope that this is responsive to your inquiry.

Eric Thompson
Director
Bank Activities and Structure

Quarterly Journal

Mergers—
October 1 to December 31, 2003

Mergers—October 1 to December 31, 2003

Mergers—October 1 to December 31, 2003

Most transactions in this section do not have accompanying decisions. In those cases, the OCC reviewed the competitive effects of the proposals by using its standard procedures for determining whether the transaction has minimal or no adverse competitive effects. The OCC found the proposals satisfied its criteria for transactions that clearly had no or minimal adverse competitive effects. In addition, the Attorney General either filed no report on the proposed transaction or found that the proposal would not have a significantly adverse effect on competition.

Nonaffiliated mergers (mergers consummated involving two or more nonaffiliated operating banks), from October 1 to December 31, 2003

Title and location (charter number)	Total assets
Alabama	
Colonial Bank, National Association, Montgomery (024444)	16,166,579,000
and Sarasota Bank, Sarasota, Florida	168,269,000
merged on December 4, 2003, under the title of **Colonial Bank, National Association, Montgomery** (024444)	16,358,848,000
California	
J.P. Morgan Trust Company, National Association, Los Angeles (023470)	371,874,000
and Bank One Zeta Trust Company, National Association, Chicago, Illinois (024461)	2,905,000
and Bank One Delta Trust Company, National Association, Columbus, Ohio (024462)	3,320,000
and Bank One Epsilon Trust Company, National Association, Columbus, Ohio (024463) 1	8,040,000
merged on November 15, 2003, under the title of **J.P. Morgan Trust Company, National Association, Los Angeles** (023470)	396,139,000
New York	
Community Bank, National Association, Canton (008531)	3,402,555,000
and Grange National Bank, Laceyville, Pennsylvania (008845)	277,693,000
merged on November 21, 2003, under the title of **Community Bank, National Association, Canton** (008531)	3,729,984,000
Texas	
The State National Bank of Big Spring, Big Spring (012543)	155,954,000
and The First National Bank of O'Donnell, O'Donnell, Texas (012831)	32,428,000
merged on December 19, 2003, under the title of **The State National Bank of Big Spring, Big Spring** (012543)	188,382,000
Wisconsin	
State Financial Bank, National Association, Hales Corners (000945)	1,303,883,000
and Anchor Bank, Grayslake, Illinois	88,833,000
merged on December 6, 2003, under the title of **State Financial Bank, National Association, Hales Corners** (000945)	1,392,716,000
State Financial Bank, National Association, Hales Corners (000945)	1,215,050,000
and Hawthorn Bank, Mundelein, Illinois	45,505,000
merged on December 6, 2003, under the title of **State Financial Bank, National Association, Hales Corners** (000945)	1,349,388,000

Nonaffiliated mergers—thrift (mergers consummated involving nonaffiliated national banks and savings and loan associations) from July 1 to December 31, 2003

Title and location (charter number)	Total assets
California	
Union Bank of California, National Association, San Francisco (021541)	39,603,076,000
and Monterey Bay Bank, Watsonville, California	609,691,000
merged on July 1, 2003, under the title of **Union Bank of California, National Association, San Francisco** (021541)	40,199,981,000
New York	
Community Bank, National Association, Canton (008531)	3,372,677,000
and Ogdensburg Federal Savings and Loan Association, Ogdensburg, New York	28,987,000
merged on September 5, 2003, under the title of **Community Bank, National Association, Canton** (008531)	3,402,555,000

Affiliated mergers (mergers consummated involving affiliated operating banks) from July 1 to December 31, 2003

Title and location (charter number)	Total assets
Arizona	
Community Bank of Arizona, National Association, Wickenburg (024320)	412,537,000
and Valley Bank of Arizona, Phoenix, Arizona	74,398,000
October 10, 2003, under the title of **Meridian Bank, National Association, Wickenburg** (024320)	486,935,000
California	
Wells Fargo Bank, National Association, San Francisco (001741)	196,755,000,000
and Wells Fargo Bank Montana, National Association, Billings, Montana (015564)	1,574,07,0002
and Wells Fargo Bank Nebraska, National Association, Omaha, Nebraska (002978)	3,758,670,000
and Wells Fargo Bank Texas, National Association, San Antonio, Texas (014208)	24,196,945,000
and Wells Fargo Bank West, National Association, Denver, Colorado (003269)	16,054,485,000
and Wells Fargo Bank Wyoming, National Association, Casper, Wyoming (010533)	2,302,134,000
and Wells Fargo Bank Alaska, National Association, Anchorage, Alaska (014651)	3,481,887,000
merged on November 21, 2003, under the title of **Wells Fargo Bank, National Association, San Francisco** (001741)	248,123,000,000
Pacific Western National Bank, Santa Monica (017423)	1,023,161,000
and Verdugo Banking Company, Glendale, California	179,149,000
merged on August 22, 2003, under the title of **Pacific Western National Bank, Santa Monica** (017423)	1,202,310,000
Nara Bank, National Association, Los Angeles (021669)	1,015,033,000
and Asiana Bank, Sunnyvale, California	43,774,000
merged on August 25, 2003, under the title of **Nara Bank, National Association, Los Angeles** (021669)	1,060,889,000
Connecticut	
U.S. Trust Company, National Association, Greenwich (022413)	1,064,377,000
and U.S. Trust Company of North Carolina, Greensboro, North Carolina	110,904,000
merged on July 31, 2003, under the title of **U.S. Trust Company, National Association, Greenwich** (022413)	1,175,281,000
U.S. Trust Company, National Association, Greenwich (022413)	1,175,281,000
and U.S. Trust Company of Florida, National Association, Palm Beach, Florida (024414)	229,569,000
merged on August 31, 2003, under the title of **U.S. Trust Company, National Association, Greenwich** (022413)	1,404,850,000
U.S. Trust Company, National Association, Greenwich (022413)	1,404,850,000
and U. S. Trust Company of Texas, National Association, Dallas, Texas (018782)	206,658,000
merged on October 31, 2003, under the title of **U.S. Trust Company, National Association, Greenwich** (022413)	1,611,508,000
Westport National Bank, Westport (023664)	146,509,000
and The Greenwich Bank & Trust Company, Greenwich, Connecticut	92,263,000
merged on December 1, 2003, under the title of **Connecticut Community Bank, National Association, Westport** (023664)	238,770,000
Florida	
First National Bank of Florida, Naples (021830)	2,874,882,000
and Southern Exchange Bank, Tampa, Florida	759,947,000
merged on October 10, 2003, under the title of **First National Bank of Florida, Naples** (021830)	3,634,829,000

Affiliated mergers (mergers consummated involving affiliated operating banks) from July 1 to December 31, 2003 (continued)

Title and location (charter number)	Total assets
Illinois	
Bank One, National Association, Chicago (000008)	226,331,000,000
Bank One Gamma Trust Company, National Association, Huntington, West Virginia (024438)	1,000,000
and Bank One Theta Trust Company, National Association, Wheeling, West Virginia (024439)	1,000,000
merged on August 8, 2003, under the title of **Bank One, National Association, Chicago** (000008)	226,331,002,000
Indiana	
First Financial Bank, National Association, Terre Haute (000047)	1,269,727,000
and First Ridge Farm State Bank, Ridge Farm, Illinois	24,720,000
merged on October 17, 2003, under the title of **First Financial Bank, National Association, Terre Haute** (000047)	1,294,447,000
First Financial Bank, National Association, Terre Haute (000047)	1,366,778,000
and Frst National Bank, Marshall, Illinois (014463)	50,661,000
merged on November 28, 2003, under the title of **First Financial Bank, National Association, Terre Haute** (000047)	1,417,439,000
Iowa	
American National Bank, Holstein (022841)	82,357,000
and American National Bank, Sac City, Iowa (024050)	29,669,000
and Western Bank & Trust National Association, Moville, Iowa (024328)	38,840,000
merged on October 20, 2003, under the title of **American National Bank, Holstein** (022841)	150,728,000
Maine	
Banknorth, National Association, Portland (024096)	25,714,346,000
and First & Ocean National Bank, Seabrook, New Hampshire (001011)	273,589,000
merged on December 31, 2003, under the title of **Banknorth, National Association, Portland** (024096)	26,022,787,000
Montana	
First National Bank of Montana, Inc., Libby (015150)	169,667,000
and Montana First National Bank, Kalispell, Montana (023010)	29,429,000
merged on November 22, 2003, under the title of **First National Bank of Montana, Inc., Libby** (015150)	199,096,000
Nebraska	
McCook National Bank, McCook (008823)	171,097,000
and Commercial Bank, Stratton, Nebraska	16,491,000
merged on September 8, 2003, under the title of **McCook National Bank, McCook** (008823)	186,053,000
New Jersey	
Valley National Bank, Passaic (015790)	7,956,604,000
and VNB DEL, Inc,. Wayne, New Jersey	1,000
merged on December 26, 2001, under the title of **Valley National Bank, Passaic** (015790)	7,956,604,000
New York	
Citibank, National Association, New York City (001461)	498,676,000,000
and Citibank (New York State), Pittsford, New York	22,151,000,000
merged on August 30, 2003, under the title of **Citibank, National Association, New York City** (001461)	507,157,000,000

Affiliated mergers (mergers consummated involving affiliated operating banks) from July 1 to December 31, 2003 (continued)

Title and location (charter number)	Total assets
Ohio	
Charter One Bank, National Association, Cleveland (024340)	42,042,160,000
and Advance Bank, Lansing, Illinois	632,181,000
merged on July 11, 2003, under the title of **Charter One Bank, National Association, Cleveland** (024340)	42,702,076,000
Bank One, National Association, Columbus (007621)	56,850,000,000
and Bank One, West Virginia, National Association, Huntington, West Virginia (003106)	2,154,802,000
and Bank One, Wheeling-Steubenville, National Association, Wheeling, West Virginia (013914)	374,002,000
merged on August 8, 2003, under the title of **Bank One, National Association Columbus** (007621)	59,378,804,000
Oklahoma	
The First National Bank and Trust Company of Vinita, Vinita (004704)	104,57,0002
and The First National Bank of Grove, Grove, Oklahoma (022820)	52,076,000
merged on October 03, 2003, under the title of **The First National Bank and Trust Company of Vinita, Vinita** (004704)	156,152,000
Pennsylvania	
Mellon Bank, N. A., Pittsburgh (006301)	25,970,208,000
and Mellon Bank (DE) National Association, Greenville, Delaware (017629)	108,626,000
merged on September 15, 2003, under the title of **Mellon Bank, N. A., Pittsburgh** (006301)	26,078,834,000
Univest National Bank and Trust Co., Souderton (002333)	1,444,591,000
and Suburban Community Bank , Chalfont, Pennsylvania	90,898,000
merged on October 4, 2003, under the title of **Univest National Bank and Trust Co., Souderton** (002333)	1,535,646,000
National Penn Bank, Boyertown (002137)	3,107,450,000
and Hometowne Heritage Bank, Intercourse, Pennsylvania	144,119,000
merged on December 15, 2003, under the title of **National Penn Bank, Boyertown** (002137)	3,282,113,000
South Carolina	
South Carolina Bank and Trust, National Association, Orangeburg (013918)	1,001,959,000
and South Carolina Bank and Trust of the Pee Dee, National Association, Florence, South Carolina (023566)	53,028,000
merged on July 11, 2003, under the title of **South Carolina Bank and Trust, National Association, Orangeburg** (013918)	1,054,835,000
South Dakota	
First National Bank, Ft. Pierre (014252)	337,906,000
and Arapahoe Bank and Trust, Englewood, Colorado	164,976,000
merged on September 1, 2003, **First National Bank, Ft. Pierre** (014252)	502,882,000
Tennessee	
FSGbank, National Association, Chattanooga (024425)	264,381,000
and FSGbank, National Association, Dalton, Georgia (024424)	270,703,000
and FSGbank, National Association, Maynardville, Tennessee (024423)	75,414,000
merged on September 24, 2003, under the title of **FSGbank, National Association, Chattanooga** (024425)	610,498,000

Affiliated mergers (mergers consummated involving affiliated operating banks) from July 1 to December 31, 2003 (continued)

Title and location (charter number)	Total assets
Texas	
Southwest Bank of Texas National Association, Houston (017479)	5,156,400,000
and Maxim Bank, Dickinson, Texas	315,800,000
merged on July 1, 2003, under the title of **Southwest Bank of Texas National Association, Houston** (017479)	5,460,800,000
Inwood National Bank, Dallas (015292)	683,045,000
and Western Bank & Trust, Duncanville, Texas	150,298,000
merged on August 15, 2003, under the title of **Inwood National Bank, Dallas** (015292)	833,811,000
First Victoria National Bank, Victoria (010360)	696,249,000
and Citizens Bank of Texas, National Association, New Waverly, Texas (022583)	125,292,000
merged on November 7, 2003, under the title of **First Victoria National Bank, Victoria** (010360)	821,541,000
Wisconsin	
Associated Bank, National Association, Green Bay (023695)	10,018,000,000
and Associated Card Services Bank, National Association, Stevens Point, Wisconsin (023125)	23,000,000
and Associated Bank, National Association, Green Bay (023695)	10,253,743,000
and Associated Bank Illinois, National Association, Rockford, Illinois (023716)	2,641,806,000
merged on November 21, 2003, under the title of **Associated Bank, National Association, Green Bay** (023695)	12,850,220,000

Affiliated mergers—thrift (mergers consummated involving affiliated national banks and savings and loan associations) from July 1 to December 31, 2003

Title and location (charter number)	Total assets
North Carolina	
Wachovia Bank, National Association, Charlotte (000001)	302,124,333,000
and Atlantic Savings Bank, F.S.B., Hilton Head Island, South Carolina	393,771,000
merged on November 6, 2003 under the title of **Wachovia Bank, National Association, Charlotte** (000001)	302,347,297,000

Corporate Structure of the National Banking System

Corporate Structure of the National Banking System

Contents

Changes in the corporate structure of the national banking system, by state, July 1 to December 31, 2003

	In operation July 1, 2003	Organized and open for business	Merged	Voluntary liquidations	Payouts	12 USC 214		In operation December 31, 2003
						Converted to non-national institutions	Merged with non-national institutions	
Alabama	2	1	0	0	0	0	0	21
Alaska	4	1	1	0	0	0	0	4
Arizona	17	0	0	0	0	0	0	17
Arkansas	44	0	0	0	0	0	0	44
California	88	2	0	1	0	0	1	88
Colorado	50	1	1	0	0	1	0	49
Connecticut	12	1	0	0	0	0	0	13
Delaware	17	0	1	0	0	0	1	15
District Of Columbia	5	0	0	0	0	0	0	5
Florida	73	1	1	1	0	0	1	71
Georgia	62	0	1	0	0	2	1	58
Hawaii	1	0	0	0	0	0	0	1
Idaho	2	0	0	0	0	0	0	2
Illinois	176	2	3	0	0	2	2	171
Indiana	32	0	0	0	0	0	0	32
Iowa	54	0	2	0	0	0	0	52
Kansas	99	0	0	0	0	0	0	99
Kentucky	50	0	0	0	0	0	1	49
Louisiana	16	0	0	0	0	0	0	16
Maine	7	0	0	0	0	0	0	7
Maryland	11	0	0	0	0	0	0	11
Massachusetts	24	1	0	0	0	0	2	23
Michigan	28	0	0	0	0	0	0	28
Minnesota	122	3	0	0	0	0	1	123
Mississippi	20	0	0	0	0	0	0	20
Missouri	48	0	0	0	0	1	0	47
Montana	15	0	2	0	0	0	0	13
Nebraska	72	0	1	0	0	1	0	70
Nevada	8	0	0	0	0	0	0	8
New Hampshire	6	0	1	0	0	0	0	5
New Jersey	24	0	0		0	0		24
New Mexico	15	0	0	0	0	0	0	15
New York	60	1	0	0	0	1	0	59
North Carolina	6	0	0	0	0	0	0	6
North Dakota	15	0	0	0		0	1	14
Ohio	90	2	2	0	0	0	0	90
Oklahoma	91	0	1	0	0	1	0	89
Oregon	4	0	0	0	0	0	0	4
Pennsylvania	85	0	1	0	0	1	3	80
Rhode Island	5	0	0	0	0	0	0	05
South Carolina	25	1	1	0	0	0	0	25
South Dakota	20	0	0	0	0	0	0	20
Tennessee	31	0	1	0	0	0	0	30
Texas	330	1	4	0	0	3	2	322
Utah	7	0	0	0	0	0	0	7
Vermont	8	0	0	0	0	0	0	8
Virginia	40	0	0	0	0	0	1	39
Washington	14	0	0	0	0	1	0	13

Changes in the corporate structure of the national banking system, by state, July 1 to December 31, 2003 (continued)

	In operation July 1, 2003	Organized and open for business	Merged	Voluntary liquidations	Payouts	12 USC 214		In operation December 31, 2003
						Converted to non-national institutions	Merged with non-national institutions	
West Virginia	21	2	4	0	0	1	0	18
Wisconsin	47	0	1	0	0	0	1	46
Wyoming	18	0	1	0	0	0	0	17
Totals:	2139	20	30	2	0	15	19	2093

Notes: The column "organized and opened for business" includes all state banks converted to national banks as well as newly formed national banks. The column titled "merged" includes all mergers, consolidations, and purchases and assumptions of branches in which the resulting institution is a nationally chartered bank. Also included in this column are immediate FDIC-assisted "merger" transactions in which the resulting institution is a nationally chartered bank. The column titled "voluntary liquidations" includes only straight liquidations of national banks. No liquidation pursuant to a purchase and assumption transaction is included in this total. Liquidations resulting from purchases and assumptions are included in the "merged" column. The column titled "payouts" includes failed national banks in which the FDIC is named receiver and no other depository institution is named as successor. The column titled "merged with non-national institutions" includes all mergers, consolidations, and purchases and assumptions of branches in which the resulting institution is a non-national institution. Also included in this column are immediate FDIC-assisted "merger" transactions in which the resulting institution is a non-national institution.

Applications for new, full-service national bank charters, approved and denied, by state, July 1 to December 31, 2003

Title And Location	Approved	Denied
California		
Commerce National Bank, Fullerton	December 11, 2003	
1st Century Bank, National Association, Los Angeles	October 24,	
Georgia		
First National Bank Of Decatur County, Bainbridge	December 16, 2003	
First National Bank Of Forsyth County, Cumming	November 20, 2003	
Illinois		
Beverly Bank & Trust Company, National Association, Chicago	October 15, 2003	
New York		
Empire State Bank, National Association, Newburgh	November 18, 2003	
Texas		
Professional Bank, National Association, Dallas	November 6, 2003	
Texstar National Bank, Universal City	November 12, 2003	
West Virginia		
Bank One Gamma Trust Company, National Association, Huntington	July 10, 2003	
Bank One Theta Trust Company, National Association, Huntington	July 10, 2003	

Applications for new, limited-purpose national bank charters, approved and denied, by state, July 1 to December 31, 2003

Title and location	Approved Denied	Type of bank
Alaska		
Wells Fargo Alaska Trust Company, National Association, Anchorage	November 14, 2003	Trust (non-deposit)
Connecticut		
State Street Bank and Trust Company Of New England, National Association, Hartford	October 15, 2003	Trust (non-deposit)
Florida		
First National Wealth Management Company, Naples	December 22, 2003	Trust (non-deposit)
Pennsylvania		
First National Trust Company, Hermitage	December 22, 2003	Trust (non-deposit)

New, full-service national bank charters issued, July 1 to December 31, 2003

Title and location	Charter number	Date
California		
Commerce National Bank, Fullerton	024404	December 17, 2003
Legacy Bank, National Association, Campbell	024363	October 1, 2003
Minnesota		
First National Bank Of Hinckley, Hinckley	024407	July 21, 2003
Merchants Bank, National Association, La Crescent	024377	October 1, 2003
Falcon National Bank, Foley	024373	July 1, 2003
West Virginia		
Bank One Theta Trust Company, National Association, Huntington	024439	August 8, 2003
Bank One Gamma Trust Company, National Association, Huntington	024438	August 8, 2003

New, limited-purpose national bank charters issued, July 1 to December 31, 2003

Title and location	Charter number	Date open	Type of bank
Alaska			
Wells Fargo Alaska Trust Company, National Association, Anchorage	024471	November 20, 2003	Trust (non-deposit)
Connecticut			
State Street Bank and Trust Company of New England, National Association, Hartford	024449	December 2, 2003	Trust (non-deposit)
New York			
General Motors Trust Bank, National Association, New York	024238	July 28, 2003	Trust (non-deposit)
Texas			
First Financial Trust & Asset Management Company, National Association, Abilene	024421	October 1, 2003	Trust (non-deposit)

State-chartered banks converted to full-service national banks, July 1 to December 31, 2003

Title and location	Charter number	Effective date	Total assets
Alabama			
Colonial Bank, National Association, Colonial Bank, Montgomery	024444	August 8, 2003	15,724,725,000
Colorado			
Colorado State Bank and Trust, National Association, Colorado State Bank and Trust, Denver	024451	September 10, 2003	297,000,000
Illinois			
South Central Bank, National Association, South Central Bank and Trust Company of Chicago, Chicago	024430	July 1, 2003	144,383,000
Massachusetts			
Mellon Trust of New England, National Association, Boston Safe Deposit and Trust Company, Boston	024412	September 15, 2003	6,041,854,000

State-chartered banks converted to limited-purpose national banks, July 1 to December 31, 2003

Title and location	Charter number	Effective date	Total assets
Illinois			
Northern Trust Investments, National Association, Northern Trust Investments, Inc., Chicago	024434	July 31, 2003	313,389,000

Nonbanking institutions converted to full-service national banks, July 1 to December 31, 2003

Title and location	Charter number	Effective date	Assets
Florida			
U.S. Trust Company of Florida, National Association, U.S. Trust Company of Florida Savings Bank, Palm Beach	024414	August 31, 2003	229,569,000
South Carolina			
Provident Community Bank, National Association, Provident Community Bank, Union	024420	July 26, 2003	297,347,000

Applications for national bank charters, by state and charter type, July 1 to December 31, 2003

				Charters issued					
	Received	Approved	Denied	New full-service national bank charters issued	New, limited-purpose national bank charters issued	Full-service national charters issued to converting state-chartered banks	Limited-purpose national charters issued to converting state-chartered banks	Full-service national charters issued to converting nonbanking institutions	Limited-purpose national charters issued to converting nonbanking institutions
Alabama	1	0	0	0	0	1	0	0	0
Alaska	1	1	0	0	1	0	0	0	0
Arizona	0	0	0	0	0	0	0	0	0
Arkansas	0	0	0	0	0	0	0	0	0
California	2	2	0	2	0	0	0	0	0
Colorado	0	0	0	0	0	1	0	0	0
Connecticut	1	1	0	0	1	0	0	0	0
Delaware	0	0	0	0	0	0	0	0	0
District of Columbia	1	0	0	0	0	0	0	0	0
Florida	2	1	0	0	0	0	0	1	0
Georgia	5	2	0	0	0	0	0	0	0
Hawaii	0	0	0	0	0	0	0	0	0
Idaho	0	0	0	0	0	0	0	0	0
Illinois	1	1	0	0	0	1	1	0	0
Indiana	0	0	0	0	0	0	0	0	0
Iowa	0	0	0	0	0	0	0	0	0
Kansas	0	0	0	0	0	0	0	0	0
Kentucky	0	0	0	0	0	0	0	0	0
Louisiana	0	0	0	0	0	0	0	0	0
Maine	0	0	0	0	0	0	0	0	0
Maryland	0	0	0	0	0	0	0	0	0
Massachusetts	0	0	0	0	0	1	0	0	0
Michigan	0	0	0	0	0	0	0	0	0
Minnesota	2	0	0	3	0	0	0	0	0
Mississippi	0	0	0	0	0	0	0	0	0
Missouri	0	0	0	0	0	0	0	0	0
Montana	0	0	0	0	0	0	0	0	0
Nebraska	0	0	0	0	0	0	0	0	0
Nevada	0	0	0	0	0	0	0	0	0
New Hampshire	0	0	0	0	0	0	0	0	0
New Jersey	0	0	0	0	0	0	0	0	0
New Mexico	0	0	0	0	0	0	0	0	0
New York	1	1	0	0	1	0	0	0	0
North Carolina	0	0	0	0	0	0	0	0	0
North Dakota	0	0	0	0	0	0	0	0	0
Ohio	0	0	0	0	0	0	0	0	0
Oklahoma	0	0	0	0	0	0	0	0	0
Oregon	0	0	0	0	0	0	0	0	0
Pennsylvania	2	1	0	0	0	0	0	0	0
Rhode Island	0	0	0	0	0	0	0	0	0
South Carolina	0	0	0	0	0	0	0	1	0
South Dakota	0	0	0	0	0	0	0	0	0
Tennessee	0	0	0	0	0	0	0	0	0
Texas	5	2	0	0	1	0	0	0	0
Utah	0	0	0	0	0	0	0	0	0
Vermont	0	0	0	0	0	0	0	0	0
Virginia	0	0	0	0	0	0	0	0	0
Washington	0	0	0	0	0	0	0	0	0
West Virginia	0	2	0	2	0	0	0	0	0
Wisconsin	0	0	0	0	0	0	0	0	0

Applications for national bank charters, by state and charter type, July 1 to December 31, 2003 (continued)

				Charters issued					
	Received	Approved	Denied	New full-service national bank charters issued	New, limited-purpose national bank charters issued	Full-service national charters issued to converting state-chartered banks	Limited-purpose national charters issued to converting state-chartered banks	Full-service national charters issued to converting nonbanking institutions	Limited-purpose national charters issued to converting nonbanking institutions
Wyoming	0	0	0	0	0	0	0	0	0
American Samoa	0	0	0	0	0	0	0	0	0
Canal Zone	0	0	0	0	0	0	0	0	0
Fed St of Micronesia	0	0	0	0	0	0	0	0	0
Guam	0	0	0	0	0	0	0	0	0
No. Mariana Islands	0	0	0	0	0	0	0	0	0
Midway Islands	0	0	0	0	0	0	0	0	0
Puerto Rico	0	0	0	0	0	0	0	0	0
Trust Territories	0	0	0	0	0	0	0	0	0
Virgin Islands	0	0	0	0	0	0	0	0	0
Wake Island	0	0	0	0	0	0	0	0	0
Total	24	14	0	7	4	4	1	2	0

*These figures may also include new national banks chartered to acquire a failed institution, trust company, credit card bank, and other limited-charter national banks.

Voluntary liquidations of national banks, July 1 to December 31, 2003

Title and location	Charter number	Effective date	Total assets
California			
Bay View Bank, National Association, San Mateo	023770	September 30, 2003	957,674,000
Florida			
CIBC National Bank, Maitland	023848	September 29, 2003	746,187,000

National banks merged out of the national bank system, July 1 to December 31, 2003

Title and location	Charter number	Effective date
California		
Kaweah National Bank, Visalia	022832	September 19, 2003
Delaware		
Allfirst Financial Center National Association, Millsboro	017295	July 3, 2003
Florida		
Marine National Bank of Naples, Naples	023719	August 15, 2003
Georgia		
Cumberland National Bank, St. Marys	023917	September 25, 2003
Illinois		
The First National Bank of Coulterville, Coulterville	012000	September 30, 2003
CoVest Banc, National Association, Des Plaines	023418	February 13, 2004
Kentucky		
First National Bank of Northern Kentucky, Ft. Mitchell	022439	December 24, 2003
Massachusetts		
Community National Bank, Hudson	002618	October 31, 2003
Trust Company of the Berkshires, National Association, Pittsfield	022858	June 1, 2003
Minnesota		
The Martin County National Bank of Fairmont, Fairmont	005423	October 27, 2003
New Jersey		
Panasia Bank, National Association, Fort Lee	024170	September 11, 2003
North Dakota		
Community National Bank of Grand Forks, Grand Forks	015088	August 29, 2003
Pennsylvania		
Allfirst Trust Company of Pennsylvania, National Association, Harrisburg	023916	June 13, 2003
Nazareth National Bank & Trust Company, Nazareth	005077	October 31, 2003
UNB Acquisition National Bank, Souderton	024443	October 4, 2003
Texas		
MainBank, National Association, Dallas	020513	November 1, 2003
First National Bank of Bellaire, Houston	015144	October 2, 2003
Virginia		
Allfirst Trust Company National Association, McLean	023196	June 13, 2003

Failed national bank acquired by other than a national bank, July 1 to December 31, 2003

Title and location	(charter number)	Effective date
Wisconsin		
The First National Bank of Blanchardville, Blanchardville	011114	May 9, 2003

National banks converted out of the national banking system, July 1 to December 31, 2003

Title and location (charter number)	Effective date	Total assets
Colorado		
The First National Bank of Flagler, Flagler (011872)	August 1, 2003	68,505,000
Georgia		
Frontier Bank, National Association, LaGrange (014553)	November 3, 2003	296,000,000
First National Bank of Cherokee, Woodstock (021836)	December 15, 2003	173,176,000
Illinois		
Capstone Bank, National Association, Watseka (015022)	June 30, 2003	213,554,000
Missouri		
Gateway National Bank of St. Louis, St. Louis (015521)	December 5, 2003	34,222,000
Nebraska		
World's Foremost Bank, National Association, Sidney (024125)	July 28, 2003	133,949,000
New York		
The Redwood National Bank, Alexandria Bay (010374)	June 30, 2003	80,509,000
Oklahoma		
Local Oklahoma Bank, National Association, Oklahoma City (023900)	June 27, 2003	2,837,227,000
Pennsylvania		
Commercial National Bank of Pennsylvania, Latrobe (014133)	July 25, 2003	367,815,000
Texas		
The First National Bank of Littlefield, Littlefield (012824)	July 8, 2003	14,000,000
PointBank, National Association, Pilot Point (004777)	August 1, 2003	172,258,000
The First National Bank of Van Alstyne, Van Alstyne (004289)	October 1, 2003	144,033,000
Washington		
NorthStar Bank, National Association, Seattle (022662)	June 30, 2003	103,731,000
West Virginia		
MCNB Bank, National Association, Welch (013512)	July 1, 2003	209,688,000

Federal branches and agencies of foreign banks in operation, July 1 to December 31, 2003

	In operation July 1, 2003	Opened July 1–December 31, 2003	Cosed July 1–December 31, 2003	In operation December 31, 2003
Federal branches				
California	1	0	0	1
District Of Columbia	1	0	0	1
New York	38	1	2	36
Washington	1	0	0	1
Limited federal branches				
California	7	0	0	7
District of Columbia	1	0	0	1
New York	2	0	0	2
Federal agencies				
Florida	1	0	0	1
Illinois	1	0	0	1
New York	0	0	0	1
Total United States	53	1	2	52

Quarterly Journal

Financial Performance of National Banks

Financial Performance of National Banks

Contents

Assets, liabilities, and capital accounts of national banks
December 31, 2002 and December 31, 2003
(Dollar figures in millions)

	December 31, 2002	December 31, 2003	Change December 31, 2002—December 31, 2003 Fully consolidated	
	Consolidated foreign and domestic	Consolidated foreign and domestic	Amount	Percent
Number of institutions	2,077	2,001	(76)	(3.66)
Total assets	$3,908,262	$4,292,331	$384,069	9.83
Cash and balances due from depositories	212,637	217,690	5,053	2.38
Noninterest-bearing balances, currency and coin	161,223	157,219	(4,004)	(2.48)
Interest bearing balances	51,414	60,471	9,058	17.62
Securities	653,702	753,606	99,905	15.28
Held-to-maturity securities, amortized cost	24,663	25,434	770	3.12
Available-for-sale securities, fair value	629,038	728,173	99,134	15.76
Federal funds sold and securities purchased	129,480	154,268	24,788	19.14
Net loans and leases	2,397,190	2,582,033	184,843	7.71
Total loans and leases	2,445,528	2,630,656	185,128	7.57
Loans and leases, gross	2,447,978	2,632,541	184,563	7.54
Less: Unearned income	2,449	1,884	(565)	(23.07)
Less: Reserve for losses	48,338	48,623	285	0.59
Assets held in trading account	164,399	202,100	37,701	22.93
Other real estate owned	2,075	1,942	(133)	(6.42)
Intangible assets	88,160	109,303	21,144	23.98
All other assets	260,620	271,388	10,769	4.13
Total liabilities and equity capital	3,908,262	4,292,331	384,069	9.83
Deposits in domestic offices	2,168,876	2,322,051	153,175	7.06
Deposits in foreign offices	396,894	464,705	67,811	17.09
Total deposits	2,565,771	2,786,756	220,986	8.61
Noninterest-bearing deposits	570,107	558,548	(11,560)	(2.03)
Interest-bearing deposits	1,995,663	2,228,209	232,546	11.65
Federal funds purchased and securities sold	268,315	264,746	(3,569)	(1.33)
Other borrowed money	380,653	499,472	118,819	31.21
Trading liabilities less revaluation losses	24,558	26,310	1,752	7.14
Subordinated notes and debentures	68,387	74,001	5,614	8.21
All other liabilities	228,998	250,531	21,534	9.40
Trading liabilities revaluation losses	84,850	98,647	13,797	16.26
Other	144,148	151,884	7,736	5.37
Total equity capital	371,582	390,515	18,933	5.10
Perpetual preferred stock	2,682	2,645	(37)	(1.39)
Common stock	12,701	12,356	(345)	(2.72)
Surplus	198,198	210,436	12,237	6.17
Retained earnings and other comprehensive income	166,701	165,665	(1,036)	(0.62)
Other equity capital components	(30)	(46)	(16)	NM

NM indicates calculated percent change is not meaningful.

Quarterly income and expenses of national banks
Fourth quarter 2002 and fourth quarter 2003
(Dollar figures in millions)

	Fourth quarter 2002	Fourth quarter 2003	Change Fourth quarter 2002—fourth quarter 2003 fully consolidated	
	Consolidated foreign and domestic	Consolidated foreign and domestic	Amount	Percent
Number of institutions	2,077	2,001	(76)	(3.66)
Net income	$13,434	$16,236	$2,802	20.86
Net interest income	35,841	36,970	1,129	3.15
Total interest income	50,789	49,208	(1,582)	(3.11)
On loans	39,675	38,700	(975)	(2.46)
From lease financing receivables	1,456	1,148	(308)	(21.16)
On balances due from depositories	444	200	(244)	(55.03)
On securities	7,564	7,275	(289)	(3.82)
From assets held in trading account	762	852	90	11.77
On federal funds sold and securities repurchased	626	705	79	12.56
Less: Interest expense	14,948	12,238	(2,710)	(18.13)
On deposits	9,913	7,944	(1,969)	(19.86)
Of federal funds purchased and securities sold	1,145	830	(315)	(27.48)
On demand notes and other borrowed money*	3,103	2,752	(351)	(11.31)
On subordinated notes and debentures	787	712	(76)	(9.63)
Less: Provision for losses	8,596	5,994	(2,602)	(30.27)
Noninterest income	28,409	30,093	1,684	5.93
From fiduciary activities	2,089	2,337	248	11.88
Service charges on deposits	5,062	5,276	214	4.23
Trading revenue	1,190	1,107	(83)	(6.99)
From interest rate exposures	364	41	(323)	(88.77)
From foreign exchange exposures	851	950	99	11.66
From equity security and index exposures	(22)	101	123	NM
From commodity and other exposures	(7)	13	20	NM
Investment banking brokerage fees	1,173	1,478	305	25.97
Venture capital revenue	1	(1)	(3)	(191.44)
Net servicing fees	2,096	3,905	1,809	86.28
Net securitization income	3,731	4,635	904	24.24
Insurance commissions and fees	519	595	76	14.67
Insurance and reinsurance underwriting income	0	99	99	NM
Income from other insurance activities	0	496	496	NM
Net gains on asset sales	1,908	1,461	(447)	(23.41)
Sales of loans and leases	1,565	1,192	(372)	(23.79)
Sales of other real estate owned	(18)	(11)	7	(41.13)
Sales of other assets(excluding securities)	361	279	(82)	(22.64)
Other noninterest income	10,644	9,301	(1,343)	(12.62)
Gains/losses on securities	1,036	191	(844)	(81.54)
Less: Noninterest expense	36,829	38,008	1,180	3.20
Salaries and employee benefits	14,445	15,357	912	6.32
Of premises and fixed assets	4,217	4,489	272	6.44
Goodwill impairment losses	8	2	(7)	(80.28)
Amortization expense and impairment losses	979	1,083	105	10.68
Other noninterest expense	17,183	17,078	(105)	(0.61)
Less: Taxes on income before extraordinary items	6,423	7,394	972	15.13
Income/loss from extraordinary items, net of income taxes	(5)	379	383	NM
Memoranda:				
Net operating income	12,735	15,723	2,988	23.46
Income before taxes and extraordinary items	19,861	23,251	3,390	17.07
Income net of taxes before extraordinary items	13,438	15,857	2,419	18.00
Cash dividends declared	10,878	13,307	2,429	22.33
Net charge-offs to loan and lease reserve	7,690	7,109	(581)	(7.55)
Charge-offs to loan and lease reserve	8,962	8,717	(245)	(2.73)
Less: Recoveries credited to loan and lease reserve	1,272	1,608	336	26.42

* Includes mortgage indebtedness
NM indicates calculated percent change is not meaningful.

Year-to-date income and expenses of national banks
Through December 31, 2002 and through December 31, 2003
(Dollar figures in millions)

	December 31, 2002	December 31, 2003	Change December 31, 2002—December 31, 2003 fully consolidated	
	Consolidated foreign and domestic	Consolidated foreign and domestic	Amount	Percent
Number of institutions	2,077	2,001	(76)	(3.66)
Net income	$56,620	$62,959	$6,339	11.20
Net interest income	141,377	143,165	1,787	1.26
Total interest income	206,462	195,295	(11,167)	(5.41)
On loans	159,137	152,530	(6,607)	(4.15)
From lease financing receivables	6,915	5,868	(1,046)	(15.13)
On balances due from depositories	1,829	1,351	(478)	(26.14)
On securities	31,142	28,313	(2,829)	(9.08)
From assets held in trading account	3,382	3,271	(111)	(3.28)
On federal funds sold and securities repurchased	2,767	2,700	(66)	(2.39)
Less: Interest expense	65,085	52,130	(12,955)	(19.90)
On deposits	43,556	34,110	(9,446)	(21.69)
Of federal funds purchased and securities sold	5,032	3,958	(1,074)	(21.34)
On demand notes and other borrowed money*	13,294	11,142	(2,151)	(16.18)
On subordinated notes and debentures	3,203	2,920	(284)	(8.86)
Less: Provision for losses	32,613	24,008	(8,606)	(26.39)
Noninterest income	109,768	116,055	6,287	5.73
From fiduciary activities	8,667	8,861	194	2.24
Service charges on deposits	19,473	20,632	1,160	5.96
Trading revenue	6,842	5,899	(943)	(13.78)
From interest rate exposures	2,789	1,027	(1,761)	(63.16)
From foreign exchange exposures	3,219	4,401	1,182	36.74
From equity security and index exposures	491	537	46	9.43
From commodity and other exposures	345	(77)	(422)	(122.33)
Investment banking brokerage fees	4,659	5,068	409	8.78
Venture capital revenue	(165)	(60)	105	(63.86)
Net servicing fees	9,404	11,743	2,339	24.87
Net securitization income	15,261	16,632	1,372	8.99
Insurance commissions and fees	2,154	2,154	(1)	(0.03)
Insurance and reinsurance underwriting income	0	453	453	NM
Income from other insurance activities	0	1,700	1,700	NM
Net gains on asset sales	5,878	8,719	2,841	48.34
Sales of loans and leases	5,165	8,408	3,242	62.77
Sales of other real estate owned	(45)	(34)	11	(23.79)
Sales of other assets(excluding securities)	758	346	(412)	(54.32)
Other noninterest income	37,595	36,406	(1,189)	(3.16)
Gains/losses on securities	3,129	2,903	(226)	(7.23)
Less: Noninterest expense	136,840	144,909	8,069	5.90
Salaries and employee benefits	55,790	60,861	5,071	9.09
Of premises and fixed assets	16,074	17,135	1,061	6.60
Goodwill impairment losses	16	118	103	658.84
Amortization expense and impairment losses	3,948	4,125	177	4.49
Other noninterest expense	61,013	62,669	1,656	2.71
Less: Taxes on income before extraordinary items	28,230	30,635	2,406	8.52
Income/loss from extraordinary items, net of income taxes	29	388	359	NM
Memoranda:				
Net operating income	54,477	60,589	6,112	11.22
Income before taxes and extraordinary items	84,821	93,206	8,385	9.89
Income net of taxes before extraordinary items	56,591	62,571	5,980	10.57
Cash dividends declared	41,757	45,048	3,291	7.88
Net charge-offs to loan and lease reserve	31,381	26,946	(4,435)	(14.13)
Charge-offs to loan and lease reserve	36,465	32,590	(3,875)	(10.63)
Less: Recoveries credited to loan and lease reserve	5,084	5,644	561	11.03

* Includes mortgage indebtedness
NM indicates calculated percent change is not meaningful.

Assets of national banks by asset size
December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda:
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	All commercial banks
Number of institutions reporting	2,001	852	981	122	46	7,769
Total assets	$4,292,331	$46,599	$273,307	$376,546	$3,595,879	$7,602,489
Cash and balances due from	217,690	2,966	12,860	25,131	176,734	387,632
Securities	753,606	12,078	70,095	90,302	581,132	1,456,290
Federal funds sold and securities purchased	154,268	2,508	8,593	13,394	129,773	333,020
Net loans and leases	2,582,033	26,872	167,094	221,649	2,166,419	4,351,677
Total loans and leases	2,630,656	27,264	169,557	225,138	2,208,697	4,428,784
Loans and leases, gross	2,632,541	27,293	169,743	225,237	2,210,268	4,431,653
Less: Unearned income	1,884	29	186	99	1,571	2,869
Less: Reserve for losses	48,623	392	2,464	3,489	42,278	77,107
Assets held in trading account	202,100	0	39	173	201,888	448,429
Other real estate owned	1,942	75	286	174	1,406	4,235
Intangible assets	109,303	155	2,435	7,583	99,130	158,155
All other assets	271,388	1,945	11,905	18,139	239,399	463,051
Gross loans and leases by type:						
Loans secured by real estate	1,254,997	16,645	115,042	130,492	992,817	2,272,296
1-4 family residential mortgages	605,107	6,721	38,251	51,633	508,502	993,935
Home equity loans	192,708	495	6,622	9,772	175,819	284,513
Multifamily residential mortgages	35,650	424	4,456	4,755	26,015	79,875
Commercial RE loans	269,939	5,249	46,472	45,002	173,216	602,307
Construction RE loans	104,215	1,785	13,780	16,974	71,677	231,469
Farmland loans	13,618	1,971	5,458	1,846	4,343	40,694
RE loans from foreign offices	33,758	0	3	511	33,245	39,503
Commercial and industrial loans	500,027	4,389	27,632	41,956	426,051	870,627
Loans to individuals	527,986	3,202	17,111	37,372	470,301	770,447
Credit cards*	250,892	139	3,000	13,728	234,025	316,014
Other revolving credit plans	32,930	47	352	2,025	30,506	37,616
Installment loans	244,163	3,015	13,760	21,619	205,770	416,818
All other loans and leases	349,531	3,057	9,958	15,417	321,100	518,283
Securities by type:						
U.S. Treasury securities	28,190	546	2,285	3,255	22,104	73,942
Mortgage-backed securities	444,035	2,938	25,304	49,956	365,837	775,610
Pass-through securities	322,976	2,297	17,845	30,818	272,017	512,533
Collateralized mortgage obligations	121,059	642	7,459	19,139	93,820	263,076
Other securities	221,766	8,586	42,227	36,420	134,533	502,523
Other U.S. government securities	83,461	6,017	25,565	18,522	33,357	263,492
State and local government securities	50,398	2,013	12,744	7,823	27,818	110,166
Other debt securities	80,278	338	2,937	9,263	67,740	112,412
Equity securities	7,629	217	981	813	5,618	16,452
Memoranda:						
Agricultural production loans	19,990	2,552	5,422	2,378	9,638	46,318
Pledged securities	341,624	4,312	32,382	43,369	261,560	702,306
Book value of securities	747,395	11,986	69,469	89,059	576,880	1,445,441
Available-for-sale securities	721,961	10,181	60,621	78,971	572,188	1,341,914
Held-to-maturity securities	25,434	1,805	8,848	10,088	4,692	103,526
Market value of securities	753,957	12,110	70,258	90,404	581,185	1,457,556
Available-for-sale securities	728,173	10,273	61,247	80,213	576,439	1,352,764
Held-to-maturity securities	25,784	1,836	9,011	10,191	4,746	104,793

*Prior to March 2001, also included "Other revolving credit plans."

Past-due and nonaccrual loans and leases of national banks by asset size
December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda:
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	All commercial banks
Number of institutions reporting	2,001	852	981	122	46	7,769
Loans and leases past due 30-89 days	$26,791	$377	$1,660	$2,002	$22,752	$45,433
Loans secured by real estate	11,440	208	961	886	9,385	20,461
1-4 family residential mortgages	7,881	120	522	543	6,695	12,861
Home equity loans	864	5	26	34	799	1,266
Multifamily residential mortgages	192	2	22	16	152	382
Commercial RE loans	1,269	53	254	176	786	3,389
Construction RE loans	686	15	99	106	465	1,597
Farmland loans	97	13	38	12	35	296
RE loans from foreign offices	452	0	0	0	452	670
Commercial and industrial loans	3,192	64	282	390	2,456	6,393
Loans to individuals	10,972	83	362	682	9,845	16,075
Credit cards	6,217	3	110	347	5,757	8,033
Installment loans and other plans	4,755	80	252	335	4,088	8,042
All other loans and leases	1,188	23	56	43	1,066	2,505
Loans and leases past due 90+ days	12,110	83	336	654	11,038	15,845
Loans secured by real estate	4,311	47	179	125	3,961	5,958
1-4 family residential mortgages	3,787	28	87	77	3,595	4,720
Home equity loans	119	0	4	7	108	191
Multifamily residential mortgages	19	0	7	2	9	50
Commercial RE loans	192	9	53	28	101	567
Construction RE loans	67	2	17	8	39	221
Farmland loans	24	7	11	2	5	95
RE loans from foreign offices	103	0	0	0	103	115
Commercial and industrial loans	558	15	59	95	389	1,227
Loans to individuals	7,042	15	80	429	6,518	8,364
Credit cards	5,186	2	49	324	4,811	6,132
Installment loans and other plans	1,856	13	31	106	1,707	2,232
All other loans and leases	199	6	18	5	170	296
Nonaccrual loans and leases	22,688	240	1,226	1,259	19,965	36,919
Loans secured by real estate	7,611	129	780	727	5,976	13,499
1-4 family residential mortgages	3,122	39	204	260	2,619	5,233
Home equity loans	344	1	7	18	318	481
Multifamily residential mortgages	143	3	14	18	107	261
Commercial RE loans	2,417	53	379	310	1,675	4,823
Construction RE loans	668	13	105	88	463	1,395
Farmland loans	207	19	70	33	84	448
RE loans from foreign offices	711	0	0	0	711	858
Commercial and industrial loans	10,387	70	285	399	9,632	17,059
Loans to individuals	2,369	14	81	35	2,240	3,346
Credit cards	441	0	44	4	393	853
Installment loans and other plans	1,928	14	37	30	1,847	2,493
All other loans and leases	2,397	27	80	101	2,189	3,142

Liabilities of national banks by asset size
December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Total liabilities and equity capital	4,292,331	46,599	273,307	376,546	3,595,879	7,602,489
Deposits in domestic offices	2,322,051	38,942	219,529	243,997	1,819,583	4,287,695
Deposits in foreign offices	464,705	19	134	3,010	461,542	741,171
Total deposits	2,786,756	38,961	219,663	247,007	2,281,125	5,028,866
Noninterest bearing	558,548	6,938	36,180	45,793	469,637	956,671
Interest bearing	2,228,209	32,024	183,483	201,215	1,811,487	4,072,195
Federal funds purchased and securities sold	264,746	554	7,816	31,494	224,882	529,022
Other borrowed funds	499,472	1,302	14,607	46,443	437,119	738,556
Trading liabilities less revaluation losses	26,310	0	0	0	26,310	86,348
Subordinated notes and debentures	74,001	7	250	3,241	70,502	101,480
All other liabilities	250,531	351	2,988	7,924	239,268	426,163
Equity capital	390,515	5,422	27,983	40,437	316,673	692,056
Total deposits by depositor:						
Individuals and corporations	2,185,190	23,530	149,691	193,309	1,818,660	3,903,920
U.S., state, and local governments	120,625	3,436	17,934	16,881	82,375	235,359
Depositories in the U.S.	77,675	750	3,064	3,612	70,249	109,492
Foreign banks and governments	90846.898	2	100	2,043	88,701	165,870
Domestic deposits by depositor:						
Individuals and corporations	1848002.143	23,512	149,684	191,227	1,483,580	3,364,547
U.S., state, and local governments	120,625	3,436	17,934	16,881	82,375	235,359
Depositories in the U.S.	35,218	750	3,015	3,545	27,908	59,120
Foreign banks and governments	5,995	2	22	1,196	4,774	14,755
Foreign deposits by depositor:						
Individuals and corporations	337188.194	19	7	2,083	335,080	539,373
Depositories in the U.S.	42456.575	0	49	67	42,340	50,372
Foreign banks and governments	84,852	0	78	848	83,927	151,115
Deposits in domestic offices by type:						
Transaction deposits	376,861	12,766	55,506	37,934	270,656	727,739
Demand deposits	285,892	6,823	31,706	27,914	219,448	523,804
Savings deposits	1,371,716	9,080	75,693	137,480	1,149,462	2,306,429
Money market deposit accounts	1015793.077	4,923	43,962	97,442	869,467	1,668,266
Other savings deposits	355922.831	4,158	31,731	40,038	279,996	638,163
Time deposits	573,474	17,096	88,330	68,584	399,464	1,253,527
Small time deposits	313,184	11,400	54,123	38,143	209,517	656,250
Large time deposits	260,291	5,696	34,207	30,441	189,947	597,277

Off-balance-sheet items of national banks by asset size
December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Unused commitments	$3,990,736	$83,524	$154,413	$699,344	$3,053,456	$5,398,897
Home equity lines	219,894	350	5,778	9,570	204,196	317,042
Credit card lines	2,739,232	79,525	121,615	637,359	1,900,734	3,385,785
Commercial RE, construction and land	92,119	1,030	9,027	13,900	68,161	187,766
All other unused commitments	939,492	2,620	17,992	38,515	880,365	1,508,304
Letters of credit:						
Standby letters of credit	178,124	111	1,717	4,404	171,892	288,624
Financial letters of credit	147,056	71	1,073	3,232	142,681	242,227
Performance letters of credit	31,067	40	645	1,172	29,211	46,397
Commercial letters of credit	15,284	18	410	447	14,408	24,234
Securities lent	177,478	40	3,556	3,633	170,249	851,980
Spot foreign exchange contracts	222,054	0	0	187	221,867	273,038
Credit derivatives (notional value)						
Reporting bank is the guarantor	178,245	0	10	0	178,235	471,459
Reporting bank is the beneficiary	202,908	0	40	0	202,868	529,754
Derivative contracts (notional value)	31,554,688	10	2,207	16,978	31,535,494	71,081,909
Futures and forward contracts	5,909,649	2	466	1,277	5,907,905	11,392,669
Interest rate contracts	3,590,803	2	464	1,208	3,589,130	7,209,791
Foreign exchange contracts	2,302,176	0	3	69	2,302,104	4,078,016
All other futures and forwards	16,671	0	0	0	16,671	104,862
Option contracts	6,756,113	3	467	3,638	6,752,004	14,605,327
Interest rate contracts	5,879,584	1	428	2,351	5,876,804	12,539,461
Foreign exchange contracts	726,617	0	0	1,279	725,338	1,298,335
All other options	149,912	2	39	8	149,863	767,530
Swaps	18,507,773	5	1,223	12,063	18,494,481	44,082,700
Interest rate contracts	17,647,756	5	1,211	7,718	17,638,823	42,106,939
Foreign exchange contracts	763,911	0	2	4,343	759,566	1,805,416
All other swaps	96,106	0	10	3	96,093	170,345
Memoranda: Derivatives by purpose						
Contracts held for trading	29,177,240	0	31	1,179	29,176,030	67,717,237
Contracts not held for trading	1,996,295	9	2,125	15,800	1,978,361	2,363,459
Memoranda: Derivatives by position						
Held for trading—positive fair value	488,557	0	0	11	488,546	1,147,400
Held for trading—negative fair value	479,255	0	0	2	479,252	1,127,519
Not for trading—positive fair value	22,160	1	18	81	22,061	25,851
Not for trading—negative fair value	18,847	0	24	608	18,215	22,725

Quarterly income and expenses of national banks by asset size
Fourth quarter, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Net income	$16,236	$120	$1,048	$1,296	$13,772	$26,595
Net interest income	36,970	444	2,514	3,206	30,805	62,006
Total interest income	49,208	595	3,432	4,242	40,939	84,394
On loans	38,700	471	2,714	3,280	32,236	64,361
From lease financing receivables	1,148	3	19	60	1,066	1,897
On balances due from depositories	200	5	11	21	163	562
On securities	7,275	107	639	790	5,740	13,672
From assets held in trading account	852	(0)	0	1	850	1,963
On fed. funds sold & securities repurchased	705	7	28	55	615	1,245
Less: Interest expense	12,238	151	918	1,036	10,134	22,389
On deposits	7,944	137	762	633	6,411	14,592
Of federal funds purchased & securities sold	830	1	22	89	718	1,706
On demand notes & other borrowed money*	2,752	12	131	286	2,323	5,046
On subordinated notes and debentures	712	0	3	28	681	1,044
Less: Provision for losses	5,994	31	204	458	5,301	8,439
Noninterest income	30,093	246	1,656	2,514	25,677	48,456
From fiduciary activities	2,337	11	250	330	1,746	5,539
Service charges on deposits	5,276	59	324	378	4,516	8,186
Trading revenue	1,107	(0)	2	12	1,093	2,143
From interest rate exposures	41	0	2	9	30	672
From foreign exchange exposures	950	0	0	1	949	1,158
From equity security and index exposures	101	0	0	1	100	258
From commodity and other exposures	13	0	0	0	13	40
Investment banking brokerage fees	1,478	1	19	45	1,413	2,917
Venture capital revenue	(1)	0	(0)	1	(2)	53
Net servicing fees	3,905	62	97	112	3,634	4,674
Net securitization income	4,635	0	86	85	4,465	6,092
Insurance commissions and fees	595	9	22	40	524	941
Insurance and reinsurance underwriting income	99	0	2	2	95	144
Income from other insurance activities	496	9	20	38	429	797
Net gains on asset sales	1,461	2	70	455	933	1,771
Sales of loans and leases	1,192	3	69	451	669	1,473
Sales of other real estate owned	(11)	(0)	1	3	(14)	6
Sales of other assets(excluding securities)	279	(0)	(0)	1	278	292
Other noninterest income	9,301	101	786	1,056	7,357	16,142
Gains/losses on securities	191	2	11	10	168	329
Less: Noninterest expense	38,008	491	2,902	3,344	31,271	64,007
Salaries and employee benefits	15,357	235	1,218	1,336	12,568	27,105
Of premises and fixed assets	4,489	58	303	344	3,784	8,139
Goodwill impairment losses	2	0	0	1	0	5
Amortization expense and impairment losses	1,083	3	26	122	932	1,317
Other noninterest expense	17,078	195	1,355	1,541	13,987	27,441
Less: Taxes on income before extraord. items	7,394	50	291	633	6,419	12,150
Income/loss from extraord. items, net of taxes	388	(0)	270	(0)	118	429
Memoranda:						
Net operating income	15,723	118	773	1,288	13,544	25,936
Income before taxes and extraordinary items	23,251	170	1,074	1,929	20,079	38,346
Income net of taxes before extraordinary items	15,857	120	782	1,296	13,659	26,195
Cash dividends declared	13,307	123	824	995	11,365	23,091
Net loan and lease losses	7,109	30	213	419	6,447	9,932
Charge-offs to loan and lease reserve	8,717	37	263	528	7,890	12,301
Less: Recoveries credited to loan & lease resv.	1,608	7	50	109	1,442	2,369

* Includes mortgage indebtedness

Year-to-date income and expenses of national banks by asset size
Through December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Net income	$62,959	$427	$3,518	$5,159	$53,855	$102,578
Net interest income	143,165	1,730	9,855	12,730	118,849	240,023
Total interest income	195,295	2,395	13,842	17,144	161,915	335,773
On loans	152,530	1,892	11,025	13,341	126,272	254,422
From lease financing receivables	5,868	11	77	250	5,531	8,872
On balances due from depositories	1,351	22	51	85	1,192	2,723
On securities	28,313	429	2,488	3,049	22,347	54,147
From assets held in trading account	3,271	0	2	4	3,265	7,881
On fed. funds sold & securities repurchased	2,700	30	129	263	2,279	5,100
Less: Interest expense	52,130	665	3,987	4,413	43,065	95,750
On deposits	34,110	610	3,365	2,788	27,347	63,070
Of federal funds purchased & securities sold	3,958	6	88	381	3,483	8,076
On demand notes & other borrowed money*	11,142	49	524	1,138	9,431	20,373
On subordinated notes and debentures	2,920	0	10	106	2,803	4,231
Less: Provision for losses	24,008	122	903	1,733	21,251	34,761
Noninterest income	116,055	1,044	6,595	9,512	98,904	186,481
From fiduciary activities	8,861	40	938	1,232	6,652	21,036
Service charges on deposits	20,632	227	1,242	1,469	17,693	31,734
Trading revenue	5,899	0	10	51	5,838	11,473
From interest rate exposures	1,027	0	8	38	981	4,564
From foreign exchange exposures	4,401	0	0	2	4,399	5,419
From equity security and index exposures	537	0	0	6	531	1,343
From commodity and other exposures	(77)	0	0	0	(77)	56
Investment banking brokerage fees	5,068	4	70	199	4,796	10,064
Venture capital revenue	(60)	0	(2)	(1)	(57)	50
Net servicing fees	11,743	263	401	446	10,633	14,016
Net securitization income	16,632	9	322	321	15,981	21,930
Insurance commissions and fees	2,154	34	90	180	1,850	3,457
Insurance and reinsurance underwriting income	453	1	9	7	436	628
Income from other insurance activities	1,700	33	80	174	1,413	2,829
Net gains on asset sales	8,719	23	410	1,545	6,742	13,898
Sales of loans and leases	8,408	20	403	1,531	6,454	13,358
Sales of other real estate owned	(34)	2	9	8	(53)	(8)
Sales of other assets(excluding securities)	346	0	(1)	5	342	548
Other noninterest income	36,406	446	3,114	4,069	28,776	58,823
Gains/losses on securities	2,903	16	119	123	2,645	5,607
Less: Noninterest expense	144,909	2,052	11,219	12,852	118,785	245,956
Salaries and employee benefits	60,861	901	4,718	5,218	50,024	107,794
Of premises and fixed assets	17,135	220	1,172	1,340	14,403	31,317
Goodwill impairment losses	118	0	1	77	40	125
Amortization expense and impairment losses	4,125	10	99	440	3,576	4,914
Other noninterest expense	62,669	920	5,230	5,778	50,741	101,805
Less: Taxes on income before extraord. items	30,635	189	1,200	2,620	26,626	49,245
Income/loss from extraord. items, net of taxes	388	(0)	270	(0)	118	429
Memoranda:						
Net operating income	60,589	414	3,158	5,069	51,948	98,325
Income before taxes and extraordinary items	93,206	616	4,448	7,780	80,363	151,394
Income net of taxes before extraordinary items	62,571	427	3,248	5,159	53,737	102,149
Cash dividends declared	45,048	523	2,205	3,553	38,766	77,833
Net loan and lease losses	26,946	89	784	1,542	24,530	37,839
Charge-offs to loan and lease reserve	32,590	119	968	1,924	29,579	46,137
Less: Recoveries credited to loan & lease resv.	5,644	30	185	382	5,049	8,298

* Includes mortgage indebtedness

Quarterly net loan and lease losses of national banks by asset size
Fourth quarter 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Net charge-offs to loan and lease reserve	$7,109	$30	$213	$419	$6,447	$9,932
Loans secured by real estate	1,084	5	41	46	992	1,443
1-4 family residential mortgages	811	2	13	15	782	929
Home equity loans	145	0	1	2	142	178
Multifamily residential mortgages	1	0	1	0	(1)	4
Commercial RE loans	49	4	14	19	13	188
Construction RE loans	37	0	7	7	22	96
Farmland loans	6	(0)	5	2	(0)	14
RE loans from foreign offices	35	0	0	0	35	35
Commercial and industrial loans	1,589	12	56	113	1,408	2,455
Loans to individuals	4,213	9	99	233	3,871	5,650
Credit cards	3,034	1	63	173	2,797	4,026
Installment loans and other plans	1,178	8	36	60	1,074	1,624
All other loans and leases	224	4	18	27	176	385
Charge-offs to loan and lease reserve	8,717	37	263	528	7,890	12,301
Loans secured by real estate	1,211	7	47	56	1,102	1,631
1-4 family residential mortgages	864	2	15	19	827	1,005
Home equity loans	168	0	1	3	164	206
Multifamily residential mortgages	4	0	2	1	2	9
Commercial RE loans	73	4	17	23	30	234
Construction RE loans	46	0	8	8	30	111
Farmland loans	10	0	5	2	3	20
RE loans from foreign offices	46	0	0	0	46	46
Commercial and industrial loans	2,180	14	69	141	1,956	3,385
Loans to individuals	5,023	12	125	299	4,587	6,768
Credit cards	3,519	1	75	216	3,226	4,667
Installment loans and other plans	1,504	11	50	82	1,361	2,101
All other loans and leases	303	4	21	33	245	516
Recoveries credited to loan and lease reserve	1,608	7	50	109	1,442	2,369
Loans secured by real estate	127	1	7	10	109	189
1-4 family residential mortgages	52	0	2	4	46	76
Home equity loans	23	0	0	1	22	29
Multifamily residential mortgages	3	0	0	1	2	5
Commercial RE loans	24	0	3	4	17	47
Construction RE loans	9	0	0	0	8	15
Farmland loans	4	0	0	0	3	6
RE loans from foreign offices	11	0	0	0	11	11
Commercial and industrial loans	592	2	13	28	548	930
Loans to individuals	810	3	27	65	716	1,118
Credit cards	484	0	12	43	429	641
Installment loans and other plans	326	3	14	22	287	477
All other loans and leases	79	1	3	6	69	132

Year-to-date net loan and lease losses of national banks by asset size
Through December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
Number of institutions reporting	2,001	852	981	122	46	7,769
Net charge-offs to loan and lease reserve	26,946	89	784	1,542	24,530	37,839
Loans secured by real estate	2,511	11	104	138	2,258	3,587
1-4 family residential mortgages	1,466	5	37	58	1,366	1,871
Home equity loans	384	(0)	3	7	374	487
Multifamily residential mortgages	12	0	3	1	8	21
Commercial RE loans	343	6	40	55	243	743
Construction RE loans	145	1	14	15	115	285
Farmland loans	14	(0)	8	2	4	31
RE loans from foreign offices	147	0	0	(0)	147	149
Commercial and industrial loans	7,075	34	166	410	6,465	11,205
Loans to individuals	15,908	34	471	924	14,479	21,049
Credit cards	11,300	10	353	689	10,248	14,888
Installment loans and other plans	4,608	25	119	234	4,230	6,161
All other loans and leases	1,452	9	42	71	1,329	1,998
Charge-offs to loan and lease reserve	32,590	119	968	1,924	29,579	46,137
Loans secured by real estate	2,947	15	127	179	2,626	4,245
1-4 family residential mortgages	1,636	6	46	75	1,509	2,130
Home equity loans	453	0	3	10	440	575
Multifamily residential mortgages	24	0	3	5	15	38
Commercial RE loans	450	7	50	67	325	927
Construction RE loans	183	1	15	18	149	344
Farmland loans	25	1	10	3	11	52
RE loans from foreign offices	177	0	0	0	177	180
Commercial and industrial loans	8,806	44	217	511	8,034	13,906
Loans to individuals	18,987	47	568	1,133	17,239	25,384
Credit cards	13,075	11	392	802	11,871	17,334
Installment loans and other plans	5,912	37	177	331	5,367	8,050
All other loans and leases	1,850	12	55	101	1,681	2,602
Recoveries credited to loan and lease reserve	5,644	30	185	382	5,049	8,298
Loans secured by real estate	436	4	24	41	368	658
1-4 family residential mortgages	170	2	9	17	143	259
Home equity loans	69	0	1	3	65	88
Multifamily residential mortgages	12	0	0	4	7	17
Commercial RE loans	106	1	10	13	83	184
Construction RE loans	38	0	2	3	34	59
Farmland loans	11	1	2	2	7	21
RE loans from foreign offices	30	0	0	0	30	31
Commercial and industrial loans	1,731	10	51	102	1,569	2,702
Loans to individuals	3,079	13	97	209	2,760	4,335
Credit cards	1,776	1	39	112	1,623	2,445
Installment loans and other plans	1,303	12	58	97	1,137	1,889
All other loans and leases	398	3	13	30	352	604

Number of national banks by state and asset size
December 31, 2003

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
All institutions	2,001	852	981	122	46	7,769
Alabama	21	11	8	1	1	151
Alaska	2	1	0	1	0	5
Arizona	16	6	5	3	2	46
Arkansas	42	12	29	1	0	163
California	79	28	38	10	3	281
Colorado	48	23	23	2	0	169
Connecticut	9	1	7	1	0	24
Delaware	9	0	4	2	3	27
District of Columbia	4	2	2	0	0	4
Florida	68	16	44	8	0	262
Georgia	57	24	31	2	0	323
Hawaii	1	0	1	0	0	6
Idaho	1	0	1	0	0	15
Illinois	167	63	95	6	3	664
Indiana	28	5	15	7	1	148
Iowa	50	25	23	2	0	399
Kansas	99	67	29	3	0	362
Kentucky	48	17	30	1	0	217
Louisiana	15	5	8	1	1	139
Maine	6	1	4	0	1	17
Maryland	11	2	8	1	0	70
Massachusetts	12	2	8	2	0	38
Michigan	26	9	16	0	1	158
Minnesota	119	70	45	2	2	464
Mississippi	20	8	10	2	0	95
Missouri	45	22	19	3	1	345
Montana	13	11	2	0	0	77
Nebraska	70	45	24	1	0	259
Nevada	8	1	3	3	1	34
New Hampshire	4	2	1	0	1	14
New Jersey	22	0	14	7	1	79
New Mexico	15	5	6	4	0	51
New York	55	11	37	6	1	135
North Carolina	6	0	4	0	2	68
North Dakota	14	6	5	3	0	101
Ohio	85	32	40	5	8	191
Oklahoma	88	47	39	1	1	273
Oregon	3	1	1	1	0	35
Pennsylvania	77	19	46	9	3	169
Rhode Island	4	2	0	1	1	8
South Carolina	25	9	14	2	0	75
South Dakota	19	8	8	2	1	90
Tennessee	30	7	20	0	3	188
Texas	317	179	127	11	0	654
Utah	7	2	3	0	2	60
Vermont	8	2	6	0	0	14
Virginia	38	7	28	2	1	125
Washington	13	8	5	0	0	78
West Virginia	17	8	8	1	0	67
Wisconsin	43	13	27	2	1	272
Wyoming	17	7	10	0	0	43
U.S. territories	0	0	0	0	0	17

Total assets of national banks by state and asset size
December 31, 2003
(Dollar figures in millions)

	All national banks	National banks				Memoranda: All commercial banks
		Less than $100 million	$100 million to $1 billion	$1 billion to $10 billion	Greater than $10 billion	
All institutions	$4,292,331	$46,599	$273,307	$376,546	$3,595,879	$7,602,489
Alabama	20,298	746	1,994	1,308	16,250	212,617
Alaska	2,269	68	0	2,201	0	3,502
Arizona	56,763	326	2,493	5,485	48,459	59,919
Arkansas	9,079	611	7,275	1,193	0	36,218
California	341,658	1,535	11,621	23,283	305,219	494,649
Colorado	10,034	1,227	6,264	2,544	0	32,690
Connecticut	4,449	94	1,991	2,364	0	6,048
Delaware	118,309	0	1,050	4,451	112,808	159,335
District of Columbia	608	173	435	0	0	608
Florida	33,441	1,113	11,653	20,674	0	79,299
Georgia	21,476	1,655	6,470	13,350	0	205,383
Hawaii	422	0	422	0	0	24,393
Idaho	286	0	286	0	0	3,691
Illinois	383,345	3,505	25,569	15,889	338,382	538,672
Indiana	69,138	255	6,114	20,220	42,549	102,324
Iowa	16,145	1,472	6,434	8,239	0	49,771
Kansas	17,294	3,562	8,833	4,899	0	40,984
Kentucky	15,261	1,033	5,772	8,456	0	44,449
Louisiana	28,359	269	1,824	7,751	18,514	48,946
Maine	28,761	19	2,302	0	26,440	31,529
Maryland	2,996	77	1,834	1,085	0	33,959
Massachusetts	9,315	113	1,646	7,557	0	141,422
Michigan	50,610	398	4,542	0	45,670	181,500
Minnesota	77,980	3,614	10,260	3,881	60,225	105,092
Mississippi	11,692	463	2,416	8,813	0	39,061
Missouri	29,122	1,291	5,226	10,521	12,084	81,551
Montana	1,186	573	612	0	0	13,254
Nebraska	13,901	2,058	5,576	6,267	0	30,158
Nevada	38,333	48	1,873	17,439	18,974	57,913
New Hampshire	14,061	71	221	0	13,769	17,146
New Jersey	45,653	0	4,134	28,615	12,904	94,268
New Mexico	12,145	327	1,487	10,330	0	17,899
New York	612,515	748	13,274	16,370	582,123	1,595,408
North Carolina	973,155	0	1,652	0	971,503	1,095,479
North Dakota	12,402	284	1,841	10,278	0	19,780
Ohio	493,010	1,751	12,655	9,910	468,694	596,266
Oklahoma	23,740	2,496	8,632	1,560	11,052	47,335
Oregon	8,891	68	220	8,603	0	19,339
Pennsylvania	132,958	1,233	14,640	20,713	96,372	179,072
Rhode Island	200,717	48	0	8,404	192,265	214,056
South Carolina	7,725	589	3,106	4,030	0	33,760
South Dakota	74,464	272	3,541	14,102	56,550	84,192
Tennessee	87,323	503	8,125	0	78,695	112,932
Texas	75,006	9,455	33,690	31,862	0	136,456
Utah	34,910	86	533	0	34,291	149,337
Vermont	1,499	116	1,383	0	0	6,232
Virginia	35,940	329	8,564	7,665	19,382	107,561
Washington	1,954	407	1,547	0	0	26,319
West Virginia	4,449	479	1,759	2,211	0	17,803
Wisconsin	24,861	677	7,457	4,022	12,706	88,455
Wyoming	2,419	359	2,060	0	0	5,183
U.S. territories	0	0	0	0	0	79,274

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