

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

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 lending 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 OTS.

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.

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