

Remarks by
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Welcome to Washington – and congratulations to the leadership and staff of the New York Bankers Association for putting together another fine program for your annual visit to the nation’s capital. I appreciate the opportunity to join you this morning.

You came to Washington, of course, to learn about developments in Washington. The lawmakers, industry experts, and regulatory policymakers who visit with you and serve as your informal faculty no doubt will see to that.

Ironically, it is developments back in your own state that have captured a fair share of the bank regulatory headlines recently. Without getting into the specifics of the current controversy concerning a certain state official’s efforts to exert jurisdiction over national banks based on their publicly-released Home Mortgage Disclosure Act (HMDA) data, I thought I would devote some time this morning to putting those developments into context – the context of the dynamic between national and state interests in the banking arena that dates back to the inception of the national banking system, and the context of how the bank supervisory process actually works.

While the players may be new, the basic issues the current litigation presents are not. Substantial precedents, dating to and recognizing the early fundamentals of the national banking system, determine the extent of states’ authorities over national banks. Nor is the comprehensive and predominately confidential bank supervisory process something new, but it can be misunderstood, and this may contribute to tensions that seem to accompany the current jurisdictional issue.

I’ll provide some perspective on each of these in turn, but I want to make clear at the outset a fundamental principle that guides our approach to bank supervision and regulation. The heart of our responsibility is to assure that national banks are safe and sound and conduct their business in accordance with law. This helps assure that national banks have the capacity to lend to credit-worthy borrowers and serve all their customers and communities fairly and with integrity. When national banks meet these standards, the national banking system benefits all Americans and strengthens our economy.

The Comptroller’s responsibility to assure that national banks conduct their business in accordance with law is not one-dimensional. It is not just a policing function to verify and enforce compliance with restrictions and requirements in applicable laws. We also have a responsibility to assure that national banks have the *ability to operate* –

consistent with safety and soundness – in accordance with applicable law, including the powers granted to them, and the supervisory regime provided for them, under federal law. This second dimension of our job is of equally long standing as the first, and from the very beginning of the national banking system, it has produced some contention with states. That's why I say that today's issues are not new.

Indeed, these issues stem from the very purpose and design of the national banking system. While the Federal government's Civil War financing needs provided the catalyst for establishing the national banking system, the system was designed to do far more – to bring stability to U.S. financial markets and vastly stimulate interstate commerce. It was envisioned – and the National Banking Acts of the 1860's reflected – that national banks would be located throughout the country, and that wherever located, they would exercise a uniform set of federal powers, under federal standards of operation, and federally-mandated capitalization, with a federal supervisor overseeing their operations.

It was also envisioned, both by proponents and opponents of the new national banking system, that it would supersede the existing system of state banks. Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general, proponents of the national system were concerned that states would be hostile to it. Articulating these worries, a key sponsor of the new system asserted that a national 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.”

Reflecting these and similar concerns, Congress established a Federal supervisory regime for national banks and vested responsibility to carry it out in the newly created OCC. Congress granted the OCC the broad authority “to make a thorough examination of all the affairs of [a national] bank,” 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, supervise, regulate, and sanction a national bank and protected national banks from potential state hostility by establishing that the authority to exercise such visitorial powers over national banks is vested only in the OCC. This authority has withstood many challenges over the years and stands today.

As distinct from the issue of visitorial powers – that is, *who* has authority to examine, supervise, regulate and sanction a national bank – preemption is the issue of *what* state laws apply to national banks. In the context of national banks, preemption is an often misunderstood and mischaracterized question. Preemption isn't a new concept; it's not a concept unique to national banks; and it's not a legal result that the OCC can simply turn on and off at will.

Principles of preemption flow directly from the Supremacy Clause of the United States Constitution, which provides that Federal law – including powers granted under Federal law – prevails over conflicting state law. Preemption has long been recognized

with respect to the powers and authorities granted national banks under the National Bank Act. An extensive body of judicial precedent has developed over the long history of the national banking system, explaining and defining the standards of Federal preemption of state laws as applied to national banks. Together, the uniformity of powers and operating standards that result from Federal preemption, coupled with the OCC's exclusive visitorial authority, have long been recognized as defining characteristics of the national bank charter.

Our positions on preemption and visitorial powers can be unpopular in some quarters, and sometimes put us at odds with individuals and organizations for which we have great respect. But we cannot conduct bank supervision and regulation based on what we think will be popular, and we cannot pick and choose which laws apply to national banks – or to ourselves – based on preferences of the moment. For example, the Fair Housing Act and the Community Reinvestment Act are as applicable to national banks as the statute that provides for OCC's exclusive visitorial authority. Both must be implemented faithfully.

When we take a position that, because of the scope of the OCC's exclusive visitorial authority, a state official does not have jurisdiction over a national bank, we sometimes hear in reaction that the additional state presence is needed because the OCC won't be tough enough – our rigor for this purpose being gauged by the number of public enforcement cases we have brought. This perception profoundly misunderstands the character and effectiveness of the bank supervisory process.

Banking is one of the longest regulated and most closely supervised of business enterprises in the Western world. The bank supervisory process in the U.S. – for both national and state banks – is uniquely extensive and comprehensive and exerts extraordinary authority through ongoing supervisory communication and other informal means.

Bank examiners have access to all aspects of a bank's affairs and the flow of communication between a bank and the supervisory agency is open and continuous. Not only the quality and classification of assets and the review of financial transactions, but also the bank's lending and investment practices, consumer disclosures, adequacy of security systems and internal controls, quality of management, and future financial prospects, among other things, are of concern to bank examiners.

Bank management is expected to be open and forthcoming with bank examiners. Examiners expect to get the information they need when they ask for it, and they expect to be told important things without having to ask. And examiners are expected to be direct and frank in expressing their concerns about the bank and the corrective actions they expect. Because of this extraordinary flow of sensitive and confidential information between banks and their supervisors, the bank supervisory process in this country has always been and remains a predominantly confidential process between the bank and its supervisor.

The supervisory process entails constant adjustments, corrections and remediation by banks based on the communications between the regulated bank and the bank supervisory agency. When supervisors identify an issue, we expect it to be fixed, promptly, without having to resort to subpoenas for the information we need or to enforcement action to achieve the result we seek.

We certainly have the ability to bring formal enforcement cases against banks, and we do not hesitate to do so when appropriate, but, in practice, the need to do so is infrequent. In the process of comment and response, banks typically agree to changes and remediation sought by their supervisor without need for a formal action to be commenced. In relatively rare cases, a bank may dispute the action sought, and a formal action may be needed, or a formal action may be appropriate based on the nature or gravity of an issue or the nature of the remedies sought by the supervisor.

Those who are unfamiliar with the bank supervisory process may not appreciate the wide range of measures – in addition to formal, public enforcement actions – that bank supervisors have available – and the power of these measures. They range from safety and soundness orders, prompt corrective action directives, capital directives, and memoranda of understanding, to communications contained in an examination report of “matters requiring attention” (MRA).

Characterizing these supervisory measures as less meaningful than a public cease and desist order and fixating on the use of “formal” enforcement actions exalts form over substance – indeed it verges on elevating publicity over effectiveness. Outsiders probably would be amazed, for example, to know the impact of just an MRA contained in an exam report. MRAs are discussed by OCC examiners with a bank’s board of directors, which typically results in bank management being grilled by its own directors about progress in achieving corrective action. At some national banks, including some of the nation’s largest, the very existence of an MRA is a matter of consequence for the compensation of the management of the line of business involved.

Does anyone want to bet how quickly that matter gets fixed?

It would be hard to find an approach more effective at identifying problems early and remedying them quickly than the bank supervisory process. But because of the confidentiality of bank supervision and examination, there are no headlines to trumpet these accomplishments. The very openness and candor that make the bank supervisory process so effective are premised on the confidentiality of bank-supervisor communications.

No one is suggesting that banks are perfect, but do those outside the banking industry make any connection between the fundamental health, stability, integrity and attention to reputation of banks today, on the one hand, and the role of bank supervision, on the other? Perhaps not, but they should not assume that the work of the bank supervisors – the business of principled bank supervision – isn’t being conducted with the

utmost vigor simply because waves of press releases announcing formal enforcement actions are not forthcoming.

When we act, and how we act, will always be based on our best judgment of what approach and sanction is best calculated under the circumstances to recognize the gravity of the problem, correct it, and assure that a bank's ongoing operations are safe and sound and conducted in accordance with law. Principled bank supervision must be thorough, careful, and fair. With the vast powers that bank supervisors wield comes the responsibility not to rush to judgments. In this regard, it is ironic that the "tough" reaction sometimes can be the easy response, where it entails little judgment or calibration to specific facts.

We must always be thorough and use sound judgment and balance in our supervision. We cannot allow ourselves to rush to judge issues before all the relevant facts are on the table. *And* we must not hesitate to take strong action when it is warranted.

In closing, and returning to the context of the issue I mentioned at the outset, all these principles govern our work to analyze the new HMDA data, our more detailed reviews of national banks' lending practices, and our responses to what we find. Ultimately, our goal is not about simply wielding enforcement authority or gaining publicity. It is about ensuring that national banks are in compliance with the law so they can fulfill their responsibilities to their customers, to their communities, and to their country.

At the OCC, this has been our mission since 1863. It will continue to be so.

Thank you very much.