Center for Responsible Lending
Consumers Union
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Sargent Shriver National Center on Poverty law

June 27, 2011

Acting Comptroller John Walsh
Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, DC 20219

Re: OTS Integration; Dodd-Frank Implementation
Docket IS OCC-2011-0006
RIN 1557-AD41

Dear Comptroller Walsh:

We respectfully submit the following comments in response to the Office of the Comptroller of the Currency's proposed Dodd-Frank Act Implementation regulations, in particular the provisions relating to preemption of state law and the OCC's exclusive visitorial powers.

The proposed rules would continue the OCC's broad preemption of state laws governing mortgages, credit cards, bank accounts, and other banking products. Continuation of those rules ignores the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which restored the important role of states in protecting consumers. The visitation regulations also impermissibly narrow the range of enforcement actions states may take. We therefore respectfully urge that the OCC withdraw the current proposal, repeal the current preemption regulations, amend the visitation regulations, and proceed in accordance with the procedural and substantive requirements of the Dodd-Frank Act.

I. State Laws Play an Important Role In Protecting Consumers from Harmful Banking Practices

Consumer protection in the financial world has been dramatically weakened in the last several years by preemption of state consumer protection laws. Broad preemption of state law is a recent phenomenon. For most of the nearly 150 years since national banks were created, they have complied with state law. Preemption has harmed states' ability to respond to financial abuses in both the banking and the nonbank world. Restoring the states' role as "first responders" and as additional "cops on the beat" was an essential element of financial reform.

For most of this nation's history, consumers have depended on states, not the federal government, to protect them. Even in the banking world, national banks were expected to

comply with state law.[1] Only in the last decade or so have federally chartered depositories been able to ignore state laws with impunity.[2]

The preemption of state laws in the mortgage area was a significant contributor to the mortgage crisis. In 2006, the peak year of irresponsible lending, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans.[3] A total of over $700 billion in risky loans were made by entities that states could not touch. Until reversed by the Dodd-Frank Act,[4] states were also preempted from regulating *any* mortgage lender (bank or nonbank) on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms. Even where they retained some authority over nonbank mortgage lenders, states were reluctant to create an uneven playing field and to disadvantage their home state industries with rules that did not apply to national banks.

The credit card abuses that eventually led to a federal crackdown – bait and switch rate increases, abusive fees, payment manipulations – were allowed to take off and grow due to preemption. States were powerless to address credit card problems. Even simple, common-sense state rules – such as allowing payment without a late fee on Monday when the due date falls on a Sunday – were held preempted by federal bank regulations.[5]

Similarly, the preemption of state laws governing bank practices designed to induce overdraft fees permitted the banking industry to get ever more aggressive in designing intricate tricks and traps. The result was so-called "overdraft protection" – an unfair and inequitable back-end method of paying for bank account services and a $28 billion tax on the very consumers who need those funds the most.[6]

States are our nation's first responders when new threats target consumers. States see abuses sooner, react more quickly, and can address local problems before they become national ones.

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[1] Even the NBA's usury preemption requires that national banks "borrow" the **state** law applicable to their home state's "most favored lender." 12 U.S.C. §85.

[2] *See generally* Lauren Saunders, National Consumer Law Center, "Restore The States' Traditional Role As 'First Responder'" (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[3] *See id.*

[4] The Dodd-Frank Act repealed most of the Alternative Mortgage Transactions Parity Act. *See* Dodd-Frank § 1083, to be codified at 12 U.S.C. §§ 3802, 3803.

[5] *See* Miller v. Bank of Amer., 88 Cal. Rptr. 3d 723 (Cal. Ct. App. 2009).

[6] *See* Leslie Parrish, Center for Responsible Lending, Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years (Oct. 6, 2009), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/overdraft-explosion-bank-fees-for-overdrafts-increase-35-in-two-years.html.

State laws also provide the models for federal law. When new problems arise and the solutions are not clear, states can experiment with different approaches. Typically, states copy and improve on each other's responses and then coalesce around a particular solution. Eventually, federal rules are adopted that provide uniform protection that benefitted from that process of experimentation.

The creation of the Consumer Financial Protection Bureau (CFPB) was designed to remedy some of the consumer protection failures of federal regulators, but the CFPB cannot do the work alone. The CFPB will not and should not adopt new nationwide rules unless a problem is or threatens to become big enough to warrant a national solution. States also bolster the resources of the CFPB and the federal banking agencies. The states have a crucial role to play and that is why Congress reaffirmed and reinvigorated the states' role as part of financial reform.

II. The Proposed Preemption Rules are Inconsistent with the State Role Authorized by the Dodd-Frank Act

In 2004, the OCC adopted broad regulations preempting state laws aimed at abusive bank practices[7] involving mortgages, credit cards, and other areas. The OCC's proposal would effectively continue those regulations without complying with the mandates of the Dodd-Frank Act.

Dodd-Frank specified the limited circumstances under which existing OCC preemption pronouncements may have continued viability, and the proposal exceeds those circumstances (*section II-a below).* Congress rejected the OCC's existing preemption standards, specified what standard must be used, and set up procedural safeguards to enforce that standard (*section II-b).* The proposal ignores the directives in the Dodd-Frank Act, both substantive and procedural (*section II-c).* Finally, the OCC exceeds its authority with respect to preemption of state laws of general applicability (*section II-d).*

a. Dodd-Frank Did Not "Grandfather" Preexisting Regulations: The OCC Must Repeal Its Regulations Because They Violate Dodd-Frank

The OCC asserts that it can reaffirm its broad preemption regulations without subjecting them to the Dodd-Frank requirements because:

> The [Dodd-Frank] Act contains no statement that Congress intended to retroactively apply these procedural requirements to overturn existing precedent and regulations, and that interpretation would be contrary to the presumption against retroactive legislation. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 272-73 (1994).

[7] For simplicity, references throughout these comments to "national banks" and the "National Bank Act" apply also to those standards as applied to federal savings associations through the Home Owners Loan Act. *See* Dodd-Frank § 1047.

This statement is wrong on several counts. First, Congress included a very clear statement of when the old regulations apply, and that statement is completely in harmony with traditional rules about retroactivity. Second, while Dodd-Frank "grandfathered" pre-existing *contracts*, it by no means grandfathered pre-existing *regulations*. Third, the Dodd-Frank Act contains both substantive and procedural requirements, and the OCC must comply with both.

In Section 1043 of the Dodd-Frank Act, Congress addressed the "Preservation of Existing Contracts":

> This title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the [Consumer Financial Protection] Bureau, shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency or the Director of the Office of Thrift Supervision regarding the applicability of State law under Federal banking law to *any contract entered into on or before the date of enactment* of this Act, by national banks, Federal savings associations, or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, respectively. (emphasis added)

This provision is quite clear: Title X of Dodd-Frank does not affect the applicability of the OCC's or OTS's otherwise valid preemption regulations as to contracts entered into *on or before* July 21, 2010,[8] but it does affect the applicability of preemption regulations to new contracts.[9] State laws are applicable to new contracts unless they are preempted under the provisions of Title X and any regulations adopted consistent with those requirements.

Section 1043 is consistent with the retroactivity rule of the *Landgraf* case. In *Landgraf,* the Supreme Court held that the damages and jury trial provisions of the Civil Rights Act of 1991 did not apply to a case that was pending on appeal when the statute was enacted. Under both *Landgraf* and Section 1043, a new law does not apply to *conduct* before enactment of that law. The Court did not in any way indicate that *old regulations* were somehow preserved as to *future conduct* notwithstanding their inconsistency with a new statutory standard.

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[8] The Supreme Court's decisions in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007), and *Cuomo v. Clearing House Assoc'n,* 129 S. Ct. 2710 (2009), did not address, much less resolve, the ongoing dispute over the validity of substantive preemption standards articulated in the 2004 preemption regulations. The extent to which they articulate a valid conflict preemption standard was an open question as of the date of enactment of Dodd-Frank, and remains so today. *See e.g.* Amy Quester and Kathleen Keest, *Looking Ahead After Watters v. Wachovia Bank: Challenges for Lower Courts, Congress, and the Comptroller of the Currency,* 27 Rev. of Banking and Financial Law, 187, 221-227 (2008). The grandfather clause in Dodd-Frank does not retroactively validate those rules, but simply says it does not "alter or affect" the applicability of the rules – whatever their ultimate validity might be as courts continue to have occasion to evaluate them.

[9] Indeed, it is likely that section 1043 grandfathered only contracts entered into prior to July 21, 2010, before the preemption amendments take affect, precisely to avoid a race to more preemption activity in the interregnum.

The OCC characterizes the Dodd-Frank amendments as merely imposing "new procedural and consultation requirements" that have no impact on existing preemption determinations. The agency implies that the new "procedures" need only be applied to new regulations.

But the Dodd-Frank preemption provisions are not merely procedural; they include a new substantive standard along with procedural and judicial review provisions intended to enforce that standard. The ban on field preemption, the prevent/significantly interfere standard, and the "case-by-case" requirement all are substantive changes. They are a statement that, as a general rule, state laws are not preempted except for particular laws that are shown, through substantial evidence on the record, to prevent or significantly interfere with bank powers.

The OCC implicitly acknowledges some change in the substantive standard through the proposed changes to its regulations, but it assumes that it can ignore the aspects of the law that it deems procedural. But there is nothing in the statute or legislative history that indicates that the OCC can cherry pick which of the Dodd-Frank amendments to apply to its regulations. Congress passed the entire package of amendments to undo the broader preemption standards that the OCC had been applying and to ensure that the OCC was faithful to the new preemption standard.

The Dodd-Frank preemption changes would be meaningless if they preserved the prior preemption determinations. Maintaining them in the wholesale manner that OCC now proposes would leave virtually no need for future preemption determinations. Doing so would be inconsistent with Congress's directive, which restores the role of state law in protecting consumers by mandating that the OCC follow a prescribed standard along with prescribed procedures in the limited circumstances where it purports to override state law.

b. Congress Intended to Undo the OCC's 2004 Preemption Regulations

The Dodd-Frank preemption amendments were the result of the ongoing controversy over the OCC's preemption activities in the past decade culminating in the 2004 preemption regulations. The role that preemption played in the financial crisis gave Congress added impetus to rein in preemption. While the preemption amendments were a compromise, both the plain language of the statute and the legislative history show that Congress intended to undo the 2004 regulations and the OCC's past (and continuing) misinterpretation of the *Barnett* standard.

(i) Background: The OCC's 2004 Rules as Stealth Field Preemption

In 1996, the Office of Thrift Supervision (OTS) asserted that the Home Owners Loan Act (HOLA) preempted the field of lending regulation for federal savings associations.[10] The OTS promulgated a regulation preempting all state laws affecting lending, including a long list of "illustrative examples" of types of lending laws that were preempted.[11]

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[10] The OTS asserted that its enabling statute, HOLA, "occupies the field," thus granting field preemption to federal thrifts. 12 C.F.R. § 560.2(a).

[11] 12 C.F.R. § 560.2(b).

In the years that followed, the OCC competed with the OTS by becoming increasingly aggressive in asserting that the National Bank Act, like HOLA, preempted state laws. The OCC began with opinion letters, amicus briefs and orders aimed at individual laws.[12]

In order to attract more banks to the national bank charter and to compete with the thrift charter, the OCC eventually adopted the 2004 regulations that, in practice if not in word, adopted field preemption as the functional standard for the NBA.[13] The OCC did not explicitly claim field preemption, which would have been inconsistent with 140 years of Supreme Court decisions interpreting the NBA as providing a less sweeping conflict preemption standard.[14] Nonetheless, the broad preemption of entire categories of state laws had the same overall effect.

To accomplish this wide degree of preemption, the OCC effectively read out the words of limitation and degree that repeatedly appear in the Supreme Court's description of the scope of NBA conflict preemption. The Supreme Court consistently uses words that require a certain magnitude of interference: "forbid, or to impair *significantly*, …. prevent or *significantly* interfere with the national bank's exercise of its powers," *Barnett Bank v. Nelson,* 517 U.S. 25, 33 (1996*)*; "prevent or *significantly* interfere… *significantly* impair,*"* *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 12 (2007) (describing the *Barnett* standard); "*unduly* burdensome and duplicative," *id* at 11; "*significantly* burden*"* *id* at 13; "impose an *undue* burden," *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944). Words like "significantly" are, in fact, significant. It is implausible to consider that a standard that requires "significant" interference is really meant to also encompass a standard that imposes only a modicum of interference.[15]

Yet in the 2004 rules, the OCC, in its "distillation" of the Supreme Court decisions, eliminated all words requiring some threshold degree of magnitude. Instead, the OCC asserted that state laws that "obstruct, impair or condition" federal bank powers are preempted.[16] It then went on to assert that entire categories of laws covering virtually every

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[12] *See* National Consumer Law Center, *The Cost of Credit,* § 3.4.6.2 (4th ed. 2009 and Supp.).

[13] As to the effect (and goal) of the 2004 regulations as bestowing field preemption, s*ee generally,* National Consumer Law Center, *The Cost of Credit,* § 3.4.6.3 (4th ed. 2009 and Supp.); Kathleen C. Engel and Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps*, 158, 159 (2011) (OCC was "hungrily eyeing the OTS, eager to give the same competitive advantage to national bank"; by offering preemption, the OCC hoped it could keep national banks from converting to thrift charters).

[14] *See* Lauren Saunders, National Consumer Law Center, "Restore The States' Traditional Role As 'First Responder'" (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[15] On the rare occasions when the Supreme Court has used looser language, it has been in the context of cases that upheld state law or in which the interference was quite substantial.

[16] 69 Fed. Reg. 1904, 1910 (January 13, 2004).

aspect of deposit taking and lending were preempted (regardless of the extent to which they interfered with bank powers).

By eliminating the limiting language, the OCC also eliminated the limiting principles. The broad preemption language together with the broad categories of laws preempted effectively created field preemption. Indeed, the supplemental information to the 2004 preemption rules explained that the OCC was not asserting field preemption of real estate lending rules – and beyond to other authorized bank powers – because the agency concluded "that the effect of labeling of this nature is largely immaterial in the present circumstances."[17] The OCC even parroted the OTS's standard – explicitly based on field preemption – for what state laws survive.[18]

The 2004 rules were a controversial, dramatic change in NBA preemption standards and were the subject of Congressional hearings.[19] Congressman Barney Frank, then ranking minority member of the House Financial Services Committee, introduced the "Preservation of Federalism in Banking Act" to reverse both the OTS's and OCC's overly broad preemption regulations.[20] That proposal was the seed for the Dodd-Frank preemption provisions ultimately adopted.

(ii) Dodd-Frank Mandates a Roll Back of the 2004 Rules to the Prevent/Significantly Interfere Standard

The financial crisis prompted Congress to revisit the preemption regulations. Some, including the OCC, claimed that preemption of state consumer protection laws played no role

[17] *Id.* at 1910-1911.

[18] *Compare, e.g.,* 12 C.F.R. § 7.4008(c) (OCC lending preemption regulation: state laws are not preempted "to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers"), *with* 12 C.F.R. § 560.2(c) (OTS lending preemption regulation: state laws are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations….").

[19] *See, e.g.* Testimony of Roy Cooper Before the Committee on Banking, Housing and Urban Affairs, *Hearings on the Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers,* 4 (April 7, 2004) ("The OCC has been explicit about trying to entice federal thrifts and state banks to switch their charters to that of a national bank. Eliminating any role for the states is evidently a selling point in their competition with other regulators."); Testimony of Arthur Wilmarth Before the Committee on Banking, Housing and Urban Affairs, *Hearings on the Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers*, 2-3 (April 7, 2004)("The OCC has deliberately crafted its rules to accomplish a sweeping preemption of state laws that is equivalent to the 'field preemption' regime established by the Office of Thrift Supervision…."); *cf.* Opening Statement of Congresswoman Sue Kelley, Subcommittee on Oversight and Investigations, H.R. Committee on Financial Services, *Congressional Review of OCC Preemption,* ("..for a regulator to single-handedly preempt a State's ability to both determine and enforce laws without public debate *or explicit direction from Congress is not only troublesome, but I believe it is careless. … Given the overreaching nature of these regulations*, which appears to be larger than just this one issue, I hope my colleagues in the Subcommittee on Housing and Financial Institutions will continue their own investigations into predatory lending to address these specific concerns.") (Transcript, p. 3, *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0.HTM) (emphasis added)

[20] Preservation of Federalism in Banking Act, H.R. 5251, 108th Cong. (introduced Oct. 7, 2004).

in contributing to the crisis. However, Congress heard testimony detailing the myriad harmful effects that preemption had on consumers – and ultimately on the economy – in a wide spectrum of financial services from mortgage lending and credit cards to deposit accounts.[21]

The various proposals to resolve the preemption controversy ran the gamut. At one end of the spectrum, state laws would have been preempted only if they discriminated against national banks or were inconsistent with federal law other than banking statutes, and the OCC would have been given no role in preempting state laws.[22] At the other end of the spectrum, amendments offered by preemption proponents either would have made no change to the banking statutes or would have ratified the OCC's ability to broadly preempt state consumer protection laws.[23]

Compromises narrowed the distance between these extremes. The final bill permitted a limited amount of preemption by the banking statutes and a limited role for the OCC but refused to codify the OCC's preemption approach.

First, Congress explicitly denied both federal banking charters field preemption: neither the NBA nor HOLA "occup[ies] the field in any area of State law."[24] Thus, Congress overturned both the explicit field preemption by OTS and the *de facto* field preemption by the OCC.

Second, Congress dictated that the OCC could preempt state laws only on a "case-by-case basis" by making "a determination … concerning the impact of a *particular* State consumer financial law on any national bank that is subject to that law, or the law of any other State

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[21] *See, e.g.* Testimony of Prof. Patricia A. McCoy Before the U.S. Senate Committee on Banking, Housing and Urban Affairs, *Hearing on Consumer Protections in Financial Services: Past Problems, Future Solutions"* at 14, 14-24 (Mar. 3, 2009) (banks lobbied OCC to "clothe them with the same federal preemption as federal savings associations", and succeeded with the 2004 preemption rules"); Q&A of Chairman Frank to Witness Michael C. Calhoun, House Committee on Financial Services, *Perspectives on the Consumer Financial Protection Agency,* (September 30, 2009) (Frank notes that it wasn't until 2004 that the OCC engaged in field preemption, and that the burden is on those who want to "maintain broad field preemption" to show there were serious problems before 2004.); Testimony of Lauren Saunders Before the Subcommittee on Monetary Policy, Committee on Financial Services, U.S. House of Representatives, *Hearing on Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve* at 21-26 (July 16, 2009); Testimony of Kathleen Keest, Center for Responsible Lending, Travis Plunkett, Consumer Federation of America, and Edmund Mierzwinski, U.S. PIRG, Before the Committee on Financial Services, U.S. House of Representatives, *Hearing on Regulatory Restructuring: Enhancing Consumer Financial Products Regulation* (June 24, 2009).

[22] H.R. 3126, 111th Cong., Sec. 143 (Introduced July 8, 2009).

[23] For example, Amendment #141, defeated December 9, 2009 in the House Committee on Rules, would, *inter alia*, have preempted a state law that "impairs, or hampers" the business of banking. Other proposals would have eliminated any change to preemption.

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), § 1044, to be codified at 12 U.S.C. § 25b(b)(4). It is made applicable to federal thrifts by Dodd-Frank §1047.

with substantively equivalent terms."[25] The case-by-case requirement was a direct reversal of the OCC's 2004 regulations, which preempted broad categories of state laws without examining the impact of particular state laws.

Third, Congress tightened up the grounds on which the OCC could preempt state law by preventing it from misapplying the *Barnett* test as it had in the past. The evolution of this language demonstrates that, like the no field preemption and case-by-case requirements, the amendment was intended to restrict the OCC's preemption activities and undo the 2004 regulations.

The financial reform bill that passed the House Financial Services Committee used the language of *Barnett* -- "prevents or significantly interferes" – without identifying the case.[26] On the floor, the House explicitly rejected an amendment to give the OCC authority to preempt a state law that merely "impairs or hampers" bank powers, an amendment that would have effectively codified the OCC's weak preemption test.[27] The final compromise language passed in the House version set the standard as "significantly interferes with or materially impairs" the ability of a national bank to exercise its powers.[28]

The bill that passed the Senate Banking committee and the full Senate simply adopted the *Barnett* standard by reference to the case itself, without identifying any particular language from that case.[29] Yet the Senate Committee report made clear that it interpreted *Barnett* as being a roll-back of the OCC's overly aggressive preemption stance. The report explained that "[t]he standard for preempting State consumer financial protection laws would *return* to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson,* 517 U.S. 25 (1996), *undoing broader standards adopted by rules, orders and interpretations issued by the OCC in 2004*."[30]

The final bill includes the reference to the *Barnett* case but gives Congress's interpretation of the standard required by that case and it is Congress's understanding of that standard that governs. The result is a law that allows the OCC some role in preemption, but "only if … in

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[25] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(3)(A) (emphasis added).

[26] HR 3126 Committee Print (October, 28, 2009).

[27] A proposed amendment to use language preferred by the OCC and introduced by Congresswoman Bean ("prevents, significantly interferes with, *impairs or hampers…"* was explicitly defeated in the House Rules Committee. Bean Amendment # 141 (December 9, 2009).

[28] H.R. 4173 (Dec. 11, 2009). In a post-passage floor statement, Congresswoman Bean explained her view that the addition of the "materially impairs" language was added to reflect the multiple standards that she (as well as the OCC) views as the *Barnett* test. Remarks by Melissa L. Bean, 155 Cong Rec E 3029, December 16, 2009. Other parties to that compromise had different views of the meaning of "materially impairs," and the language did not survive the final bill.

[29] S. 3217 (April 15, 2010); H.R. 4173 (May 20, 2010).

[30] S. Rep. No. 111-176, at 175 (Apr. 30, 2010) (emphasis added).

accordance with the legal standard for preemption in [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise of the national bank of its powers ….”[31] Congress unambiguously specifies only one "standard" drawn from *Barnett*.

In the conference committee statement on the final bill, Congress once again made clear its view that "prevent or significantly interfere" is the *Barnett* standard. The conference report noted that "[the Committee] codifies the standard in the 1996 Supreme Court case Barnett Bank of Marion County, N.A. v. Nelson to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national bank's exercise of their powers."[32]

Finally, in order to further ensure that the OCC did not misapply the new preemption standard, Congress put in a number of safeguards:

- To ensure that the OCC conduct true case-by-case review and not preempt broad categories of state laws that are "substantively equivalent," Congress dictated that "the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination" that laws are equivalent.[33]
- To ensure that the OCC did not misapply the preemption test, Congress provided that "No regulation or order" of the OCC shall be applied to invalidate state law "unless *substantial evidence*, made *on the record of the proceeding*, supports the specific finding regarding the preemption of such provision in accordance with the legal standard" of the *Barnett* decision.[34]
- To subject any OCC preemption determinations to further scrutiny, Congress provided that courts should review them using the less deferential *Skidmore* judicial review standard rather than the *Chevron* standard under which courts generally defer to agencies.[35]

Together, these substantive and procedural requirements add up to a complete repeal of the OCC's preemption regulations.

c. The OCC's Proposed Regulations Violate the Requirements of the Dodd-Frank Act

[31] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(1)(B).

[32] Joint Explanatory of the Committee of Conference, H. Rept. 111-517 at 875 (June 29, 2010).

[33] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(3)(B).

[34] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(c) (emphasis added).

[35] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(5); *see* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Evaluating the OCC's proposal in light of Dodd-Frank Act requirements is telling. The proposed regulations violate numerous provisions of the Act.

(i) The Proposed Regulations Violate the Ban on Field Preemption and the Requirement for Case-by-Case Preemption Determinations

The OCC's proposal to continue its broad preemption regulations with only modest changes violates the ban on field preemption and the requirement for case-by-case preemption determinations.

The deposit-taking regulation would continue to state that a "national bank may exercise its deposit-taking powers without regard to state law limitations concerning" the identical list of categories that are currently preempted: abandoned and dormant accounts; checking accounts; disclosure requirements; funds availability; savings account orders of withdrawal; state licensing or registration requirements (except for purposes of service of process); and special purpose savings services.[36] While the OCC proposes to delete an introductory sentence to this provision,[37] the OCC makes no changes to the substance of what is preempted and continues to effectively preempt the field of laws affecting deposit-taking.

The non-real estate lending regulation would continue to state that a "national bank may make non-real estate loans without regard to state law limitations concerning" an unchanged list of categories: licensing, registration and reports; creditor requirements for insurance for collateral or other credit enhancements or risk mitigants; loan-to-value ratios; the terms of credit; escrow and impound accounts; security property, including leaseholds; access to, and use of, credit reports; disclosure and advertising; disbursements and repayments; and rates of interest on loans.[38] Except for the deletion of the introductory sentence, this regulation too is identical to the broad field preemption regulation currently in effect.

The real-estate lending regulation would also continue to state that a "national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning" the identical list of categories as before.[39] Those categories are similar to the non-real estate lending regulation, and include mortgage servicing.

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[36] Proposed 12 C.F.R. § 7.4007(b).

[37] The OCC proposes to delete the introductory sentence: "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 deposit-taking powers are not applicable to national banks." 12 C.F.R. § 7.4007(b)(1). The impact of the removal of that sentence is discussed in the next section.

[38] Proposed 12 C.F.R. § 7.4008(d).

[39] Proposed 12 C.F.R. § 34.4(a).

The OCC's proposal would repeal in its entirety only one of the 2004 preemption rules – the one applicable to "incidental" bank powers.[40] We strongly support this repeal, but the OCC must likewise repeal the broad deposit-taking and lending field preemption regulations.

By proposing to continue the broad preemption of state laws affecting deposit-taking and lending, the OCC would violate several Dodd-Frank requirements:

- The OCC continues to preempt the field;
- The OCC has failed to conduct a case-by-case review of particular state laws;
- The OCC has failed to conduct a proceeding with substantial evidence on the record;
- The OCC has failed to analyze what state laws are substantively equivalent to particular ones that are preempted;
- The OCC has failed to consult with the CFPB in extending preemption beyond particular state laws to equivalent ones.[41]

As discussed in the next section, the OCC also fails to explain how the state laws that are being preempted prevent or significantly interfere with bank powers or otherwise are preempted under the *Barnett* case.

In sum, the OCC ignores every element of the NBA amendments that dictate when the OCC can and cannot preempt state law. Consequently, the continuation of the 2004 preemption regulations, as amended, is outside of the OCC's authority except as authorized by section 1043's grandfather clause. The OCC's regulations are completely inconsistent with the Dodd-Frank Act requirements, which were adopted for the purpose of "undoing broader [preemption] standards adopted by rules, orders and interpretations issued by the OCC in 2004."[42]

(ii) The OCC Has Failed to Apply the Prevent or Significantly Interfere Standard, and the OCC's Application of Barnett Distorts the Congressional Standard

The OCC proposes modest changes to two sections of its regulations: those governing laws that are preempted, and those governing laws that are not preempted. Neither set of changes is sufficient to comply with the requirements of Dodd-Frank. The OCC makes no pretense of applying the prevent/significantly interfere standard, or even the *Barnett* case as interpreted by the OCC, to state laws governing deposit-taking or lending. While it purports to apply the *Barnett* standard to general laws, it fails to incorporate the entire congressional standard.

[40] 76 Fed. Reg. at 30571, removing 7.4009.

[41] Dodd-Frank, § 1044, to be codified at 12 U.S.C. § 25b((b)(1)(B), (b)(3). Though there is a delayed implementation date for specified functions, the CFPB was created as of the date of enactment, Dodd-Frank, §1018, and the Treasury Department has been exercising its early powers until a Director is in place. The OCC could have, but did not, consult with the Treasury CFPB Implementation Team.

[42] S. Rep. No. 111-176, at 175 (Apr. 30.2010) (emphasis added).

Taken together, the OCC's inadequate changes leave the preemption regulations largely untouched, in violation of the new preemption standard.

First, the OCC proposes to delete one sentence in the introductory paragraph of the deposit-taking, lending, and real-estate lending preemption regulations. That sentence currently provides that state laws that "obstruct, impair or condition" a bank's activities are preempted.[43]

Although we support the deletion of these words from the rule, Dodd Frank requires more. The OCC has continued to assert both its ability and intention to apply the broader preemptive concepts those words describe. The OCC asserts that precedent based on the "obstruct, impair or condition" language "remains valid."[44] The OCC's explanation for deleting those words is not that they stated an overbroad standard in light of Dodd-Frank, but rather that they "created ambiguities and misunderstandings."[45]

As discussed above, the rules would continue to preempt the same broad categories of state laws. The OCC merely asserts, with no justification or explanation: "We have reviewed [the OCC preemption rules] … to confirm that the specific rules are consistent with the standard for conflict preemption in the Supreme Court's Barnett decision." The OCC has no basis to categorically pronounce that *any* state law in the listed categories (including, for example, mortgage servicing laws) prevents or significantly interferes with bank powers.[46] The OCC does not even include any basis to support its assertion that its standards are consistent with the *Barnett* decision.

Second, the OCC proposes to amend the language governing state laws that are *not* preempted. Currently, those regulations provide that general laws such as contract and torts laws, and any other law that the OCC determines, are not preempted to the extent that they have only an "incidental" affect on bank powers.[47] The OCC proposes instead that such laws would not be preempted to the extent consistent with the *Barnett* decision.

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[43] The OCC proposes to delete 12 C.F.R. § 7.4007(b)(1) (deposit taking), § 7.4008(d)(1) (non-real estate lending) and § 34.4(b) (real estate lending).

[44] The OCC claims: "This language was drawn from an amalgam of prior precedents …. To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the Barnett case." 76 Fed. Reg. at 30563.

[45] 76 Fed. Reg. at 30563.

[46] For example, the OCC continues to assert that *any* state law governing abandoned and dormant accounts is preempted. The OCC drops a footnote to exclude 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. But there would be no need for that footnote if the general rule were consistent with Supreme Court caselaw. The Supreme Court has reviewed very few state laws and the OCC cannot preempt every state law that has not been upheld by the Court.

[47] *See* 12 C.F.R. §§ 7.4007(c), 7.4007(c)(8), 7.4008(e), 7.4008(e)(8), 34.4(b), 34.4(b)(9).

While we support the removal of "incidental" effect test, the reference to the *Barnett* case alone is insufficient; the proposed regulation nowhere adopts the specific "prevents or significantly interferes" language mandated by Dodd-Frank. Critically, in explaining the omission of the mandatory language from the proposed rules, the agency essentially repeats the same interpretation of *Barnett* that it invoked in promulgating the weaker standard in 2004.

In the Supplementary Information, the OCC denies that "prevents or significantly interferes" *is* the test to be applied, although the statute expressly and unambiguously states that it is. Instead, the agency asserts that *Barnett* allows for "different formulations" and that the specified language is merely "one exemplary formulation." OCC claims that, while that articulation of the prevent/significantly interfere test "may serve as a touchstone or a starting point in the analysis….the analysis may not simply stop and isolate those terms from the rest of the decision."[48] Instead, the OCC claims it is appropriate to look at what it terms as "the whole" of *Barnett* and to consider other formulations of conflict preemption.[49]

The OCC's proposal makes clear that the agency intends to preserve the same degree of power to preempt state laws – whether state consumer financial laws, or laws of general applicability[50] – that the OCC assumed in the past. This approach is not permitted by Dodd-Frank.

Congress directed the OCC to apply *Barnett* as interpreted and directed by Congress, not to parse *Barnett* for alternative formulations. Congress was reacting to the OCC's 2004 claim that the "obstruct, impair or condition" language reflected the "variety of formulations" that the Supreme Court quoted in *Barnett*.[51] Read against the backdrop of the 2004 rulemaking, the OCC's current statement of intent to apply "the whole" of *Barnett* in making its future preemption determinations sounds like a declaration that it will continue to use the same standard it has in the past irrespective of what Congress says. In Dodd-Frank, Congress rejected the OCC's prior reading of the *Barnett* standard. Congress has instructed the agency to use the "prevents or significantly interferes" standard stated in Act, and the agency must now do so.

Statutes must be interpreted to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[52] In deliberating dropping the words "prevent or

[48] 76 Fed. Reg. at 30562-63.

[49] Id.

[50] As discussed in section II(d) below, the Dodd-Frank Act does not give the OCC any preemption power over general state laws.

[51] *See, e.g.*, 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004).

[52] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883); *accord* Safeco Ins. Co. of Amer. v. Burr, 551 U.S. 47, 60 (2007).

significantly interfere" from the *Barnett* reference, the OCC would violate the rule against "rendering superfluous" any statutory language.[53] It was no accident that Congress included that phrase, and it was no accident that it referred to it as "the legal standard" in the singular case.

The OCC has no authority to defy the explicit mandate reflected in the law. The regulation should codify the statutory standard. The final rule, when promulgated in accord with all of Dodd-Frank's procedural requirements, should drop all discussion in the explanatory material that claims or suggests that weaker standards under the OCC's versions of alternative formulations have any continuing validity, except as applied to pre-existing contracts within the scope of Section 1043's grandfather clause.

d. The OCC Has No Authority To Preempt State Laws of General Applicability

The OCC's proposed rules continue to list laws of general applicability, such as contracts and torts, as applicable to national banks.[54] But the regulation appears to assert that state laws, other than those specifically listed, are preempted unless the OCC determines them to be applicable to national banks. As amended, the list of generally non-preempted state laws includes specified categories of general laws, such as contracts, torts, *plus*

> [a]ny other law *that the OCC determines to be applicable to national banks* in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.[55]

However, the OCC has no authority to determine preemption of state laws other than state consumer financial laws.

In Dodd-Frank, Congress clarified where and on what terms state laws are preempted. Apart from the explicit usury preemption provision in the NBA[56] and state laws that discriminate against national banks, the new provisions governing "state consumer financial laws" are the only place in the NBA where Congress specified that state law is preempted or gave the OCC any authority to issue preemption regulations.[57]

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[53] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

[54] *See* 12 C.F.R. 7.4007(c) (deposits); 7.4008(e) (non-real estate lending); 34.4(b) (real estate lending) for categories of state laws that are presumptively not preempted, and therefore applicable to national banks, except as the OCC deems otherwise.

[55] 76 Fed. Reg. 30557, 30571-73 (May 26, 2011) (amending 12 C.F.R. §§ 7.4007(c)(8), 7.4008(e)(8), 34.4(b)(9)) (emphasis added).

[56] 12 U.S.C. § 85.

[57] General principles of statutory construction strongly suggest that Congress' decision to make the scope of OCC's preemptive authority explicit as to only one category of state laws reflects an intent not to extend authority beyond those circumstances. This conscious decision by Congress is especially important against the

Dodd-Frank's silence on laws other than state consumer financial laws cannot be construed as an implicit delegation of authority to preempt such laws. Congress did not address general state laws because the OCC has generally not asserted preemption of those laws. Congress's silence about any preemption of state laws other than consumer financial laws, coupled with its awareness that even the OCC has taken the position that such laws are generally not preempted, is "powerful evidence" that the NBA does not preempt such laws.[58]

State laws other than state consumer financial laws may only be preempted under traditional Supremacy Clause principles. Congress gave the OCC no role in applying those principles. It would be an absurd result to read Dodd-Frank's silence on laws of general applicability to make them *more* vulnerable to preemption, without the substantive and procedural protections that state consumer financial protection laws receive, when there was – and still is – a consensus that banks should comply with such laws.

III. The Visitation Regulations Must Be Revised

The proposed regulations make changes to the visitorial powers regulation, section 7.4000, in response to the changes in Section 1047 of Dodd-Frank. That section addresses the circumstances under which states may take enforcement actions against national banks. Here again, the proposed rule inappropriately changes Congress's terminology, deviating from the statutory meaning. It further fails to make more extensive changes to section 7.4000 that are necessary to conform to the *Cuomo* decision[59] and Dodd-Frank.

The OCC proposes to continue the portion of Section 7.400's general rule that reads: "State officials may not exercise visitorial powers with respect to national banks, such as … prosecuting enforcement actions, except in limited circumstances authorized by federal law." However, *Cuomo* makes clear that "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions.'"[60] State enforcement actions are simply not a visitorial power. Therefore, the visitorial powers rule cannot restrict state enforcement actions to limited circumstances.

The proposed regulation also adds to the lists of visitorial powers: "<u>investigating or</u> enforcing compliance with any applicable federal or state laws concerning those activities."[61] Although the Supreme Court in *Cuomo* held that states may not enforce pre-litigation

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backdrop of the debate over administrative agency preemption generally, *see, e.g.* Nina A. Mendelson, *A Presumption Against Agency Preemption,* 102 Northwestern U. L. Rev. 695 (2008), and the Supreme Court's recent decisions in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and *Cuomo,* both rejecting administrative preemption in those cases.

[58] Wyeth v. Levine, 129 S.Ct. 1187, 1200 (2009).

[59] *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710 (2009).

[60] *Id.* at 2721.

[61] 76 Fed. Reg. at 30562 (proposed 12 C.F.R. § 7.4000(a)(2)(iv).

investigative subpoenas against national banks, it did not hold that every possible type of investigation is prohibited visitation. For example, states could collect complaints from consumers or research the public records without running afoul of the exclusive visitation provision of the NBA. Consequently, a broad rule prohibiting states from investigating compliance with applicable laws is unwarranted and section 7.4000(a)(2)(iv) should be removed in its entirety.

These problems are not cured by adding, as a permissible activity, the following exception to the general rule:

> In accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce a non-preempted state law against a national bank and to seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.[62]

Dodd-Frank amends the NBA to permit states "to enforce an *applicable* law and to seek relief as authorized by such law."[63] The OCC changes the word "applicable" to "non-preempted state law."[64] While the claim at issue in *Cuomo* involved state law, the OCC's past efforts to undermine states' rights to enforce federal law were in mind when Congress specifically chose not just to codify the *Cuomo* case but to use the term "applicable" law, rather than refer solely to non-preempted state laws.[65] The OCC has no authority to change the words that Congress used to narrow the type of state enforcement that Congress authorized. The OCC should replace the words "non-preempted state" with "applicable" to conform its regulation to the statute.

Finally, OCC should delete section 7.4000(a)(2)(iii), which prohibits "regulation and supervision of activities authorized or permitted pursuant to federal banking law." The regulation already bars supervisory activities such as examination of a bank, but the broad bar on any regulation or supervision could be read to preempt state laws and regulations that do not constitute visitation and are not preempted under the Dodd-Frank standard.

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[62] 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b)).

[63] Dodd-Frank § 1047, to be codified at 12 U.S.C. § 25b(i)(1) (emphasis added).

[64] 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b).

[65] *See, e.g. Minnesota ex rel Hatch v. Fleet Mortgage,* 181 F. Supp. 995 (D. Minn. 2001) (OCC filed amicus on behalf of national bank operating subsidiary to prevent state enforcement of federal Telemarketing Sales Rule); Testimony of Prentiss Cox Before U.S. House Rep. Committee on Energy and Commerce, p. 2 n. 2 "*The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC,"* (July 8, 2009) http://republicans.energycommerce.house.gov/Media/file/Hearings/CTCP/070809_Consumer_Financial_Protection_Agency/Cox.Testimony.pdf.

IV. The OCC Appropriately Repeals the Subsidiary Preemption Provision

Congress reversed the Supreme Court and the OCC by directing that operating subsidiaries of national banks are fully subject to state law. The OCC's proposal to repeal 12 C.F.R. § 7.4006 is consistent with that directive and we support it.

V. Conclusion

The OCC's insistence on continuing its broad preemption of state law ignores the mandate of the Dodd-Frank Act. State laws that protect consumers from abusive bank conduct without preventing or significantly interfering with national bank powers are not preempted under the Dodd-Frank preemption standard. The OCC cannot preempt state laws as applied to contracts entered into after July 21, 2010 without following the standards and procedures of the Dodd-Frank Act. The OCC's reaffirmation of its broad preemption regulations without regard to any of the Dodd-Frank limitations cannot withstand scrutiny.

Yours very truly,

Center for Responsible Lending
Consumers Union
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Sargent Shriver National Center on Poverty law