NEGLECT and INACTION
An Analysis of Federal Banking Regulators' Failure to Enforce Consumer Protections

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INTRODUCTION

For too long the responsibility for protecting consumers has been fragmented among various federal regulators whose primary focus was the safety and soundness of the banking system. Consumer protection often went neglected, if anything, an afterthought or a box to check. Federal regulators' failure to restrain abuses that led to today's credit crisis demonstrates the need for a single agency focused on protecting consumers to ensure financial institutions flourish in a sustainable way. To succeed in protecting consumers, this agency must have the complete set of tools necessary, which are now spread across different agencies. This agency will need: the power to write rules, the ability to examine all financial institutions to ensure they are complying with the rules, and the power to enforce the law when those rules are violated. A consolidated single agency focused on consumer protection will also benefit financial institutions. Financial institutions will be able to rely on a single baseline of protections for all providers, which will eliminate regulatory arbitrage on one hand and a race to the bottom to compete with the worst lenders on the other.

Congress is considering creating such an agency, the Consumer Financial Products Administration (CFPA).

The Three Agencies That Failed to Protect Consumers

The failure of the bank regulators to protect consumers is a systematic problem that has stretched over at least several decades. The fix must involve a complete overhaul of the existing system for protecting consumers. Two of the frontline federal bank regulators, the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC), have come to view banks as customers rather than entities to be regulated. Regulators at these agencies, which rely on fees from the banks they charter and regulate, have been reluctant to take actions that could cause an institution to switch to another charter and regulator, thereby taking their fees with them. In this classic race to the bottom, each agency has defended practices that hurt consumers. Worse, the regulators not only failed to act, they intervened to prevent state authorities from acting to stop such practices.

The Federal Reserve, which is the primary writer of rules to protect consumers, has a similar record. It waited more than 14 years to implement rules Congress gave it to address unfair and deceptive trade practices in the mortgage lending market and has missed many opportunities to act on behalf of consumers to prevent abusive financial practices in other areas.

Frederic Mishkin, former Fed Board governor who recently testified before Congress, has acknowledged that the demands of systemic regulators and those of consumer protection regulators need to be separate to ensure that both needs are adequately met, stating “The skills and mindset required to operate as a consumer protection regulator is fundamentally different from those required by a systemic regulator."[1]

Analysis of Banking Regulators’ Failures in Enforcing Consumer Protections

The following analysis provides examples of federal regulators' failure to enforce existing consumer protection regulations. The results, as even a quick reading of news headlines over the last 18 months shows, have been devastating for millions of Americans, stripping families of hundreds of billions of dollars of wealth and, thus, denying them the financial security necessary to send a child to college, start a small business, or retire.

The examples below are hardly an exhaustive list. Rather, they are representative of the regulatory lapses that have nearly broken our financial system. Though the Federal Reserve played a major role in this grim record, we have focused on examples from the OCC and the OTS as the two agencies that most aggressively blocked state officials from passing and enforcing laws to protect their residents from unfair and deceptive financial practices.

Failures on Rules and Exam Guidance

The agencies failed to enact rules and exam guidance on predatory mortgage lending and when they did act, those rules were often too late or not enforced.

Subprime lending, and the abuses that accompanied it, began in the 1990s and peaked from 2005-07. However, regulators were slow to act with respect to the mortgage market despite an epidemic of weakened underwriting standards for all loans, particularly subprime and nontraditional loans.

- A 2005 OCC survey of credit underwriting practices found a “clear trend toward easing of underwriting standards as banks stretch for volume and yield,” and the agency commented that “ambitious growth goals in a highly competitive market can create an environment that fosters imprudent credit decisions.” In fact, 28% of the banks eased standards, leading the 2005 OCC survey to be its first survey where examiners “reported net easing of retail underwriting standards.”[2]

- Despite the 2005 survey, the agencies took an additional two years to issue interagency guidance on underwriting or purchasing subprime loans. The agencies issued joint guidance on underwriting nontraditional loans in late September 2006, a full nine months after they first solicited comments on proposed guidance on that topic.[3] It is unclear to what degree the nontraditional guidance was enforced as lax underwriting standards continued in the nontraditional market until the market collapse.[4] While the agencies explicitly required lenders to evaluate a borrower's ability to repay a nontraditional loan based on the fully indexed rate and based on a fully amortizing repayment schedule, they did not implement similar explicit rules for subprime loans for another 10 months, finally issuing parallel guidance on underwriting subprime loans in July 2007.[5]

- Even without the new guidance, the regulators could have used rules already in place to at least mitigate the impact of subprime lending, but failed to act. The agencies did issue guidance as early as 1999 on subprime lending,[6] with a second guidance in 2001 that explicitly described predatory lending as including: "Making unaffordable loans based on the assets of the borrower rather than on the borrower's ability to repay an obligation…"[7] Despite these guidances, however, there is little evidence of cases where the agencies prevented lenders from devising new products that failed to evaluate the borrowers' ability to repay the loan.[8]

- Under the OCC's watch, national banks moved aggressively into risky "Alt-A" low-documentation and no-documentation loans during the housing boom.[9] A 2004 OCC rule prohibiting the origination of unaffordable mortgages "was vague in design and execution, allowing lax lending to proliferate at national banks and their mortgage lending subsidiaries through 2007," law professor Patricia McCoy has testified.[10] Big national banks continued rolling up huge volumes of poorly underwritten subprime loans and low- and no-documentation loans. For example, in 2006 more than 62 percent of the first-lien home purchase mortgages made by National City Bank and its OCC-supervised subsidiary, First Franklin Financial, were high-priced subprime loans. As these loans began to go bad in large numbers in 2007 and 2008, National City Corp. reported five straight quarters of net losses. It was saved from receivership only by a "shotgun marriage" to PNC Financial Services Group.[11]

- Fourteen years ago, Congress required the Federal Reserve Board (the Board) to prohibit mortgage lending acts and practices for all originators that are abusive, unfair or deceptive, but the Board took no action until July 2008 — even though borrowers, state regulators, and advocates repeatedly raised concerns about abuses in the subprime market, and hard evidence demonstrated the destructive results of abusive practices.[12]

Failures to Enforce Consumer Protection and Fair Lending Laws

The OCC and the OTS have failed, again and again, to use the regulatory and enforcement tools available to it to rein in bad practices and irresponsible lending.

- ***Fair lending enforcement inaction.***

- From 1987 to the present, the OCC brought only four formal enforcement actions under Equal Credit Opportunity Act, 15 U.S.C. § 1691c(a)(1)(A), and its implementing regulation, and from 2000 to 2008, the OCC made no referrals under ECOA to the U.S. Department of Justice of matters involving race or national origin discrimination in mortgage lending.[13]

- OCC inaction is even more troubling given the evidence of potential discrimination among national banks. For example, studies show national banks routinely originated a disproportionate number of subprime loans among minority borrowers. For example, one study found that national banks were 4.15 times more likely to make higher-cost refinance loans to African-Americans than they were to make higher-cost loans to white borrowers.[14] In addition, two former Wells Fargo employees have signed declarations that the bank's sales staffers steered minorities into high-cost subprime loans.[15]

- Although the OTS has recently increased the number of ECOA referrals to the DOJ, from 2000 to 2006 the OTS made no referrals for race or national origin discrimination in mortgage lending. Despite the lack of referrals, in 2002 DOJ filed a complaint alleging that Mid America Bank, an OTS-regulated bank, engaged in a pattern or practice of redlining on the basis of race. Among the allegations made by DOJ was that 34-branch Mid America had never opened a full-service branch office in a census tract with a majority African-American or majority African-American/Hispanic population. The complaint also alleged that the bank made nearly $6 billion in single-family residential real-estate loans between 1996 and 2000, but that only 1% of that amount went to census tracts with majority African American populations.[16]

• ***Consumer protection enforcement inaction***.

- The OCC did not exercise its consumer protection authority to address unfair and deceptive practices under the FTC Act for *twenty-five years.*[17] The OCC's first action using its power to go after banks' unfair and deceptive practices came only after a decade in which the target bank "had been well known in the … industry as the poster child of abusive consumer practices" and after the OCC was "embarrassed … into taking action" by a California prosecutor.[18]

- Between 2000 and 2008, as the mortgage market grew wildly and abusive practices against homeowners flourished, the OCC took exactly *two* public enforcement action against banks for unfair and deceptive practices in mortgage lending – both against small Texas banks.[19]

- The OCC's enforcement record is also thin when it comes to credit cards, bank accounts and other consumer concerns. From 1997 to 2007, the

Federal Reserve Board reported just nine formal enforcement actions against banks by the OCC under TILA.[20] An academic researcher found that most OCC actions regarding violations of consumer lending laws have targeted small national banks – even though "ten large banks accounted for four-fifths of all complaints" received by the OCC's Customer Assistance Group in 2004.[21] The Customer Assistance Group receives roughly 70,000 complaints and inquiries each year on consumer issues.[22] Despite the hundreds of thousands of complaints and inquiries it fielded between 2000 and 2008, the OCC took just *a dozen* public enforcement actions during this span for unfair and deceptive practices relating to home mortgages, credit cards and other consumer loans.[23]

- ***Ignoring servicing abuses.*** A Louisiana bankruptcy judge has issued a series of rulings that Wells Fargo violated the law in a "systematic" manner in how it handles consumers' mortgage accounts by failing "to notify borrowers of the assessment of fees, costs, or charges at the time they are incurred." She also found that Wells' mortgage servicing operations charged unjustifiable fees, including multiple late fees based on a single late payment, and misapplied consumers' monthly payments by deducting late fees before applying payments to principal and interest.[24] While the Federal Trade Commission has recognized the abuses present in mortgage servicing and taken enforcement actions in recent years to crack down on such abuses by the non-bank entities it regulates, the OCC has done little to address such abuses, even though the Louisiana federal court rulings make it clear national banks are not immune from such improper behavior.

- ***Case study: A First Union borrower's story.*** The case of Dorothy Smith, a 67-year-old homeowner is East St. Louis, Ill., illustrates the OCC's lack of concern for consumers. As described in a 2007 article in the *Wall Street Journal*, Ms. Smith, who was living on $540 month in government benefits, was taken in by a home repair contractor and a mortgage broker who landed her in a mortgage from First Union National Bank. The loan contract required her to pay two-thirds of her income – $360 a month – for 15 years, followed by a balloon payment of more than $30,000. After receiving Ms. Smith's complaint about First Union, the OCC brushed her off, saying that it couldn't intercede in a "private party situation regarding the interpretation or enforcement of her contract. . . . The OCC can provide no further assistance."[25]

- ***Ignoring abusive preacquired account marketing programs.*** Numerous national banks have taken part in abusive "preacquired account marketing programs," in which banks provide third-parties, such as telemarketers, with personal information about credit card or mortgage account holders and their accounts to use in targeted marketing for usually low-value, high-margin add-on products. In addition, such programs potentially leave account holders vulnerable to unauthorized withdrawals from their accounts by unscrupulous vendors. State attorneys general have pursued these unfair and deceptive practices vigorously against all the participants in these schemes, including major OCC-regulated national banks Chase, Citi, and First USA-Bank One.[26] The OCC, by contrast, not only failed to uncover such abuses in its supervision of these entities, but affirmatively went to court in 2001 to try to prevent states from protecting consumers against such abuses by national banks.[27]

- ***Weak response to bank that aided telemarketing fraud.*** Evidence came to light in late 2006 as part of a Department of Justice prosecution of telemarketing fraud that Wachovia might be facilitating the fraud by turning a blind eye to highly questionable "remotely created checks" that the fraudsters were depositing.[28] Wachovia continued to do business with the fraudsters despite a huge rate of charge-backs (a fraud red-flag), and warnings by its own risk management staff (advising the bank to sever the relationship despite the loss of a revenue-generating customer), by other banks, and even by the Social Security Administration.[29] OCC examiners apparently did not discover Wachovia's extensive relationships with the fraudsters during their own investigation, but only pursued an expanded inquiry after being informed of the extensive relationships by private attorneys for the fraud victims and prosecutors.[30] Additionally, the OCC's initial settlement with Wachovia provided a cumbersome and lengthy claims process that would have left many harmed consumers without restitution and would have allowed Wachovia to retain any unclaimed funds. Only after lawyers for the victims, joined by three members of Congress as amici, went to court objecting to this settlement did the OCC amend the settlement to provide for direct restitution payments to the victims.[31]

- The OCC has repeatedly defended its thin public record of enforcement by claiming, in essence, that it takes care of problems in the privacy of the home. Indeed, the OCC conceives of secrecy, rather than transparency, as a virtue of its consumer protection efforts.[32] Far from providing the kind of transparency that brings accountability, the agency's message instead is to tell consumers, in short: "Trust Us."[33]

Aggressive Preemption of State Law and State Law Enforcement

In contrast to their lack of consumer protection and fair lending enforcement, the OCC and OTS have been aggressive in preempting state law and preventing state attorneys general from enforcing non-preempted state laws against national banks and thrifts. The two agencies' general pronouncements on preemption are well known. Below are specific examples of how their conduct has undermined consumer protection.

- The OCC did more than allow National City's aggressive expansion into risky lending (see above), it also shielded National City from state law enforcement. At the request of National City Mortgage, the OCC stopped a Washington State inquiry into its mortgage practices in 2002.[34] The following year the parent, National City Bank and its subprime operating subsidiary First Franklin, successfully sought an OCC ruling exempting national banks from state anti-predatory mortgage lending laws.[35] Six years later First Franklin made the OCC's own list of the "Worst Ten in the Worst Ten"—the originators with the largest number of foreclosures in the metropolitan areas with the highest foreclosure rates.[36]

- Rather than enforcing the fair lending laws, the OCC has expended substantial resources in preventing state attorneys general from enforcing state civil rights against national banks and has consistently intervened in lawsuits on behalf of its financial institutions rather than borrowers.[37]. A lending discrimination investigation initiated in 2005 by the New York Attorney General, was still being blocked by the OCC until this June when the Supreme Court ruled that the OCC could no longer prevent New York from enforcing its civil rights laws.

- As a product of the OCC's pronouncements on preemption, a multi-year investigation conducted by the West Virginia Attorney General into abusive credit card practices of Capital One was stopped dead in its tracks in 2008 by the conversion of Capital One into a national bank. A federal district judge determined that the OCC's regulations left him no choice but to block the Attorney General from continuing the investigation—even if the investigation was limited to the time before Capital One became a national bank—although he recognized that Capital One sought "to usurp West Virginia's power to investigate whether national banks have violated West Virginia consumer protection law" and that the West Virginia's Attorney General's "lawful investigation was hijacked by Capital One's conversion to a national bank."[38] The decision forced the West Virginia Attorney General to tell consumers who had complained about Capital One that he was powerless to address their concerns.

- The OCC has encouraged national banks to disregard simple requests about mortgage delinquency and modification rates from state officials seeking to address the foreclosures crises in their jurisdictions.[39] Such data is essential to formulating solutions that keep borrowers in their homes.

Failures on Safety and Soundness Are Linked to Consumer Protection Failures

The OCC and the OTS's desire to protect the institutions they regulate and their reluctance to enforce rules and regulations was not limited to consumer protection. In safety and soundness and other areas, there have been similar lapses. In some instances these lapses also illustrate how a more focused consumer protection agency could have mitigated the scope of the crisis.

- Defenders of the OCC and the OTS have argued that the banks and thrifts under their supervision were largely victims of unforeseeable market downturns. This argument is belied by the superior performances of banking institutions overseen by other regulators. State-chartered thrifts and banks performed significantly better during the crisis in terms of loan quality than OTS-supervised national thrifts and OCC-supervised national banks, FDIC data shows. As of Sept. 30, 2008, the rate of 1-4 family residential loans from national banks that were past due or in "nonaccrual status" was *twice* that of state banks; federal thrifts' rate was *more than four times* that of state thrifts.[40]

- ***Countrywide: A three-part failure.*** The implosion of the nation's largest mortgage lender is instructive, given that three of the main federal regulators – the OCC, the OTS and the Federal Reserve – shared responsibility for overseeing Countrywide Financial and Countrywide Bank. Investigations by CRL and law-enforcement authorities produced compelling evidence that Countrywide targeted borrowers for unfair and unsafe loans that have left many struggling to save their homes.[41] Under the watch of the OCC and, later, the OTS, the company boosted its loan volume by making large numbers of poorly unwritten pay option ARM mortgages and home equity lines of credit—loans that were approved with little scrutiny of borrowers' long-term ability to stay current as monthly payments began to rise.[42] A single agency with oversight over consumer protection in all of Countrywide's entities, including the non-federally regulated lender, would have been much more effective in preventing harm to consumers and the market in general.

- ***Inspector general rebukes.***

    - Reports by the Treasury Department's inspector general have supported the conclusion that the OCC did a poor job of making sure that banks underwrote loans responsibly. ANB Financial failed in 2008 due to risky lending, unsound underwriting and other problems; the inspector general found that the OCC identified most of ANB's problems in 2005, but it "took no forceful action" until 2007, when it was too late to save the bank.[43] The inspector general found a similar pattern in the 2008 failures of FNB Nevada and First Heritage Bank; the OCC knew about problems as early as 2002, and found additional problems in 2005, 2006 and 2007, but failed to take timely and aggressive action to curb the affiliated institutions' risky practices.[44]

    - In 2008, the OTS presided over a flurry of unprecedented financial meltdowns. Five thrifts with assets totaling $354 billion collapsed, led by Washington Mutual Savings Bank, the largest banking failure in American history. Seven others holding assets totaling another $350 billion have been sold or were caught up in their parent companies' bankruptcies. The failures of these institutions – and the harm they caused consumers – were the fruits of years of inaction by the OTS.[45] The OTS turned a blind eye as WaMu, IndyMac Bank and other thrifts engaged in a spree of unsafe, abusive lending.[46] A series of inspector general reports have concluded that the OTS failed to rein in reckless lending practices at the institutions it oversaw. The reports cited serious supervisory shortcomings leading up to the failures of Superior Bank[47] in 2001, NetBank[48] in 2007 and IndyMac[49] and Downey Financial[50] in 2008. The reports criticized the OTS for moving too slowly to respond to obvious problems at the thrifts and for failing to quell the institutions' breakneck lending strategies.

- The inspector general also found that the OTS so pliable in its supervision that it allowed some thrifts to hide the consequences of their imprudent business strategies by falsifying financial reports. The OTS expressly allowed two institutions to backdate capital infusions, and took no action against four others that did so without permission. [51]

- In 2005, a group of senior risk managers crafted a plan requiring that loan officers document that borrowers could afford the full monthly payment on option ARMs. A former bank official told the Washington Post that the OTS signed off on the plan, but "never said anything" after top bank executives rejected the plan.[52]

- ***Weak enforcement on money laundering.*** In another example highlighting the OCC's elastic style of law enforcement, Treasury's inspector general found that agency had failed to take aggressive action against Wells Fargo despite five years of "numerous and recurring deficiencies" in the bank's anti-money-laundering controls. Top OCC officials overruled examiners who recommended tougher action against the bank. The inspector general concluded that "OCC's failure to take formal enforcement action against Wells sent the wrong message to the banking industry about OCC's resolve to ensure that banks comply" with the Bank Secrecy Act's provisions against money laundering.[53]

CONCLUSION

The OTS and the OCC aren't consumer protection agencies. No amount of tinkering with their policies and procedures will change that. Their cultures, their funding streams and their organizational structures make it inevitable that they will tend to side with the institutions they oversee rather than with average consumers or simply focus on issues they view as a higher priority than consumer protection. An agency with a consumer protection mission, accountable to the public, and with the tools to succeed, is the only way to ensure that we do not repeat the mistakes of the past.

About the Center for Responsible Lending

The Center for Responsible Lending (CRL) is a national nonprofit, nonpartisan research and policy organization dedicated to protecting home ownership and family wealth by working to eliminate abusive financial practices. CRL is affiliated with Self-Help, one of the nation's largest community development financial institutions.

For additional information, please visit our website at **www.responsiblelending.org**.

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[1] Subcommittee on Domestic Monetary Policy and Technology Hearing, *Regulatory Restructuring: Balancing the Independence of the Federal Reserve in Monetary Policy with Systemic Risk Regulation*, July 9, 2009, *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/mishkin_testimony.pdf.

[2] Office of the Comptroller of the Currency, National Credit Committee, *Survey of Credit Underwriting Practices 2005*; see also Fitch Ratings, 2007 Global Structured Finance Outlook: Economic and Sector-by-Sector Analysis (December 11, 2006).

[3] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, "Interagency Guidance on Nontraditional Mortgage Product Risks," 71 Fed. Reg. 58609 (Oct. 4, 2006), *available at* http://www.federalreserve.gov/boarddocs/srletters/2006/SR0615a2.pdf

[4] See *In Re Washington Mutual, Inc. Securities Litigation*, No. 2:08-MD-1919 MJP (W.D. Wash) (Former employees allege in the court documents that, well into 2007, WaMu underwrote pay option ARM loans based on the borrowers' ability to afford the low "teaser" payment—and not the full payment that inevitably would cause borrowers' monthly obligations to skyrocket).

[5] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, "Statement on Subprime Mortgage Lending," 72 Fed. Reg. 37569 (July 10, 2007).

[6] Interagency Guidance on Subprime Lending (Mar. 1, 1999), *available at* http://www.fdic.gov/news/news/financial/1999/FIL9920a.html.

[7] 2001 Interagency Expanded Guidance for Subprime Lending Programs (Feb. 2, 2001), *available at* http://files.ots.treas.gov/25137.pdf.

[8] On March 7, 2007, the FDIC did enter a cease and desist order against Fremont Bank that, in part, addressed the lack of underwriting involved in Fremont's subprime loans. The FDIC's action was the rare instance of a regulator taking aggressive action against a subprime lender. Unfortunately, it came after much of the damage by Fremont's loans had already been done. See http://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf

[9] See *Consumer Protections in Financial Services: Past Problems, Future Solutions: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. (2009) (statement of Patricia A. McCoy, Professor of Law, Univ. of Conn.), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=40666635-bc76-4d59-9c25-76daf0784239.

[10] Id.

[11] Id.

[12] See, e.g. Edmund L. Andrews, Fed Shrugged as Subprime Crisis Spread, N.Y. Times (Dec. 18, 2007), available at http://www.nytimes.com/2007/12/18/business/18subprime.html.

[13] Information on OCC's enforcement actions is contained in annual reports that the U.S. Attorney General provide to Congress. See U.S. Attorney General, Annual Report to Congress Pursuant to the Equal Credit Opportunity Act, *available at* http://www.usdoj.gov/crt/housing/housing_special. php.

[14] Cal. Reinvestment Coal., *Who Really Gets Higher-Cost Home Loans?* 3, 18 (2005).

[15] Affidavits by Elizabeth M. Jacobson and Tony Paschal in *Mayor and City Council of Baltimore v. Wells Fargo Bank*, No. 1:08-cv -00062-BEL (D. Md.), Documents 74-16 and 74-17.

[16] See http://www.usdoj.gov/crt/housing/documents/midamericacomp.php
[17] See Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act").
[18] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also* Frontline, *Secret History of the Credit Card*, Transcript at 16-17, http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html.
[19] In 2005, the OCC required that Laredo National Bank set aside $14 million to cover refunds to borrowers who'd been harmed by the bank's home loan practices. In 2003, it required Clear Lake National Bank to provide $100,000 in restitution to borrowers who'd received tax-lien mortgage loans and to review a portfolio of mortgage loans to determine if similar violations existed. See *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 18 (2007) (statement of John C. Dugan, Comptroller of the Currency).; cf. *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 14-15, 18 (2007).
[20] Information on OCC's enforcement actions is contained in annual reports that the Federal Reserve Board provides to Congress. See Board of Governors of the Federal Reserve System, Annual Report, *available at* http://www.federalreserve.gov/ boarddocs/rptcongress/ .
[21] Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 237-52 (2004).
[22] See *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 18 (2007) (statement of John C. Dugan, Comptroller of the Currency).
[23] See OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.gov/Consumer/Unfair.htm.
[24] See *In re Stewart*, 391 B.R. 327 (Brank. E.D. La. 2008); *In re Jones*, 366 B.R. 584 (Bankr. E.D. La. 2007)
[25] Greg Ip & Damian Paletta**,** *Lending Oversight: Regulators Scrutinized In Mortgage Meltdown --- States, Federal Agencies Clashed on Subprimes As Market Ballooned*, Wall Street Journal (Mar.ch 22, 2007).
[26] For instance, Chase entered into a settlement with California and other state attorneys general in 2006 to repay victims of such a scheme $14.5 million. See *People v. Chase Bank USA, N.A.*, No. GIC850483 (Cal. Super. Ct. Dec. 2006), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/2006-12-11_Chase_Settlement_Judgment.pdf.
[27] See *Minnesota v. Fleet Mortgage Co.*, 181 F. Supp. 2d 995 (D. Minn. 2001).
[28] See *United States v. Payment Processing Ctr., LLC*, 461 F. Supp.2d 319, 330 n.11 (E.D. Pa. 2006).
[29] See Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. Times, May 20, 2007, at 1; Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008, at C1.
[30] See Plaintiffs' Memorandum in Support of the Petition for Approval of the Agreed Attorneys' Fees and Costs, *Faloney v. Wachovia Bank*, No. 07-1455 (E.D. Pa.) and *Harrison v. Wachovia Bank*, No. 08-755 (E.D. Pa.) at 3-4, 12, 15.
[31] See Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of the Intervenor Faloney Plaintiff's Motion for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa. May 29, 2008); Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly (Dec. 11, 2008), *available at* http://www.occ.gov/ftp/ release/2008-143.htm.
[32] See *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 131-32 (2007) (written statement of John C. Dugan, Comptroller of the Currency) (explaining OCC primarily ensures consumer protection through "behind the scenes" supervision).
[33] See Stephanie Mencimer, *No Account*, The New Republic, Aug. 27, 2007, at 14.
[34] See Eric Nalder, *Mortgage System Crumbled While Regulators Jousted*, Seattle Post-Intelligencer, Oct. 11, 2008, at A1.
[35] See 68 Fed. Reg. 46,264 (Aug. 5, 2003).

[36] See Letter from John Dugan, Comptroller of the Currency, to Elizabeth Warren, Chair, Congressional Oversight Panel (Feb. 12, 2009) (listing First Franklin and two other significant subprime lenders under OCC's supervision on the list).
[37] See, e.g., *Cuomo v. The Clearing House Association and the* OCC, 129 S. Ct. 1695 (2009).
[38] *Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613 (S.D. W. Va. 2008).
[39] See State Foreclosure Prevention Working Group, *Analysis of Subprime Mortgage Servicing Performance: Data Report No. 1*, at 7 (Feb. 2008), *available at* http://www.csbs.org/Content/NavigationMenu/Home/StateForeclosurePreventionWorkGroupDataReport.pdf.
[40] See McCoy, testimony, *supra*.
[41] See, e.g., *The People of the State of California v. Countrywide Financial Corp.*, Los Angeles Superior Court, June 24, 2008. Available, *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1588_firstamendedcomplaint.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/d9682d50-f6f7-4c18-9b74-dd03bca6cf28/2/hilite/ . Seehttp://ag.ca.gov/cms_attachments/press/pdfs/n1588_firstamendedcomplaint.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/d9682d50-f6f7-4c18-9b74-dd03bca6cf28/2/hilite/; see also *Unfair and Unsafe: How Countrywide's irresponsible practices have harmed borrowers and shareholders***,** CRL Issue Paper (Feb. 7, 2008). Available at http://www.responsiblelending.org/mortgage-lending/research-analysis/unfair-and-unsafe-countrywide-white-paper.pdf .), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/unfair-and-unsafe-countrywide-white-paper.pdf .
[42] Countrywide Financial Corporation, Q3 2007 Earnings Call, Oct. 26, 2007. See; see also Gretchen Morgenson, I*nside the Countrywide Spending Spree*, N.YY. Times (August. 26, 2008)); Gretchen Morgenson & Geraldine Fabrikant, *Countrywide's Chief Salesman and Defender*, N.Y. Times (Nov. 11, 2007).
[43] Office of Inspector General, Department of the Treasury, *Material Loss Review of ANB Financial, National Association* (Nov. 25, 2008) OIG-09-013.
[44] Office of Inspector General, Department of the Treasury, *Material Loss Review of First National Bank of Nevada and First Heritage Bank, National Association* (February 27, 2009) OIG-09-033.
[45] In 2004, as warning signs of dangerous practices in the mortgage market grew, then-OTS director James Gilleran made it clear his agency was determined to keep a pliable attitude toward policing the home lenders: "Our goal is to allow thrifts to operate with a wide breadth of freedom from regulatory intrusion." Between 2001 and 2004, the OTS slashed its staff by 25% and changed its examination structure to emphasize having lenders do "self-evaluations" of their compliance with consumer protection laws. By 2005, the OTS had a new director, John Reich, but the message was similar. When concerns were raised about lenders' lack of concern for borrowers' ability to repay their loans, Reich cautioned that regulators should not interfere with thrifts that "have demonstrated that they have the knowhow to manage these products through all kinds of economic cycles." See Binyamin Appelbaum & Ellen Nakashima, *Banking Regulator Played Advocate Over Enforce*r, Wash. Post (Nov. 23, 2008).
[46] For more details on OTS's regulatory failures, see Michael Hudson and Jim Overton, *The Second S&L Scandal: How OTS allowed reckless and unfair lending to fleece homeowners and cripple the nation's savings and loan industry*, Center for Responsible Lending (Jan. 2009), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/the-second-s-l-scandal.pdf.
[47] See, e.g., *The People of the State of California v. Countrywide Financial Corp.*, Los Angeles Superior Court, June 24, 2008, *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1588_firstamendedcomplaint.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/d9682d50-f6f7-4c18-9b74-dd03bca6cf28/2/hilite/ ; see also *Unfair and Unsafe: How Countrywide's irresponsible practices have harmed borrowers and shareholders***,** CRL Issue Paper (Feb. 7, 2008), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/unfair-and-unsafe-countrywide-white-paper.pdf.
[48] Office of Inspector General, Department of the Treasury, *Material Loss Review of NetBank, FSB* (Apr. 23, 2008) OIG-08-032.
[49] Office of Inspector General, Department of the Treasury, *Material Loss Review of IndyMac*

Bank, FSB (Feb. 26, 2009) OIG-09-032.

[50] Office of Inspector General, Department of the Treasury, *Material Loss Review of Downey Savings and Loan FA* (June 15, 2009) OIG-09-039.

[51] The inspector general discovered, for example, that OTS's western regional director had allowed IndyMac to count money it received from its bank holding company in May 2008 in a quarterly report outlining its financial condition as of March 31, 2008. See Binyamin Appelbaum and Ellen Nakashima, *Regulator Let IndyMac Falsify Report*, Washington Post (December 23, 2008) and Cheyenne Hopkins, *Treasury IG Faults OTS For Allowing Backdating*, American Banker (May 22, 2009).

[52] Appelbaum & Nakashima, *Banking Regulator Played Advocate Over Enforcer*, *supra*.

[53] Office of Inspector General, Department of the Treasury, *Bank Secrecy Act: OCC Did Not Take Formal Enforcement Action Against Wells Fargo Bank for Significant BSA Deficiencies* (Aug. 18, 2006) OIG-06-034.