June 27, 2011

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2–3
Washington, DC 20219

Re: Docket ID OCC-2011-0006

Dear Acting Comptroller Walsh:

The Conference of State Bank Supervisors (“CSBS”) finds it necessary to comment on the proposed preemption revisions to Part 7 of Title 12 of the OCC’s regulations implementing the National Bank Act, Docket ID OCC-2011-0006, RIN 1557-AD41.

In the courts and before Congress and other policy makers, CSBS has long been an advocate of a State-federal balance that recognizes the importance of State authority, especially in the area of consumer financial protection. The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) (“Dodd-Frank Act” or “Dodd-Frank”) has been a key turning point on this issue, re-setting the relationship between the National Bank Act and applicable State law and rejecting blanket preemption that clearly served the interests of this nation’s largest financial institutions to the detriment of consumers and State authority. Unfortunately, in an effort to maintain the status quo, the OCC’s proposed preemption regulations plainly ignore the balance that Dodd-Frank strikes between State and federal laws.

The proposed rule violates both the plain language and statutory intent of Subtitle D of Title X of Dodd-Frank, Preservation of State Law. Given Congress’s clear intent to “undo [the] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004” by “revis[ing] the standard the OCC will use to preempt State consumer protection laws,” the proposed rule turns a blind eye toward the sweeping changes Congress put into place. The OCC’s continued insistence that “obstruct, impair, or condition” is a legally justifiable conflict

1 CSBS is the professional membership organization for State banking regulators from all fifty States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands. Our members currently supervise over 5,500 institutions of all sizes, including most of the small community banks in the United States.
2 While this letter only references preemption for national banks pursuant to the National Bank Act, we recognize that Dodd-Frank establishes an identical preemption standard for federally-chartered thrifts under the Home Owners’ Loan Act, 12 U.S.C. 1461 et seq.
The preemption standard for national banks is disconcerting considering the clear mandate in Section 1044 of Dodd-Frank and the overall stated purpose of Subtitle D of Title X of Dodd-Frank. Similarly, the OCC’s deliberate failure to use statutory language in the proposed visitorial powers rule reflects an unwillingness to follow Congress’s mandate.

We believe the OCC’s proposed rule clearly violates Dodd-Frank’s preemption requirements and undermines the principles of federalism. Accordingly, the OCC should rescind its preemption regulations and proceed as directed by Congress. Failure to do so is to reject Congress’s clear direction to rethink preemption and the appropriate role of both the State and federal players in forming a partnership that is in the best interest of our nation’s economy as well as the individual citizens that our nation’s financial system is supposed to serve.

I. CONFLICT PREEMPTION

The plain language and legislative intent of the law clearly establish that the OCC may preempt a State consumer financial protection law only where the State law “prevents or significantly interferes with the exercise by [a] national bank of its powers.”

The language of the law is clear. A State consumer financial law is preempted only if:

. . . in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers[.]5

Furthermore, Section 1044 of Dodd-Frank sets out the process that the OCC must follow to preempt a State consumer financial law, requiring the OCC to do so on a case-by-case basis.6

The OCC’s proposed rule avoids the clear mandate of Dodd-Frank, incorporating instead an interpretation of the Barnett decision that is nothing short of an effort to preserve a standard that Congress has clearly rejected. The OCC asserts that the “prevents or significantly interferes with” standard is a “touchstone or starting point” for preemption analysis and that it will be guided by the “whole of the Supreme Court’s decision” in Barnett.7 “Prevents or significantly interferes” is certainly a touchstone—as defined in Merriam-Webster, this touchstone is the “fundamental and quintessential part or feature” required by Congress.8 This is precisely why Congress articulated this standard, and to use it merely as a starting point misconstrues Congress’s efforts to scale back the OCC’s preemption authority.

It is difficult to imagine legislators outlining a specific standard with the intent that the standard would be just a “starting point.” Congress could have given the OCC the latitude to develop a

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6 Id.
7 Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 F.R.30562 (proposed May 26, 2011).
preemption standard based on its own interpretation of the “full” *Barnett* decision, but Congress clearly rejected this approach, opting instead to set “prevents or significantly interferes with” as the preemption standard for the OCC to apply. The OCC’s approach ignores the very existence of the “prevents or significantly interferes with” standard clearly articulated in Section 1044(b)(1)(B) of Dodd-Frank.

Furthermore, if Congress intended to preserve the status quo in terms of federal preemption of State consumer financial laws, the statute could have remained silent on the issue altogether. On the contrary, Section 1044 states in the clearest possible language that the OCC’s preemption decisions must be determined in accordance with “the legal standard for preemption” in *Barnett*, which the law expressly defines as whether “the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.”

Throughout Subsection D, Title X of Dodd-Frank, Congress made clear its intent to limit the OCC’s ability to preempt State consumer financial laws and its intent that preemption be the exception, not the rule, when considering the applicability of State consumer financial laws to the activities of nationally chartered institutions. In addition to the plain language of Section 1044 establishing the “prevent or significantly interfere” standard, the law denies the OCC *Chevron* deference in judicial review of its preemption determinations under Section 1044 and requires the more demanding standard of review articulated in the *Skidmore* decision. This is a clear reflection of the higher hurdles that the OCC must overcome in its preemption determinations and of Congress’s intent to narrow the OCC’s authority in this area. Additionally, under Dodd-Frank, valid OCC preemption determinations must be done on a case-by-case basis and must meet a “substantial evidence” standard. Congress’s rejection of the OCC’s prior approach could not be clearer.

The House-Senate Conference Report and the Senate Report both confirm that “prevent or significantly interferes” is the only standard to be applied under *Barnett*. After the Senate passed its version of Dodd-Frank, the House-Senate Conference Committee inserted the “prevents or significantly interferes” standard into the final text. The timing and specificity of this addition are highly significant. “Prevents or significantly interferes” was added to clarify the reference to the *Barnett* decision and to make explicit the standard that Congress intended the OCC to follow. As stated in the Senate Report:

> Section 1044 amends the National Bank Act to clarify the preemption standard relating to State consumer financial laws as applied to national banks . . . . The standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett*, undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004.11

The Conference Report echoes this change, stating that Dodd-Frank “revises the standard the OCC will use to preempt State consumer protection laws. It codifies the standard in the 1996

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Supreme Court case of [Barnett].”12 This juxtaposition makes it abundantly clear that the standard is the single standard in [Barnett] that Congress has codified. The OCC’s interpretation of [Barnett] has been “undo[ne]” and “revise[d];” preemption determinations as of July 21, 2011, must be based on the “prevents or significantly interferes standard.”

In the preamble to its proposed rule, the OCC inaccurately relies on a “colloquy” between Senators Carper and Dodd to support its interpretation of the statute. The OCC posits that “[t]he legal standard for preemption in [Barnett] is conflict preemption and the decision references different formulations of conflict to illustrate and explain the nature and level of interference with national bank powers that triggers preemption.” However, in their exchange, Senators Carper and Dodd maintain that a single standard has been codified. Senator Dodd states that “[t]here should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [Barnett],” and the law explicitly codifies the language “prevents or significantly interferes.”13

Congress clearly identified how the [Barnett] standard is to be used. To declare valid previous amalgamations based on “the whole” of [Barnett] is offensive to Congress’s desire to “[undo] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004.”14 Preserving the status quo does nothing to further the principles of federalism or the State-Federal partnership that should emerge from the framework Congress created in Dodd-Frank.

Preserving precedent established under the “obstruct, impair, or condition” standard violates the substantive and procedural requirements set out in Dodd-Frank.

The precedential rules, interpretations, and orders issued by the OCC under their 2004 preemption standard must be reconsidered under the standards and procedures set out in Dodd-Frank. The OCC argues that Section 1044 of the Dodd-Frank Act codifies any preemption formula that the OCC can extract from [Barnett], and that their previous “obstruct, impair, or condition” standard was based on such an extraction. Therefore, the OCC theorizes, previous OCC rules and precedents based on this standard remain valid under the new Dodd-Frank standard. On the contrary, the clear import of the statutory language is that after July 21, 2011, these issues must be readdressed on a “case-by-case” basis supported by “substantial evidence” that the “prevents or significantly interferes” standard has been met.

The OCC’s proposal ignores this requirement and tries to preserve the very preemption decisions Congress sought to undo, including State Anti-Predatory Lending statutes and other real estate laws that were established to protect consumers and restore market discipline only to be declared preempted for the nation’s largest lenders. Preserving the sweeping preemption decisions of the past undermines the important role that elected and appointed state officials play in recognizing and addressing problems “on the ground.” Denying the States the ability to identify problems as they emerge leaves the financial sector vulnerable and misses the opportunity to rethink the State and federal relationship.

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13 156 Cong. Rec. S5870-02, S5902 (July 15, 2010).
The statutory language clearly requires the OCC to readdress its prior preemption determinations under the new standard. First, Section 1044 of Dodd-Frank states that State consumer financial laws are preempted “only if” the law violates one of the three standards enumerated in that section. Congress’s use of “only if” makes clear that Dodd-Frank’s new preemption standards establish the controlling and exclusive requirements for justifying preemption of State consumer financial laws. Second, the new preemption standards outlined in sections 1044 through 1047 become effective on the transfer date, subject to two carve outs. The two carve outs – preservation of the OCC’s existing preemptive regulation defining “the meaning of ‘interest’” and preservation of contracts entered into before the transfer date – indicate that the OCC’s preemption rules in other areas must be brought into compliance by the transfer date. If Congress intended for existing OCC and OTS preemption rules to apply after the transfer date, these carve outs would not have been necessary.

For the OCC to preserve precedent based on legal principles clearly rejected by Congress is untenable and would nullify all of Congress’s work in crafting the preservation of State law provisions of Dodd-Frank. The law is clear. Congress has removed the OCC’s ability to make sweeping preemption determinations based on a contorted reading of the Barnett decision. To claim that the “amalgam” that Congress sought to overturn is somehow consistent with the new standard set out in Dodd-Frank is at best legally unjustifiable and at worst represents a disingenuous effort to avoid the clear language of the law. The OCC’s previous preemption regulations should be withdrawn, and, according to the letter of the law, each State consumer financial law at issue should be addressed on a case-by-case basis.

II. Visitorial Powers

The plain language of Dodd-Frank clearly establishes the Authority of State Attorneys General to enforce applicable State and federal law.

The OCC’s proposed change to 12 C.F.R. § 7.4000(b) addressing visitorial powers is contrary to the Dodd-Frank Act, the Supreme Court’s decision in Cuomo v. Clearing House Association, L.L.C., as well as the existing language of the National Bank Act. In its preamble, the OCC properly states that Dodd-Frank

expressly codifies the Supreme Court’s decision in Cuomo regarding enforcement of State law against national banks by providing that no provision or other limits restricting the visitorial powers to which a national bank is subject shall be construed to limit or restrict the authority of any State attorney general to “bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.”

However, the proposed rule states that it is not an exercise of visitorial powers where “an action against a national bank in a court of appropriate jurisdiction [is] brought by a State attorney

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15 Dodd-Frank Act § 1044.
16 Dodd-Frank Act § 1043.
17 Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 F.R.30564 (proposed May 26, 2011) (emphasis added).
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 . . . .” “Non-preempted State law” is not the same as “applicable law.” The Dodd-Frank Act and other federal banking laws include provisions that allow State Attorneys General (AGs) to enforce applicable federal law. Most notably, the Dodd-Frank Act authorizes State AGs to enforce CFPB regulations issued under the Consumer Financial Protection Act against national banks. Even the National Bank Act allows State AGs to exercise visitorial powers over national banks to the extent “authorized by Federal law.”

Given the clarity of the statutory language and the OCC’s citation of the language in its discussion, the OCC’s failure to replicate the statutory language in its proposed rule is puzzling. To faithfully implement the language of the law, the final rule should be withdrawn because the statutory language is clear on its face—States may bring an action against a national bank in a court of appropriate jurisdiction to enforce an “applicable law.” To limit State AGs to non-preempted State law by regulation violates the explicit jurisdiction settled by *Cuomo*, Dodd-Frank, and the National Bank Act.

**Dodd-Frank confirms the authority of the State Attorneys General to enforce compliance with certain federal laws, prosecute enforcement actions, and perform investigations.**

As discussed above, the Dodd-Frank Act and other federal banking laws include provisions that allow State AGs to enforce applicable federal law. This includes enforcement of CFPB regulations issued under the Consumer Financial Protection Act against national banks and other areas authorized by Federal law. Despite this statutory mandate, the OCC has not proposed to rescind its regulation defining visitorial powers as “[e]nforcing compliance with any applicable federal or state laws concerning those activities.” This regulation is out of date and must be rescinded.

In *Cuomo*, the Supreme Court explicitly excluded prosecutorial enforcement actions from the definition of visitorial powers. In adopting the holding in *Cuomo*, Congress confirmed the authority of State Attorneys General to engage in prosecutorial enforcement actions. Accordingly, the OCC must rescind its regulation that states, “State officials may not exercise visitorial powers . . . such as . . . prosecuting enforcement actions, except in limited circumstances authorized by federal law.” This is contrary to the explicit language of *Cuomo*, which Congress understood to be the proper policy and application of the National Bank Act. By law, State Attorneys General are not exercising visitorial powers when prosecuting enforcement actions, therefore this regulation must be withdrawn.

Further, the OCC’s proposed addition of “investigating” into the definition of visitorial powers and limitation of attorney general authority to “actions” are both blatant efforts to limit State Attorneys General in a manner inconsistent with both *Cuomo* and Dodd-Frank. In the proposal, “investigating” is added to the list of activities that are considered visitorial powers. The proposal also implements *Cuomo* as an exception to visitorial standards, but only when an

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18 *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710, 2721 (2009) (“the Comptroller erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions.’”).
19 12 CFR § 7.4000(a)(1).
Attorney General takes an “action” against a national bank. Combined, these provisions of the proposed rule attempt to eliminate the States’ ability to discover violations of applicable State and federal law. States routinely receive complaints about national banks, and to classify standard enforcement procedures as visitorial powers prevents a State from tracking problems and referring them to the attorney general for action.

State Attorneys General clearly have the authority to investigate compliance with applicable federal or state laws. Promulgating a broad rule prohibiting investigations is unfounded legally and ignorant of the role of financial regulators. The OCC should be concentrating on remedying problems that are reported to the States, not preventing the States from acting on complaints received from their citizens. Congress adopted Cuomo to affirm the authority of State Attorneys General to prosecute enforcement actions, and all of the OCC’s proposed regulations upending this authority must be withdrawn as a matter of law and policy.

State Attorneys General are key components of effective financial regulation and consumer protection. To attempt to limit their authority by changing the explicit wording of Supreme Court decisions and federal law shamefully disregards their role in working with other authorities to protect the integrity of the financial system.

III. Preemption Policy

In the wake of the financial crisis, there is a plethora of evidence that broad preemption is simply not good public policy. Understanding local markets and business practices requires a strong presence in the community. Given the size of national banks and their regulators, it is managerially impossible to monitor safety and soundness and consumer compliance across the 50 States, District of Columbia, Puerto Rico, Guam, Northern Mariana Islands, and Virgin Islands. While banking becomes increasingly national and international, the core functions still occur at a local level that requires local oversight. The Constitution established a federalist system to balance local and national priorities, and a return to a more balanced State-federal regulatory regime in the exercise of bank regulation would greatly improve our financial system.

State consumer financial laws are not passed to deter national banks and thrifts from engaging in proper banking activities. To do so would frustrate the purpose of a federalist system. For the banking regulatory system to be successful, both the federal and State regulators must respect this system. Instead, the OCC’s broad preemptive actions frustrate State laws that are enacted in response to locally identified needs and priorities. As this relates to mortgages in the recent financial crisis, Congress’s view is very clear:

Where federal regulators refused to act, the States stepped into the breach. In 1999, North Carolina became the first State to enact a comprehensive anti-predatory law. Other States followed suit as the devastating results of predatory mortgage lending became apparent through increased foreclosures and disinvestment.

Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them. In 1996, the OTS preempted all State lending laws.
The OCC promulgated a rule in 2004 that, likewise, exempted all national banks from State lending laws, including the anti-predatory lending laws. At a hearing on the OCC’s preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC.\textsuperscript{20}

These actions removed an extra layer of regulatory protection. State officials have a unique expertise in local banking practices and local markets, which makes them uniquely situated to recognize and act upon consumer financial protection issues.

Preemption of State legislative and regulatory authority eliminates the possibility of a partnership where federal regulators can look to the States for information regarding local developments that might not be apparent in supervision directed by officials in Washington, D.C. State authority in consumer financial protection and other areas is no accident. As the 2009 Executive Memo on preemption states,

\begin{quote}
Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”
\end{quote}

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Dodd-Frank reaffirms this principle and recognizes that, in the run-up to the financial crisis, the states were hampered in exercising the role that Justice Brandeis described so eloquently. The uniformity that federal standards create and the national markets that this uniformity promotes can and should thrive in collaboration and coordination with state authority to respond to local opportunities and challenges.

IV. CONCLUSION

Preservation of State law is not an area that should be undermined through regulation in order to shield national banks from exposure to State laws. Rather, State laws and initiatives should be welcomed as an opportunity for national banks and their regulators to understand the communities these institutions serve. The plain statutory mandate included in Dodd-Frank should be taken as an opportunity to coordinate with State authorities to improve oversight of all banking systems, regardless of charter and size. CSBS supports coordinated regulation in order to promote modernization of financial services, healthy competition among providers, and greater availability of financial services to the public. As currently written, the proposed rule ignores both Congress’s clear mandate for the OCC to rescind its existing body of preemption

rules and the opportunity to engage constructively with States to work toward substantive uniformity that reflects the new State-federal alignments embodied in Dodd-Frank.

Sincerely,

Neil Milner  
President & CEO