Financial Services and E-Commerce

OCC Preemption: Advancing Regulator Competition

*By Charles M. Miller**

As a rule, I dislike federal preemption. I prefer the republican capitalism of 50 states competing to create the most attractive legal framework for individuals and corporations to live and operate under. This same rationale leads me to *favor* broad federal preemption for national banks. In banking law, preemption leads to more regulatory competition.[1]

Originally, states chartered banks. A bank was only authorized to transact business in the state where it was chartered. Bank notes issued in one state were not readily useable in other states. Our modern banking structure is rooted in the National Bank Act of June 3, 1864. What makes our banking system unique is a bank's ability to elect to operate under a federal or state charter. A bank chartered under federal law is called a national bank. A national bank receives its powers from the federal government through 12 U.S.C. 24. A state bank receives its powers from the state where it is chartered. The key feature of the dual banking system is that national banks are overseen by a federal regulator, the Treasury Department's Office of the Comptroller of the Currency ("OCC"), while state banks are regulated by the individual states.

Federal preemption of state banking law for national banks came to the forefront on January 13, 2004 when the OCC issued two sets of final rules. The first clarified interpretation of 12 U.S.C. 484 and addresses which entities possess visitorial powers over national banks, and defined the extent of those powers.[2] The second enacts new "predatory lending"[3] regulations and expressly codifies which areas of banking law are and are not preempted.[4] Combined, these regulations show the clear intention of the OCC to assert itself as the exclusive regulatory authority for national banks. During the rulemaking process, state attorneys general, state banking regulators and consumer advocates submitted comments opposing the new rules. Democrat Senators called for the OCC to delay the rule making process until Congressional hearings could occur.[5] The OCC ignored the request and finalized the rule on January 13, 2004.

Fifteen days later, the U.S. House Banking Committee's Subcommittee on Oversight and Investigations held a hearing on the new rules. The Senate held its own hearing on February 5, 2004. Many members, mostly Democrats, expressed outrage that the OCC enacted the rules without express congressional approval. Rep. Sue Kelly (R-NY), chair of the House subcommittee, went so far as to threaten to instill a "culture of change" into the OCC.[6] House Democrats chastised the OCC and questioned its resources to enforce the new rule in an amendment to the Financial Services Committee's Fiscal Year 2005 Budget Report.[7] Resolutions were introduced in both houses to disapprove the regulations, but were not acted upon in a timely fashion.[8] If history is any guide, inaction will prevail and the regulations will remain in force.[9] The likelihood of inaction is bolstered by the House Financial Services Committee chairman's support for OCC's position.[10] Absent a seismic shift at the polls this November, there is little chance that Congress will override of the new rules.

I. Preemption Standards & Predatory Lending

The OCC's new preemption and predatory lending rules do two things. First, they establish anti-predatory lending regulations applicable to national banks. Second, the rules codify a standard for determining when state law is preempted. Most critics of the new rule focus upon the preemption of state predatory lending laws. If the OCC had preempted state predatory lending laws without establishing its own rule, a void would have been created, for which legitimate complaints could be raised. The OCC, however, promulgated its own predatory lending rules governing national banks.

A. Preemption

The OCC's preemption regulations codify case law setting forth preemption rules. The OCC promulgated separate rules applicable to deposit taking,[11] non-real estate consumer lending,[12] national banking operations,[13] and consumer real estate lending.[14] The four rules are nearly identical. Each expressly preempts "state laws that obstruct, impair, or condition a national bank's ability" to fully exercise its powers granted by 12 U.S.C. 24. The rules expressly do not preempt state laws relating to contracts, torts, criminal law, property law, zoning, taxation, and the right to collect debts. These types of laws do not regulate banking, but "establish the legal infrastructure that makes practicable the conduct of that business."[15] The "legal infrastructure" is the background of laws that establish an orderly society and only incidentally relate to banking.[16] By listing these laws as not preempted, and explicitly reserving any banking or banking related law to the states, the OCC implicitly shows how

thoroughly it intends to occupy the field of regulating national banks.

The states, in contrast, view the duel banking system to be one where each bank "is subject to both federal and state law".[17] They argue that state laws and state enforcement merely compliment federal oversight.[18] Never before has a banking statute or regulation provided such an express statement of preemption. The OCC preemption rules, however, are not groundbreaking. "National banks have been national favorites."[19] The Court and the OCC believe the "very core of the dual banking system is the simultaneous existence of different regulatory options that are not alike in terms of statutory provisions, regulatory implementation and administrative policy."[20] The OCC justifies the preemption because "the variety of state and local laws that have been enacted in recent years—including laws regulating fees, disclosures, conditions on lending, and licensing—have created higher costs and increased operational challenges."[21] It concludes the dual banking system "is under attack" by state attempts to legislatively and administratively regulate national banks.[22]

The attorneys general admit that "under this dual system, federal authorities have overseen the business activities of national banks. . . ."[23] The Court recognized, "the 'business of banking' is not limited to the enumerated powers in [12 U.S.C.] § 24 Seventh and . . . the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."[24] "So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state laws."[25] The OCC decided to issue its preemptive regulation because it determined the national banks ability "to operate under uniform standards of operation and supervision[, which] is fundamental to the character of their national charter," has eroded at the hands of state legislators.[26] The question is not whether the OCC's determination is correct. The rule is reasonable. The OCC has the discretion to promulgate it.

<u>1. The Standard: Obstruct, Impair or Condition</u>

Critics of the preemption rules focus the brunt of their attack on the standard that preempts state laws that "obstruct, impair, or condition" the exercise of national banking powers. They claim that the OCC regulation preempts more laws than the most recent preemption rule announced by U.S. Supreme Court in *Barnett Bank of Marion Cty., N.A. v. Nelson*. In *Barnett*, the Court summarizes its own precedent on the topic, "[N]ormally Congress would not want States *to forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where * * * doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers."[27] The operative terms in *Barnett* were "forbid", "impair significantly", "prevent" and "significantly interfere".

The OCC cited six Supreme Court cases including *Barnett* as authority for its "obstruct, impair, or condition" standard. The OCC source for "obstruct" is *Hines v. Davidowitz*, which stated, "Our primary function is to determine whether [the state law at issue] stands as an *obstacle* to the accomplishment and execution of the full purpose and objectives of Congress."[28] Although "impair significantly" was used in *Barnett*, the OCC cites the more dated *National Bank v. Commonwealth* as its authority for "impair".[29] *National Bank* held, "[T]he agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or *impair* their efficiency in performing the functions by which they are designed to serve that government."[30] *Barnett* itself cites *Nat'l Bank v. Commonwealth* as the original precedent for the impair standard.[31] *Barnett* is cited as the OCC's authority for "condition."[32] "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."[33]

There is room to criticize the OCC's sources for its "obstruct, impair, or condition" standard. *Hines*, the source for "obstruct" was not a banking case. Although *Hines* addressed preemption in general, the controversy centered upon a state statute governing aliens.[34] To mirror Supreme Court precedent, the OCC should have modified "impair" with "significantly" as done in *Barnett*. The "condition" discussed in *Barnett* was Congress's decision whether or not state law would apply, not a condition imposed by a state. Critics, thus, conclude that the OCC standard permits broader ranging preemption than the language used in *Barnett*.

The Supreme Court stated in *Barnett* that it consistently "interpret[s] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law."[35] This pronouncement echoes *Franklin Nat'l. Bank of Franklin Square v. New York*, which noted that when Congress intends to subject an aspect of national banking to state restriction, it does so expressly.[36] As recently as 2003, the Court stated that it views federally chartered banks as part of "a banking system that needed protection from 'possible unfriendly

State legislation.'"[37] Few legal precedents walk as straight a path as that blazed by national banking law. These holdings all stem from those famous words penned in 1819 that states "have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations" of national banks.[38] While it has not consistently used the same language, the Court has consistently held the regulation of national banking to be the sole providence of the federal government. The "obstruct, impair, or condition" standard adopted by the OCC fits safely within the Court's long standing precedent.

The argument that the OCC's "obstruct, impair, or condition" standard is broader than *Barnett* neglects the importance of the *Chevron* doctrine. The Court defers to an agency's interpretation of a statute the agency is charged with enforcing.[39] The OCC has broad discretion to interpret Federal banking law.[40] An OCC regulation has the same preemptive effect as a Congressional enactment.[41] Courts need not ask whether the new rules track *Barnett*, but only whether the OCC has the authority to enact the regulation and whether the OCC's interpretation is reasonable. The OCC has the authority.[42] The OCC preemption rules is similar enough to *Barnett* that the Court will uphold and hereafter apply the OCC rules when deciding banking preemption issues.

I wish to note that the OCC expressly avoided implementing a regulation preempting the entire field of federal mortgage lending law. Officially, the OCC "concluded that the effect of such labeling is largely immaterial, and thus we [the OCC] decline to attach a particular label to the approach reflected in the Final Rule."[43] This is administrative speak for "we know what we did, but we don't want to admit it." Its disclaimer of field preemption appears designed to blunt criticism and to placate Congress. In reality, the OCC would be quite pleased if its rules were interpreted as field preemption. The effect of the final rules is clear. States may not regulate the banking activity of a federal bank except in areas where federal law specifically implicates state law. The only oversight a state may exercise is to enforce the general legal framework of the state's general laws, *e.g.*, contracts, torts, and zoning. The regulation also allows for state criminal law to apply, but not when the criminal law is especially applicable to banking activities.[44] Thus, despite its reluctance to so admit, the OCC, as authorized by Congress, has occupied the field of federal banking law.

Critics contend that this effective field preemption violates 12 U.S.C. 36(f)(3), enacted as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. It reads, "No provision of this subsection may be construed as affecting the legal standards for preemption of the application of State law to national banks."[45] Subsection (f) addresses when host state laws apply to intrastate branches of national banks. The critics contend that this provision prevents a broad interpretation of the OCC's ability to preempt state laws. However, the statute does no such thing. Section 36(f)(3) expressly states that the subsection should have *no affect* upon preemption analysis. When issuing the regulations, the OCC followed 12 U.S.C. 43, the procedural requirements governing OCC preemption of state law. If Congress intended to limit the OCC's ability to preempt state law, it would have expressly done so in or near section 43. The Court has long supported the notion of banking field preemption.[46] The OCC's preemptive authority will be upheld by the Court.

B. Predatory Lending

As discussed above, the OCC preemption rules expressly preempt state predatory lending laws. Consumer advocates argue that the OCC created a void where consumers are no longer protected from malicious lenders. The OCC responds by quoting an admission by the National Association of Attorneys General that "'most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks.'"[47] The OCC also cites its enforcement action against Providian National Bank[48] and its advisory letters on predatory lending[49] as proof that it "will not tolerate" predatory and abusive lending practices.[50]

The OCC promulgated two new predatory lending rules—one, 12 C.F.R. 34.3(b), applies to consumer real estate lending; the other, 12 C.F.R. 7.4008(b), to all other forms of consumer lending. The rules are nearly identical. Each states that a national bank cannot make a consumer loan "based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms." Each rule also provides, "A bank may use any reasonable method to determine a borrower's ability to repay". These regulations are designed to prevent equity stripping. In addition to the anti-equity stripping regulations, the OCC will enforce federal law banning unfair and deceptive practices, 15 U.S.C. 45(a)(1).[51]

These regulations clearly prevail over contrary state laws. "[T]he entire legislative scheme [of federal banking law] is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the Na-

tional Banking Act."[52] "Where state and federal laws are inconsistent, the state law is preempted even if it was enacted by the state to protect its citizens or consumers."[53] Even when the federal and state laws share the same purpose, "[a] state law . . . is preempted if it interferes with the methods by which the federal statute was designed to reach th[at] goal."[54] Moreover, even prior to the existence of the OCC's anti-predatory lending rules, the OCC determined that state predatory lending laws do not apply to national banks.[55]

1. <u>Federalism</u>

Of course, the preemptive effect of the OCC rules does not make the rules wise. State regulators, attorneys general, and consumer advocates argue that predatory lending is a local issue, best handled locally. The OCC counters that the financial markets are increasingly national (if not international). Many national banks operate regionally or nationwide. The OCC concludes that national banks must be able to operate under the same standard nationwide.

Essentially, the states argue that local regulation is more effective than national regulation. This argument highlights a rationale for federalism—effectiveness—different from the one discussed in the introduction of this article—competition. Often effectiveness and competition are both promoted by federalism. In those cases, not only do states compete to develop the best laws, the states are also best positioned to implement the laws. As addressed in the introduction, regulatory competition is increased by the dual banking system. Therefore, banking law is one of the few areas where the desire to increase regulatory competition does not favor federalism. The states, then, ask us to choose between regulatory effectiveness and regulatory competition. When faced with this choice, competition is always the better option. Competition does not hinder effectiveness; it promotes it. If the states are better regulators of predatory lending, consumers will notice and shun national banks. The national banks and the OCC, in turn, facing the loss of customers and the stigma of being labeled predatory, will be forced to change to attract customers. Competition leads to effectiveness. Market participants demand as much.

The states' argument assumes the states are the best regulators. What if they are not? The OCC rules squarely address the form of predatory lending of most concern to the OCC – equity stripping. Perhaps the OCC's relatively simple rule will prove more effective than more complicated predatory lending laws. Comptroller Hawke put it, "We know that it's possible to deal effectively with predatory lending without putting impediments in the way of those who provide access to legitimate subprime credit…. We believe a far more effective approach would be to focus on the abusive practitioners, bringing to bear our formidable enforcement powers where we find abusive practices."[56] If wrong, the OCC will amend its rules to better address the problem. But if the OCC's rule works, perhaps states with more intricate and costly regulations will find it best to emulate the OCC. Competition works. It deserves to be borne out here.

2. <u>Sub-Prime Borrowers</u>

Some suggest that the OCC rules are weighted in favor of the banks, and against the consumer. However, overly broad predatory lending laws hurt consumers because the laws prevent sub-prime borrowers from accessing capital markets. The OCC rules focus upon the abusive lenders, not the terms of the loan. The rules allow a high credit risk borrower to receive a loan, albeit at an above-market rate, that the borrower would otherwise not be able to obtain. The mantra of consumer advocates is that sub-prime lenders charge higher interest rates to the people who are least able to afford them. This statement is true. However, it does not mean that the lenders are manipulating the sub-prime borrower. The sub-prime borrower is also the least likely to repay the loan, even when the terms are favorable to the borrower. As in all markets, greater risk warrants higher returns. If a bank loses the ability to demand higher returns from the sub-prime borrower, the bank will justly abandon that market. This leads to the sub-prime borrower losing his only loan source. To adopt the mantra of the consumer advocate, the person in most need of money is denied access to a loan. The OCC rule best serves the sub-prime borrower. It allows him access to capital, while protecting him from potential abuse.

3. <u>Reverse Mortgages</u>

The OCC predatory lending regulations appear to prevent national banks from offering reverse mortgages. Popular with the retired, a reverse mortgage is a loan, secured by a home, in which no payment is made until the borrower's death. At that time, the entire loan, with interest, comes dues. Both the bank and the borrower anticipate that the property will be sold in order to repay the loan. The difference between a predatory loan and a reverse mortgage is that in the reverse mortgage context the borrower intends for the property to be liquidated to pay off the loan. The new OCC rules are "intended to prevent borrowers from being unwittingly placed in a situation where repayment is unlikely without the lender seizing the collateral. Where the bargain agreed to by a borrower and a lender involves an understanding by the borrower that it is likely or expected that the collateral

will be used to repay the debt, such as with a reverse mortgage, it clearly is not objectionable that the collateral will then be used in such a manner."[57] With these words, the OCC clarifies that it views reverse mortgages to be permitted under its predatory lending rules. While it is clear that reverse mortgages are permitted by the spirit of the law, I believe that they violate the letter of the law.

Reverse mortgages are impermissible under a strict reading of 12 C.F.R. 34.3(b). The regulation states that a mortgage "shall not" be issued "based predominantly on the bank's realization of the foreclosure or liquidation value" of the home. A reverse mortgage is precisely such a loan. The OCC is correct that because of the borrower's knowledge of the probability of liquidation, a reverse mortgage lacks the objectionable aspects of a predatory loan. However, the regulations do not provide any exception.

The regulations go on to provide, "A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors."[58] While a lender may "use any reasonable method" when assessing a borrower's ability to repay, consideration of the collateral's liquidation value is not permitted. The only room that the rules offer to permit a reverse mortgage is the "other relevant factors" catchall. The borrower's intention to surrender the collateral is certainly a relevant factor. Nevertheless, this "other factor" is not strong enough to outweigh the clear statement that a "national bank *shall not* make a [mortgage] based predominantly on . . . the foreclosure or liquidation value of the borrower's collateral." While a reverse mortgage does not violate the spirit of the predatory lending rules, it does violate the letter. The OCC intends to interpret the rule as not prohibiting reverse mortgages. The courts will probably wag their rhetorical finger at the OCC for poor draftsmanship, but affirm the OCC's interpretation of the rule as reasonable. However, there is the potential for a court to find that the OCC did not provide itself any wiggle room in "shall not."

II. Visitorial Powers

On the same day the OCC promulgated the preemption and predatory lending rules, it also modified its visitorial powers regulation that implements 12 U.S.C. 484.[59] It added as 12 C.F.R. 7.4000(a)(3), "Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law." The OCC also revised 12 C.F.R. 7.4000(b) to clarify the OCC's interpretation of the "vested in the courts of justice" exception to the general rule that only Congress or the OCC may exercise visitorial powers over national banks.

The purpose of the modification to C.F.R. 7.4000 is to "clarify the appropriate agency for enforcing those state laws that are applicable to national banks."[60] According to the OCC, that agency is the OCC exclusively. The rule states that even where state banking law applies to a national bank, the OCC possesses exclusive powers to enforce the state law. For support for its interpretation of 12 U.S.C. 484, the OCC looks to 12 U.S.C. 36(f), which addresses when host state law "regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches" apply to national bank branches. The statute states that any such state law that applies "shall be enforced, with respect to such branches, by the Comptroller of the Currency."[61]

State courts only have authority to exercise power over a national bank to the extent that they would have power over any party before the court in the scope of litigation. The "vested in the courts of justice" exception does not grant to states the authority to implement through courts state laws enforceable only by the OCC. A state agency may file a declaratory judgment—in state or federal court— to ascertain whether a state law applies. Once a law is declared applicable, enforcement is exclusively the purview of the OCC.[62] This rule does not apply to a private civil action, which does not amount to visitation, and may be brought in a state court.[63]

The modification to the visitorial regulation creates no new law. Even prior to the change, the regulation provided, "Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks . . . ." The modification does signify that the OCC intends to assertively prevent states from encroaching upon its territory. State attorneys general have actively pursued high profile enforcement actions in recent years, e.g., actions against Microsoft and "Big Tobacco." The OCC apparently sensed the need to remind the attorneys general where the enforcement boundaries lie for actions against national banks.

III. Conclusion

In recent years, some lenders have adopted abusive practices that can be ruinous to the unsuspecting customer. States, to their credit, have aggressively pursued these lenders. So too has the OCC. At the same time, the OCC has become concerned about how complying with

multiple regulatory standards affect the competitiveness of national banks. It determined the better course to be to adopt one set of predatory lending standards applicable to all national banks.

National banks are perennial national favorites. So too is the OCC a favorite of the Supreme Court. National banks are protected from state regulation through federal statutes, administrative rules, and a long, unbroken line of case law. The Supreme Court recognizes that the OCC is vested with remarkably broad regulatory authority. The Court yields a wide berth to the OCC when interpreting national banking law. It also ensures states do the same. Despite consumer advocates' and state officials' arguments to the contrary, the authority of the OCC to promulgate the preemption, predatory lending, and visitorial rules is not in doubt. Through these rules, the OCC is furthering the very heart of the dual banking system—competing regulators.

In the dual banking system, a bank not only has the option of choosing the state in which to incorporate; once it has chosen a location, the bank can choose a state or federal regulator. Just as one state can enact a regulatory framework different from its neighbor, so too can the OCC adopt a framework for national banks. In criticizing the new OCC rules, Senator Sarbanes approvingly quotes a state banking supervisor, "'The OCC's preemption rule seems to be more about protecting its remaining multistate megabanks or attracting new ones to the fold than about "clarifying" a 140 year old law....The OCC's standard for preemption has been built on a political platform for the promotion of its charter.'"[64] Precisely. Promoting federal charters and attracting new banks to the federal system are legitimate goals of the OCC upheld by the Supreme Court.[65] The dual banking system's regulatory capitalism will ensure a strong and competitive U.S. banking system for decades to come.

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Footnotes

[1] Kenneth E. Scott, "The Dual Banking System: A Model of Competition in Regulation," 30 Stan. L. Rev. 1 (1977).

[2] 69 Fed. Reg. 1895 (2004).

[3] This term is often used pejoratively. In this article "predatory loan" means a loan issued where the lender, who believes that the borrower cannot repay the loan on its terms, issues the loan with the intent of profiting solely from fees, fines, and/or foreclosure. A sub-prime loan is not necessarily a predatory loan.

[4] 69 Fed. Reg. 1904 (2004).

[5] Letter from Senate Banking Committee Democrats to OCC (Nov. 24, 2003).http://banking.senate.gov/index.cfm? FuseAction=Press Releases.Detail&PressRelease_id=158&Month=11&Year=2003

[6] Opening Statement of Subcommittee Chairwoman Sue Kelly, "Congressional Review of OCC Preemption" (January 28, 2004) http://financialservices.house.gov/media/pdf/012804ke.pdf

[7] House Committee on Financial Services, *Views and Estimates of the Committee on Financial Services on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005,* 108th Congress, 2d Sess. 15-16 (2004). http://financialservices.house.gov/media/pdf/FY2005%20Views_FINAL.pdf However, several Republicans who missed the vote voiced their opposition to the amendment, casting doubt over whether the committee will take any action to disapprove the regulations. Id. at 25-26, 39.

[8] S.J. Res. 31, S.J. Res. 32, H.R. 4236, and H.R. 4237.

[9] Marcel C Duhamel, "Predatory Lending and National Banks: The New Visitorial Powers, Preemption and Predatory Lending Regulations," 121 Banking L.J. 455 (2004).

[10] "In my view, the OCC regulations represent a thoughtful attempt to codify and harmonize past legal precedents, and there are many, and regulatory guidance into a coherent framework for resolving conflicts between Federal and State laws as they apply to national banks." Opening Statement of Michael G. Oxley, "Congressional Review of OCC Preemption" (January 28, 2004) http://financialservices.house.gov/media/pdf/012804ox.pdf

[11] 12 C.F.R. 7.4007

[12] 12 C.F.R. 7.4008

[13] 12 C.F.R. 7.4009

[14] 12 C.F.R. 34.4

[15] 69 Fed. Reg. at 1913

[16] "The duties to comply with contracts and the laws governing them and to refrain from misrepresentation, together with the more general provisions of the UCL, are principles of general application. They are not designed to regulate lending and do not have a disproportionate or otherwise substantial effect on lending. To the contrary, they are part of the legal infrastructure that undergird all contractual and commercial transactions. Therefore, their effect is incidental and they are not preempted." *Gibson v. World Savings & Loan Assn.*, 103 Cal.App.4th 1291, 1303-1304 (2002).

[17] M. Maureen Murphy, "Preemption of State Law for National Banks and Their Subsidiaries by the Office of the Comptroller of the Currency," CRS Report EBFIN59 (Apr. 30, 2004)

[18] Comment of Nat'l Assn. of Attys. Gen. at 2 (Oct. 6, 2003) http://www.naag.org/issues/20031006-multi-occ.php

[19] *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412, 21 L.Ed. 862 (1874)

[20] 30 Stan. L. Rev. at 41.

[21] 69 Fed. Reg. at 1908.

[22] Office of the Comptroller of the Currency, *Nat'l Banks and The Dual Banking System* (Sept. 2003) at 1. http://www.occ.treas.gov/DualBanking.pdf

[23] Comment of Nat'l Assn. of Attys. Gen. at 2.

[24] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co*., 513 U.S. 251, 258 n.2, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).

[25] *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983)

[26] 69 Fed. Reg. at 1908.

[27] 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996) (emphasis added).

[28] 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)(emphasis added).

[29] 69 Fed. Reg. at 1910.

[30] 76 U.S. (9 Wall.) 353, 362, 19 L.Ed. 701 (1869) (emphasis added).

[31] 517 U.S. at 33 – 34.

[32] 69 Fed. Reg. at 1910.

[33] 517 U.S. at 34.

[34] "Obstacle" is used in *Barnett*: "the State's prohibition of those [banking] activities would seem to 'stan[d] as an obstacle to the accomplishment' of one of the federal statute's purposes." 517 U.S. at 31

[35] Id. at 32.

[36] *Nat'l Bank of Franklin Sq. v. New York*, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954).

[37] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).

[38] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 436 (1819).

[39] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

[40] "'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.'" *Clarke v. Securities Industry Assn*., 479 U.S. 388, 403-404, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971)).

[41] 710 F.2d at 882-883

[42]See n. 42, supra.

[43] Office of the Comptroller of the Currency, "Preemption Fine Rule – Questions and Answers" at 4-5 (January 7, 2004). http://www.occ.treas.gov/2004-3dPreemptionQNAs.pdf

[44] See, e.g., footnote accompanying 12 C.F.R. 7.4007(c)(3).

[45] 12 U.S.C. 36(f)(3)

[46] "[W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation." *Easton v. Iowa*, 188 U.S. 220, 232, 23 S.Ct. 288 (1903). "[B]rought into existence for this [federal] purpose, and intended to be so employed, the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" *Famers' & Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 34 (1875).

[47] 69 Fed. Reg. at 1914 (quoting National Assoc. of Attys. Gen. comment letter on the propel at 10 (Oct. 6, 2003)).

[48] *In re: Providian Nat'l. Bank, Tilton, NH*, OCC Enforcement Action 2000-53 (June 28, 2000)(Providian consented to a cease and desist order and to pay $300,000,000 in restitution). http://www.occ.treas.gov/FTP/EAs/ea2000-53.pdf

[49] OCC Advisory Letters 2003-2 & 2003-3. http://www.occ.treas.gov/advlst03.htm

[50] 69 Fed. Reg. at 1913.

[51] 12 C.F.R. 7.4008(c) and 34.3(c). 15 U.S.C. 45(a)(1) reads, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

[52] 710 F.2d at 885

[53] *Assn. of Banks in Ins. Inc. v. Duryee*, 55 F. Supp. 2d 799, 802 (S.D. Ohio 1999) (affirmed at 270 F.3d 397 (6th Cir. 2001)).

[54] *Int'l. Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).

[55] 68 Fed. Reg. 46264 (Aug. 5, 2003)

[56] http://www.occ.treas.gov/consumernews.htm

[57] 69 Fed. Reg. at 1911.

[58] E.g., 12 C.F.R. 34.3(b).

[59] 69 Fed. Reg. 1895.

12 U.S.C. 484 provides:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

[60] Id. at 1896

[61] 12 U.S.C. 36(f)(1)(B).

[62] 69 Fed. Reg. at 1900, (citing *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980)).

[63] 69 Fed. Reg. at 1899.

[64] Statement of Sen. Paul S. Sarbanes, "Review of the National Bank Preemption Rules" (April, 07 2004) http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&TestimonyID=547&HearingID=106 (quoting Dudley Gilbert "OCC's Preemption Rule Is About Keeping Market Share" American Banker (Feb. 20, 2004)

[65] "It could not have been intended, therefore, to expose [national banks] to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks." 85 U.S. at 413.