

The New York City Department of Consumer Affairs'
Comments to
Docket ID OCC-2011-0006
"Office of Thrift Supervision Integration; Dodd-Frank Act Implementation"
Submitted to
The Office of the Comptroller of the Currency

June 27, 2011

The New York City Department of Consumer Affairs (DCA) is the largest municipal consumer protection agency in the country, charged with ensuring a fair and vibrant marketplace for New York City's consumers and businesses. DCA collaborates with all levels of government to maintain a transparent and competitive business marketplace by dynamically addressing consumer protection issues. DCA licenses and inspects more than 77,000 businesses in 55 categories, conducts community outreach and public education campaigns, mediates consumer complaints, brings targeted enforcement actions and educates and empowers consumers through its Office of Financial Empowerment. DCA also co-chairs the Cities for Financial Empowerment (CFE) Coalition, a network of eleven cities committed to advancing innovative financial empowerment initiatives locally and nationally.¹

The Office of the Comptroller of the Currency's (OCC's) proposed regulations implement important reforms to federal preemption of state and local laws enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The OCC's rules, however, do not accomplish the important reforms Congress enacted last year. **DCA urges the OCC to revisit its interpretation of Section 1044 of the Dodd-Frank Act and its determination that existing rules, including the sweeping preemption of state laws accomplished by its 2004 Bank Activities Rule², are preserved going forward.**

- The OCC's proposed regulations are inconsistent with Dodd-Frank. The interpretation is plainly inconsistent with the intent of Congress, which in passing the Dodd-Frank Act chose to curb overreaching federal preemption. Section 1044 of Dodd-Frank delineates a clear legal standard to govern the OCC's determinations for preemption of state law. State consumer financial laws are 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*...the state consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."³ Congress did not intend for this *Barnett Bank* standard to maintain or codify the OCC's 2004 Bank Activities Rule. On the contrary, the legislative history of the new Dodd-Frank provision clearly shows Congress' intent to roll back the 2004 rules, specifically stating it was "undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."⁴ Furthermore, the

¹ The CFE Coalition is co-chaired by New York City and San Francisco. Members include Chicago, the County of Hawai'i, Los Angeles, Miami, Newark, Providence, San Antonio, Savannah, and Seattle. For more information about CFE visit www.CFEcoalition.org.

² Bank Activities and Operations; Real Estate Lending and Appraisals, Final Rule, 69 FR 1904 (Jan. 13, 2004)

³ Florida Insurance Commissioner, et al., 517 U.S. 25 (1996)

⁴ Report 111-176, Committee on Banking, Housing, and Urban Affairs, *The Restoring American Financial Stability Act of 2010*, 111th Congress, 2d Session (April 30, 2010), at 175.

Barnett Bank standard requires “case-by-case” preemption determinations⁵, rather than determinations with respect to a field of financial laws, the approach taken in the 2004 rules. According to George Washington University Professor of Law Arthur E. Wilmarth, Jr., the OCC “...deliberately crafted its rules to accomplish a sweeping preemption of state laws that is equivalent to the ‘field preemption’ regime established by the Office of Thrift Supervision (‘OTS’) for federal savings associations and their operating subsidiaries.”⁶

- States and localities are best able to nimbly respond to emerging experiences on the ground. The OCC’s proposed regulations will hinder states and localities from quickly and effectively enacting the needed laws and rules to address the pressing issues faced by their residents long before federal action is taken. New York has a history of passing important consumer protection laws well in advance of federal regulatory or legislative action. In 2002, New York enacted a predatory lending law⁷ to address subprime mortgage lending long before the housing bubble burst. Federal regulatory action in this area followed later, in 2008.⁸ New York also enacted a law prohibiting creditors from garnishing statutorily exempt funds from bank accounts. The Exempt Income Protection Act, passed in 2008, prohibits financial institutions from improperly freezing consumers’ accounts with statutorily exempt deposits, ensuring New Yorkers have access to the money that our elected officials intended to help them meet basic needs.⁹ Federal regulators issued similar regulations in February of this year to address these improper garnishment practices.¹⁰ At the local level, DCA enforces the City’s law regarding required consumer disclosures about tax refund anticipation loans, which has been in effect since 2003.¹¹ The OCC outlined similar disclosure standards in its 2010 “Policy Statement on Tax Refund-Related Products.”¹²

States and localities have on-the-ground working relationships with community members, businesses and consumers and are well-positioned to improve fairness in the marketplace in smart, targeted ways to react to local circumstances. Such state and local efforts are often a result of coordination. For example, as a co-chair of the Cities for Financial Empowerment Coalition, New York City recently has collaborated with our sister cities across the country to respond effectively to debt settlement scams and predatory prepaid debit card products. The proposed OCC rules potentially will undermine a great deal of this work going forward by perpetuating categorical preemption of a range of important state and local solutions.

- Maintaining the OCC’s 2004 Bank Activities Rule will harm states and localities. The OCC’s interpretation of Dodd-Frank maintains a regime of overreaching federal preemption that has undermined state and local consumer protection efforts and has harmed consumers. As the House Committee on Financial Services noted in 2004, “...these rules may represent an unprecedented expansion of Federal preemption authority and a significant expansion of OCC’s regulatory responsibilities to monitor and enforce consumer law compliance.”¹³ The

⁵ Dodd-Frank, Section 1044(b)(1)(B).

⁶ 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 (2004)

⁷ Ch. 626, Laws of New York (2002)

⁸ Lauren Saunders, *Preemption and Regulatory Reform: Restore the States’ Traditional Role as First Responder*, National Consumer Law Center (2009)

⁹ N.Y. C.P.L.R. 5205 (2008).

¹⁰ *Garnishment of Accounts Containing Federal Benefit Payments*, Interim Final Rule, 76 FR 9939 (Feb. 23, 2011)

¹¹ New York City, N.Y., Local Law No. 31 Int. 383-A (2003)

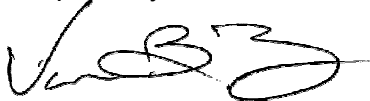
¹² OCC Policy Statement on Tax Refund-Related Products (Feb. 18, 2010), at 2-4

¹³ House Comm. On Fin. Serv., 108th Cong., *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*, at 15 (Comm. Print 2004)

2004 preemption rules have been particularly catastrophic in the context of the mortgage market. Immediately following the promulgation of its 2004 preemption rules, the OCC proposed no increase in budget to step up enforcement efforts, something that the House Committee on Financial Services described as “...impractical given the magnitude of the enforcement efforts now conducted by State agencies of all U.S. States,” specifically citing states’ expansive efforts to address abusive mortgage lending.¹⁴ The predicted deleterious effects of these rules followed. As former New York State Banking Superintendent Richard Neiman described, “states were forced to stand down their enforcement efforts by federal regulators who were asserting preemption and calling for exclusive authority at the federal level.”¹⁵ Research shows that the 2004 preemption rules contributed to the “deterioration in lending standards and a rollback in consumer protection during the subprime crisis.”¹⁶ Consumers and whole communities were devastated because certain lenders were exempted from effective state anti-predatory lending laws, which led to a race to the bottom that resulted in a greater proliferation of subprime, predatory lending.

Keeping the 2004 preemption rules in effect is inconsistent with Dodd-Frank, perpetuates the harms caused by the OCC’s current preemption rules, and undermines responsive regulatory and legislative efforts at the state and local level. Therefore, on behalf of New York City consumers, DCA urges the OCC to amend its proposed rules to fully comply with Congress’s intent that state and local laws are only preempted on a “case-by-case” basis and to no longer apply its overreaching 2004 preemption rules.

Respectfully submitted,



Jonathan Mintz
Commissioner

¹⁴ Ibid., at 16

¹⁵ Richard H. Neiman, Cooperative Federalism in Bank Supervision and Consumer Protection, Remarks before the Exchequer Club (Oct. 13, 2010)

¹⁶ Lei Ding, Roberto K. Quercia, Carolina K. Reid, Alan M. White, The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis, Center for Community Capital (Aug. 27, 2010)