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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

July 13, 2011

VIA EMAIL (kim.wallace@treasury.gov & carrie.moore@occ.treas.gov)

The Honorable Timothy Geithner
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20520

Mr. John Walsh
Acting Comptroller
Office of the Comptroller of the Currency
U.S. Department of the Treasury
Independence Square
250 E Street, S.W.
Washington, DC 20219

RE: OCC Proposed Rules on Preemption, Docket ID OCC-2011-0006, RIN 1557-AD41

Dear Secretary Geithner and Acting Comptroller Walsh:

The Office of the Comptroller (OCC) is relying upon a fundamentally misguided analysis of its revised authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[1] to preempt state laws and restrict state enforcement authority against national banks. In both a May 12, 2011 letter from Acting Comptroller Walsh to Senator Carper[2] and the OCC's proposed rules released on May 26, 2011,[3] the OCC has outlined flawed legal interpretations regarding preemption and visitation for national banks.

The OCC's misinterpretations of the law threaten not only to leave American families and businesses with inadequate consumer protections, but to encourage legal challenges to any rules based upon them that may introduce years of uncertainty on the marketplace. The OCC's misinterpretations are too far afield from the plain meaning of the text, the legislative history, and clear Congressional intent to be afforded regulatory deference.

[1] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[2] Letter from John Walsh, Acting Comptroller of the Currency, to Thomas Carper, U.S. Senator (May 12, 2011).
[3] 76 Fed. Reg. 30557 (May 26, 2011).

The Treasury Department should work closely with the OCC to revise these misguided interpretations so as to conform OCC practices to the Dodd-Frank Act, provide necessary protection to American families and businesses, and provide certainty to the marketplace.

HISTORICAL CONTEXT OF PREEMPTION AND VISITATION AUTHORITIES

For years, national banks have sought federal preemption of states' authorities,[4] arguing that being subject to the vagaries of numerous states' consumer protection laws and enforcement actions is unduly burdensome and unnecessary. Nevertheless, for most of the past 150 years, the states were able to protect their consumers by enforcing their laws against national banks.[5]

Starting in approximately 2001, the OCC began taking numerous actions[6] to aggressively preempt individual states' laws.[7] Then, in 2004, the OCC promulgated new regulations that broadly asserted preemption over states' consumer laws,[8] and limited the powers of states to practically enforce the laws.[9] These regulations reflected the OCC's attempt to exercise – for the first time[10] – what amounted to broad, "field" preemption.[11]

In fact, among the few state laws that the OCC did not attempt to preempt were those in which Congress had expressly incorporated the state-law standards into federal statutes, and those which the OCC determined had only an "incidental" effect on national banks, defining "incidental" narrowly.[12]

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[4] *See, e.g.*, Cheyenne Hopkins, *Banks, OCC Face Uphill Fight Over Preemption*, AMERICAN BANKER, (May 4, 2010)(quoting Ed Yingling, President and CEO of American Bankers Association)("I guarantee the state associations are very concerned about preemption."); *see e.g.*, Letter from E. Kenneth Reynolds, Executive Director, Association of Banks in Insurance, to Office of the Comptroller of the Currency (Oct. 23, 2000)("we urge the [OCC] to broadly apply the 'prevent or significantly interfere' preemption standards").

[5] *See generally* Lauren Saunders, National Consumer Law Center, "Restore the States' Traditional Role as 'First Responder'" (Sept. 2009).

[6] *See, e.g.*, OCC Interpretive Letter #939 on 12 USC 24(7) (October 15, 2001) (available at http://www.occ.gov/static/interpretations-and-precedents/jul02/int939.pdf) (concluding that federal law would preempt some state laws that purport to limit or restrict a national bank from establishing deposit-taking ATMs).

[7] *See, e.g.*, PRELIMINARY DRAFT LIST OF JURISDICTIONS WITH BANK-INSURANCE SALES LAWS THAT APPEAR TO CONFLICT WITH THE GRAMM-LEACH BLILEY ACT (AS OF 12/19/01), AMERICAN BANKERS ASSOCIATION, available at http://www.aba.com/ABIA/Issue_FP.htm.

[8] 69 Fed. Reg. 1904 (Jan. 7, 2004) ("The OCC is adopting this final rule to specify the types of state laws that do not apply to national banks' lending and deposit taking activities ... Other state laws not specifically listed in this final rule also would be preempted under principles of preemption developed by the U.S. Supreme Court, if they obstruct, impair, or condition a national bank's exercise of its lending, deposit-taking, or other powers granted to it under Federal law.").

[9] 69 Fed. Reg. 1895 (Jan. 7, 2004).

[10] *Review of the National Bank Preemption Rules: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 108th Cong. (2004) (testimony of Roy Cooper, Attorney General of North Carolina)("Cooper Testimony") ("[T]hese rules represent a significant change in the federal-state balance in banking regulation that has served us well for many years.").

[11] Cooper Testimony ("In the OCC's view, it is difficult to find any state-based consumer protections that do not impermissibly obstruct a bank.").

[12] See Wilmarth Testimony.

States' administrators and regulators,[13] consumer groups,[14] and experts[15] were alarmed by what they perceived as an unsupported and unwise power grab by the OCC.

While many of us believed the states should be able to protect their citizens from abuses by national banks,[16] what made it worse was that, after preempting the field, the OCC refused to exercise its purported newfound authority in a meaningful way to protect consumers. After taking the state-level cops off the beat,[17] the OCC made sure there were no cops on it.

The predictable abuses that followed – particularly in mortgage lending – contributed to the 2008 financial crisis, and directly led to resolve by Congress and the Administration to revamp the OCC's preemption stance in the Dodd-Frank Act to restore the states' role in protecting consumers from financial abuses.

PREEMPTION LANGUAGE IN THE DODD-FRANK ACT

The preemption language in the Dodd-Frank Act was the result of a very complex negotiation. Initially, the Dodd-Frank Act drafts effectively eliminated federal preemption. In response to concerns raised by many national banks, Senators Corker and Carper jointly proposed revising the Act to include language that, instead of eliminating preemption, would have largely codified the OCC's position.[18]

When they realized that their language had insufficient Senate support to win adoption,[19] Senator Carper drafted a compromise amendment. The Senate voted on both versions.[20] The Carper Amendment, which I supported, was adopted and ultimately included in the Dodd-Frank Act, while the Corker Amendment was defeated.

Although the Carper compromise language included in the Dodd-Frank Act allowed some degree of preemption to continue, those of us who voted for it did so because it significantly reduced the preemptive powers of federal regulators compared to the OCC's approach prior to its enactment. If we had wanted to leave the OCC's purported federal preemptive powers unchanged,

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[13] At the time, the OCC's regulations were opposed by many government organizations, including the National Governors Association, the National Conference of State Legislatures, the Conference of State Banking Supervisors, and the National Association of Consumer Credit Administrators. *See* Cooper Testimony.

[14] Consumer groups ranging from the AARP, the Consumer Federation of America, the Center for Responsible Lending, and the National Community Reinvestment Coalition all opposed the OCC's new regulations. See Cooper Testimony.

[15] *See, e.g.*, Wilmarth Testimony.

[16] *See, e.g.*, Cooper Testimony.

[17] See Cooper Testimony ("Simply put, the OCC rules will eliminate 50 cops from the beat.").

[18] Cong. Rec. S.3868, May 18, 2010 (statement of Sen. Carper) (" Last week, Senator Corker and I and about 11 other Republicans and a number of Democrats joined to offer the amendment he is offering at this time.").

[19] Cong. Rec. S.3868, May 18, 2010 (statement of Sen. Carper) ("When it became clear to me that we were not going to be able to muster the 60 votes to prevail on what was our amendment, we began working with Senator Dodd and his staff--I hope we kept our colleagues in the loop, as we went through the negotiations--to come up with legislation that enables us to get a half a loaf.").

[20] *Compare* S.Amdt 4071, 111th Cong. (2010) to S.Amdt. 4034, 111th Cong. (2010).

Congress could have engaged in a very simple exercise – do nothing. That is plainly not what Congress did.

As a recent letter from Senators Carper and Warner to Secretary Geithner makes clear, "Congress did not accept th[e] position" that federal preemption should be entirely eliminated.[21] Rather than entirely eliminate preemption, Congress eliminated it in most circumstances, and then selectively authorized courts and regulators to find preemption in very limited circumstances.

First, to ensure that the National Bank Act or the Home Owners Loan Act could never be mistakenly relied upon to support broad, field preemption, Congress declared that the title "does not occupy the field in any area of State law."[22] Thus, the *de facto* field preemption that had been asserted by the OCC in beginning in 2004 was explicitly reversed. With respect to when preemption of state consumer financial laws could be asserted, Congress laid out a specific set of mandatory conditions that must be met. Taken collectively, Congress explicitly disallowed OCC preemption of state consumer financial laws in all circumstances other than those that met the narrow circumstances articulated in the statute.[23]

Specifically, Congress provided that state consumer financial protection laws could be preempted only if:

> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
> (B) 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; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
> (C) the State consumer financial law is preempted by a provision of Federal law other than this title.[24]

Because the conditions set forth under (A) and (C) have not yet been a source of controversy, I will focus the remainder of my remarks on (B). This provision lays out two distinct types of conditions, one that focuses on process and one the focuses on substance. Process-wise, in order for preemption to be authorized under (B), the statute states that a court or the Comptroller of the Currency must conduct an individualized, case-by-case analysis in accordance with applicable

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[21] Letter from Thomas Carper, U.S. Senator, and Mark Warner, U.S. Senator, to Timothy Geithner, Secretary of the Department of the Treasury (July 10, 2011).
[22] Dodd-Frank Act § 1044 (amending 12 U.S.C. 21 et seq.).
[23] *See generally* Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Northwestern U. L. Rev. 695 (2008).
[24] Dodd-Frank Act § 1044 (amending 12 U.S.C. 21 et seq.) (emphasis added).

law.[25] This process stands in contrast to the corresponding preemption language in the Financial Services Modernization Act of 1999 ("Gramm-Leach-Bliley Act"), in which Congress itself directly found preemption in certain circumstances, rather than delegate that finding to a court or federal agency.[26]

With respect to the substance of the preemption rule, part (B) outlines the legal standard to be applied in order for a court or the OCC to find that a state consumer financial law or regulation has been preempted, making an explicit reference to the Supreme Court's opinion in *Barnett*. In light of that reference, the essential questions are:

(1) What is the legal standard of the *Barnett* decision?
(2) Based in part upon the standard of *Barnett*, what is the legal standard for preemption in the Dodd-Frank Act?

Barnett Legal Standard

In *Barnett*, the Supreme Court was asked whether a federal statute that authorized banks to sell insurance preempted a state statute that expressly prohibited it.[27] The federal statute did not contain express preemption language, and so the Court was forced to decide whether Congress intended to preempt contrary state law.[28]

Because the Court was simply trying to determine whether Congress had implied preemption when drafting the federal statute, the Court's analysis focused on the federal statute's text.[29] The Court began its analysis by noting that "the Federal Statute's language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks 'may . . . act as the agent' for insurance sales."[30] The Court then continued with its examination of the federal statute and found that "its grant of authority to sell insurance is in 'addition to the *powers* now vested by law in national [banks].'"[31] The Court concluded that Congress's granting of authority to national banks to sell insurance preempted the State of Florida's statute forbidding the national banks from selling insurance.[32]

In so holding, and while citing to Supreme Court decisions holding that state banking statutes were not preempted by federal law,[33] the Court ruled:

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[25] 12 U.S.C.A. § 25b(b)(1)(B).
[26] Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999) ("In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996)*, no State may . . . prevent or significantly interfere with the ability of a depository institution . . . to engage . . . in any insurance sales, solicitation, or crossmarketing activity.").
[27] *Barnett,* at 31.
[28] *Barnett,* at 31.
[29] *See generally Barnett,* at 31-32.
[30] *Barnett,* at 32.
[31] *Barnett,* at 32 (emphasis in original).
[32] *Barnett,* at 37.
[33] *Barnett,* at 33-34. Citing *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 247–252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks");

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally *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 (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[34]

Stated differently, the Court ruled that: (1) if Congress explicitly granted a power, (2) it would not want states to forbid or impair significantly the exercise of that power.[35] Thus, two conditions must be met for preemption to be found under *Barnett*: Congress must have explicitly granted a power and the state statute in question would have had to "forbid, or [] impair significantly" the exercise of that power. The *Barnett* Court then applied its ruling to the statute in question and found that "[t]he Federal Statute before [it] … explicitly grants a national bank an authorization, permission, or power."[36] After finding that the state statute prohibiting the sale of insurance ran directly contrary to that Congressional, the Court unanimously found the state statute preempted.

In applying *Barnett*, the OCC[37] and various banking lobbyists[38] have argued that federal preemption doctrine in the consumer financial protection field is not limited by the specific words used by the Court in the *Barnett* opinion, but can instead look to the entirety of what the *Barnett* opinion *meant to say*. In other words, they can ignore the limited language used by the Court, and substitute their own more general rule. So rather than apply the standard that a state statute must "forbid, or []impair significantly" a federally granted authority in order to be preempted, the OCC developed its own standard, allowing preemption of any state law that would "obstruct, impair, or condition"[39] the operations of any national bank.

This longstanding misinterpretation by the OCC of the *Barnett* standard simply ignores the magnitude of the impairment required by the Supreme Court, *i.e.*, that it must "forbid" or "impair

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McClellan v. *Chipman,* 164 U. S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions); *National Bank* v. *Commonwealth,* 9 Wall. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").

[34] *Barnett,* at 33 (emphasis added).

[35] *Barnett,* at 33.

[36] *Barnett,* at 34.

[37] 76 Fed. Reg. 30562-63 (May 26, 2011).

[38] *See, e.g.*, Memorandum from American Bankers Insurance Association, *Gramm-Leach-Bliley Act Preemption of State Insurance Sales Laws Applicable to Banks* (June 2, 2002) ("[I]t is clear that this "*Barnett Bank* preemption standard" is a broad and flexible one intended to override any state law that stands as "an obstacle" to the exercise of a national bank's legitimate powers."), *available at* *http://www.aba.com/ABIA/Issue_FP.htmhttp://www.aba.com/ABIA/Issue_FP.htm.*

[39] See Wilmarth Testimony.

significantly" a federally granted authority.[40] Further, the OCC has selectively focused its analysis on whether the exercise of a power of the national banks is somehow inhibited, ignoring the Supreme Court's second express condition in *Barnett* that Congress must first have explicitly granted a power to be inhibited.[41]

Dodd-Frank Act Standard for Preemption

The Dodd-Frank Act[42] codified – in direct contravention of the OCC's preemption regulatory interpretations – the ability of states to protect their consumers. Congress was clear that the Dodd-Frank Act does not allow field preemption.[43] At the same time, Congress clearly intended for the *Barnett* case – as distinct from the OCC's longstanding misinterpretation of it – to provide a foundation for preemption decisions made under the Dodd-Frank Act (or prior to its enactment).[44]

Much like the language in the Gramm-Leach-Bliley Act,[45] Congress explicitly requires preemption decisions under the Dodd-Frank Act to be made "in accordance with" the *Barnett* standard, while also using language from the key explanatory sentence in *Barnett*[46] as its touchstone for legal analysis. Rather than restate the requirements that (1) there must be an explicit grant of authority by Congress and (2) that, to be preempted, the state statute would have to "forbid, or [] impair significantly" the exercise of that authority, however, the Dodd-Frank Act states that the OCC or courts can find preemption "only if … in accordance with the legal standard for preemption in [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."[47]

Thus, the legal standard in the Dodd-Frank Act appears to be somewhat of a hybrid, not exactly the same as *Barnett*, but not significantly different from it. The statute does not simply direct the OCC to "apply the legal standard for preemption" set forth in *Barnett*. Instead, it directs the OCC and courts to act "in accordance with" the legal standard set forth in *Barnett*.[48] In addition, the Dodd-Frank Act (much like the Gramm-Leach-Bliley Act before it) uses the

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[40] Letter from Center for Responsible Lending, et al., to John Walsh, Acting Comptroller of the Currency, at 6 (June 27, 2011).
[41] 76 Fed. Reg. 30557, 30562-63 (May 26, 2011).
[42] For the purposes of this discussion, the analysis of the Dodd-Frank Act preemption standard will focus on the circumstances outlined in (B).
[43] *Supra* at 5.
[44] Letter from Thomas Carper, U.S. Senator, and Mark Warner, U.S. Senator, to Timothy Geithner, Secretary of the Department of the Treasury (July 10, 2011) (" Both the language of the final law and its legislative history clearly demonstrate that the Barnett standard is maintained, and the Treasury position in this comment process was, in fact, rejected by Congress.").
[45] Gramm-Leach-Bliley Act § 104 ("In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996)*, no State may . . . prevent or significantly interfere").
[46] The language "prevent or significantly interfere" is actually used by the Court in Barnett as to what the states are not precluded from doing. Put simply, the state law can do anything less than "prevent or significantly interfere." See *Barnett,* at 33.
[47] 12 U.S.C.A. § 25b(b)(1)(B).
[48] 12 U.S.C.A. § 25b(b)(1)(B).

explanatory Barnett phrase, "prevent or significantly interfere," rather than "forbid, or [] impair significantly."[49]

Critically, there is nothing in the statute or legislative history to suggest that the initial prerequisite of *Barnett*, that Congress made an explicit grant of authority to the national banks, should somehow be ignored. To the contrary, the statute makes clear that the preemption standard under Dodd-Frank Act should be "in accordance with" the *Barnett* standard. Thus, to satisfy the standard for preemption under the Dodd-Frank Act, (1) Congress must have explicitly granted an authority to the national banks, and (2) the state law in question must "prevent or significantly interfere" with the national banks' exercise of that authority.[50]

OCC'S MISINTERPRETATION OF THE DODD-FRANK ACT'S PREEMPTION LANGUAGE

In its interpretations of the Dodd-Frank Act's provisions, the OCC's proposed rules correctly recognize Congress's explicit elimination of preemption for subsidiaries, agents, and affiliates.[51] Similarly, the proposed rules correctly recognize that the OCC's historical standard of finding preemption if the state law "obstruct[s], impair[s], or condition[s] a national bank's ability to fully exercise" its federally-authorized powers must be repealed.[52]

However, the OCC's preemption interpretations and proposed standard still fail to reflect the standard articulated in the Dodd-Frank Act, and need to be significantly revised. The OCC's regulations should make clear that, in order for there to be preemption, Congress must first have explicitly granted an authority to the national banks, and second, a state law must "prevent or significantly interfere" with the banks' exercise of that authority.

While the OCC correctly proposes to delete its inaccurate legal standard that it has used that a state law must not "obstruct, impair, or condition a national bank's ability to fully exercise" its federally-authorized powers,[53] it should replace the language with the standard required by the Dodd-Frank Act. Unfortunately, the OCC's proposed response is to go in the nearly opposite direction and remove any reference to any legal standard,[54] rather than reference the proper legal standard.[55]

The OCC's proposed rules also continue to list as preempted, despite the Dodd-Frank Act's plain prohibition on field preemption, state laws of general applicability.[56] The OCC clearly lacks the statutory authority to preempt those state laws.[57]

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[49] 12 U.S.C.A. § 25b(b)(1)(B).
[50] *Barnett*, 517 U.S. at 33.
[51] 76 Fed. Reg. at 30562.
[52] 76 Fed. Reg. at 30562.
[53] 76 Fed. Reg. at 30563.
[54] 76 Fed. Reg. at 30563.
[55] See Letter from Center for Responsible Lending, et al., to John Walsh, Acting Comptroller of the Currency, at 6 (June 27, 2011).
[56] 76 Fed. Reg. at 30571-73.

Finally, the OCC's assertion that the proposed rules should somehow be applied only to preemption determinations on a "going forward" basis, and should not be used to revise or nullify existing preemption determinations, is contrary to law and clear Congressional intent.[58] It essentially asserts that all of its erroneous interpretations – which Congress clearly reversed – are somehow grandfathered into compliance.

That the OCC would interpret the complex compromise on preemption reflected in the Dodd-Frank Act as requiring it to make only superficial changes[59] to its preemption regulatory standards is contrary to the OCC's obligation to comply with the law. Because the OCC's proposed rules fail to accurately reflect the Dodd-Frank Act's requirements, it should, in consultation with the Treasury Department, revise them. The OCC has tried in the past – to the detriment of American families and businesses – to make up its own legal standards for preemption, and it should not do so again, particularly in light of the direct Congressional instruction in the Dodd-Frank Act.

OCC'S MISINTERPRETATION OF VISITATION POWERS

In response to Dodd-Frank Act Section 1047, the OCC has also proposed changes to its interpretation of visitorial powers – the circumstances under which states may take enforcement actions against national banks.[60] Again, the OCC's proposed rules ignore the actual language in dispositive Supreme Court precedent[61] as well as the plain language of the Dodd-Frank Act.

Again, the OCC seems to continue its assertion of field preemption – attempting to prohibit most state enforcement actions against national banks, notwithstanding its plain lack of authority to do so. In *Cuomo*, the Supreme Court held that "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions."[62] Yet, that is exactly what the OCC proposes to continue to prohibit, "except in limited circumstances."[63]

Adding to its deviation from the Supreme Court's binding precedent, the OCC proposes a broad prohibition on states "investigating"[64] possible violations of law by national banks. The Supreme Court in *Cuomo* was not so broad. Rather, the *Cuomo* Court noted states may be restricted in their abilities to utilize certain pre-litigation investigation techniques, such as subpoenas. However, that did not preclude the states from collecting documents from public sources, reviewing materials from injured consumers, or taking other investigative measures. The whole point of the Dodd-Frank Act's compromise was to allow states to play a role in protecting consumers from

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[57] See Letter from Center for Responsible Lending, et al., to John Walsh, Acting Comptroller of the Currency, at 15 (June 27, 2011).
[58] 76 Fed. Reg. at 30563.
[59] Amongst other modest changes, and consistent with Congress's directive in the Dodd-Frank Act, the OCC has proposed to repeal 12 C.F.R § 7.4006.
[60] 76 Fed. Reg. at 30562.
[61] See *Cuomo*, 129 S. Ct. 2710 (2009).
[62] *Cuomo*, at 2721 (2009).
[63] 76 Fed. Reg. at 30562.
[64] 76 Fed. Reg. at 30562.

financial abuses. The OCC's proposed broad prohibition on states conducting any meaningful investigation of compliance with applicable laws overreaches, and should be removed.

Finally, the proposed rules simply ignore Congress's direction in the Dodd-Frank Act explicitly authorizing states to "enforce an applicable law and seek relief."[65] Rather than use "applicable law," the OCC substitutes its own phrase, "non-preempted state law."[66] There is no justification for this unwarranted deviation from the plain language of the statute, and the proposed rules should be modified to reflect the statutory text, its plain meaning, and the intent of Congress.

CONCLUSION

The OCC is ill-advised to attempt to disregard the Dodd-Frank Act compromise provision on preemption. The OCC's sweeping preemption approach in the past disabled needed state consumer protections, contributed to the financial crisis, and has been widely condemned. That's why the Dodd-Frank Act provision was put into law. The deeply flawed interpretations and analysis articulated in the May 12, 2011 letter and May 26, 2011 proposed rules are so far beyond the scope of the statute that they – and any regulatory actions taken in reliance upon them – should be afforded no *Chevron* deference.[67]

I therefore urge the Treasury Department to work with the OCC to substantially revise the proposed rules.

Thank you for your timely consideration.

Sincerely,

Carl Levin
Chairman
Permanent Subcommittee on Investigations

[65] Dodd-Frank Act § 1047.
[66] 76 Fed. Reg. at 30564.
[67] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).