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June 27, 2011

Acting Comptroller John Walsh
Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, D.C.20219

Re: OTS Integration; Dodd-Frank Act Implementation,
Docket ID OCC-2011-0006,
RIN 1557-AD41

Dear Comptroller Walsh:

We, the undersigned state Attorneys General respectfully submit the following comments in response to the Office of the Comptroller of the Currency's proposed regulations implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] The comments address our specific concerns about the preemption of state law and the exercise of state enforcement powers that are addressed in the proposed regulations.

Protection of consumers is a traditional state duty and power. Beginning with the 1999 enactment of North Carolina's predatory mortgage lending law, states have been at the forefront of protecting consumers against abusive financial practices. The landmark mortgage lending settlements with First Alliance, Household Finance, Ameriquest and Countrywide returned hundreds of millions of dollars to victimized borrowers while forcing lenders to agree to significant reforms. At the outset of the subprime lending debacle, many states enacted new restrictions on subprime loan origination and documentation practices. These state-level reforms occurred before any similar action at the federal level, and paved the way for the new mortgage rules in the Dodd-Frank Act. More recently, state Attorneys General took the initiative in addressing mortgage servicing failures and are now cooperating with federal authorities to bring needed reforms to loan servicing and foreclosure processing.

Over the last decade, state Attorneys General have vigorously opposed the OCC's aggressive campaign to preempt state consumer protection laws. In 2003, all 50 state Attorneys General filed comments on the OCC's proposed preemption rules. Those rules attempted to preempt consumer protection laws that the states had enforced for years in the financial marketplace, including against national banks. Notwithstanding the unanimous objections of the Attorneys General, the OCC proceeded to promulgate preemption regulations that were sweeping in their breadth and in

[1] Pub. L.No. 111-203, Tit. X, 1001-1100H, 124 Stat. 1376 (July 21, 2010) (hereinafter Dodd-Frank).

their disregard for the lawful role of the states. The OCC is now seeking to retain the broad preemption rules that the states opposed in 2003.

Congress has responded to the OCC's overreaching, recognizing the importance of state law and state enforcement. As part of the Dodd-Frank Act, Congress restored and strengthened the states' historic role. The Act not only affirms powers states have always had to enforce state laws against federally-regulated banks, it also gives states new powers, such as the ability to enforce regulations promulgated by the new Consumer Financial Protection Bureau. Congress enacted these reforms to encourage an active and effective law enforcement partnership between the states and federal financial agencies to the ultimate benefit of consumers and a free and fair marketplace.

Unfortunately, the OCC's current proposal maintains the very same preemption rules that were rejected by Congress in Dodd-Frank and by the Supreme Court in *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710 (2009). The OCC has not complied with the Congressional directive to thoroughly review its relationship with state law on case-by-case basis, in light of the Supreme Court's decision in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996),and the statutory language of Dodd-Frank. In our view, the OCC should demonstrate its compliance by withdrawing its preemption regulations completely.

The OCC's 2004 Preemption Rules are Inconsistent with Dodd-Frank and the U.S. Supreme Court *Barnett* Standard and Should be Repealed.

With some minor tinkering, the proposed OCC rules basically reaffirm the broad preemption regulations promulgated by the OCC in 2004. This failure to withdraw the 2004 rules conflicts with the letter and intent of the Dodd-Frank Act.

Section 1044(a) of the Act explicitly states that the National Bank Act does not "occupy the field in any area of State law." Instead, the OCC is required to examine each state law it wishes to preempt on a "case-by-case" basis in a "proceeding." It must place substantial evidence on the record during this proceeding to support preemption. The OCC must also confer with the new Consumer Financial Protection Bureau to determine whether the law is substantially equivalent to other laws before it may apply this preemption decision to any other law.

Historically, while purportedly based on a conflict preemption analysis, the OCC's 2004 preemption regulations attempted to annul many state laws as they applied to national banks. Although the OCC did not use the field preemption label, through these regulations the OCC attempted to assert field preemption over state law. Instead of overturning its field preemption approach, the OCC's proposed amended rule disregards the balanced preemption requirements of the Dodd-Frank Act and preserves the 2004 rules. The OCC's attempt to assert field preemption in 2004 was untenable then and is clearly unsupportable now after the direct Congressional mandate in the Act.

Although the OCC claims to use a "conflict preemption" analysis in its preemption determinations, the proposed regulations seek to maintain the broad preemption standard from

the 2004 regulations in which the OCC attempted to essentially occupy the fields.[2] Specifically, the new regulations would retain 12 C.F.R. § 7.4007 (b), which states that "[a] national bank may exercise its deposit-taking powers without regard to state law limitations concerning" abandoned and dormant accounts, checking accounts, disclosure requirements, and other aspects of deposit-taking. The regulations would also retain 12 C.F.R. § 7.4008 (d), which states that "[a] national bank may make non-real estate loans without regard to state law limitations concerning" licensing, registration, loan-to-value ratios, credit reports, and other aspects of consumer lending. Both sections are in opposition to the provision in Dodd-Frank that the National Banking Act does not "occupy the field" in any area of state law, as well as Dodd-Frank's requirement that preemption determinations be made on a "case-by-case" basis.

Perhaps the most serious error in the proposed regulations is the OCC's attempt to minimize the impact of the "prevent or significantly interfere" preemption standard mandated by Dodd-Frank and the Supreme Court's *Barnett* decision. Dodd-Frank divides state laws into two categories – 'consumer financial laws' and all other state laws. Consumer financial laws are ones that directly and specifically address the manner, content or terms of a financial transaction.[3] Consumer financial laws are preempted only if they discriminate against national banks or if they prevent or significantly interfere with a bank's exercise of a federally-granted power.[4]

The OCC does not use the term "prevent or significantly interfere" in its proposed preemption regulations. The OCC prefers to generally reference the *Barnett* case and contends that the "prevent or significantly interfere" test is not the exclusive *Barnett* standard and that "other formulations of conflict preemption" are relevant.[5] However, the OCC does not have the discretion to continue to interpret *Barnett* to suit its own views of preemption. The Congressional mandate is that "prevent or significantly interfere" is the applicable standard. The OCC should correct its proposed regulation to ensure that it will apply the proper preemption test.

Furthermore, the OCC must review its existing preemption precedents in light of the "prevent or significantly interfere" standard required by Dodd-Frank. The OCC's proposal notes that the current "obstruct, interfere, or condition" standard for preemption was drawn from "an amalgam of prior precedents relied upon by the Supreme Court in its decision in Barnett."[6] Thus, "[t]o the extent any existing precedent cited those terms in our regulations, that precedent remains valid."[7] The OCC is clearly attempting to maintain its current standard for preemption, in direct opposition to the requirements of the Dodd-Frank Act. Congress rejected the standard currently used by the OCC by specifically including the "prevent or significantly interfere"

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[2] The OCC's notice of proposed rulemaking states that "under the Dodd-Frank Act, the proper preemption test is conflict preemption." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed.Reg.30557, 30563 (proposed May 26, 2011).
[3] Dodd-Frank at § 1044 (a).
[4] *Id.*at §§1044 (a) and 1046 (a).
[5] 76 Fed Reg. at 30563 (amending 12 C.F.R. §§ 7.4007(c), 7.4008(e) and 34.4(a)).
[6] *Id*.
[7] *Id.*

language from the *Barnett* decision.[8] By stating that precedents based on the "obstruct, interfere, or condition" language remain valid, the OCC is subverting the intention of Congress by essentially continuing to use the standard that was rejected by Dodd-Frank to preempt state consumer financial laws.

The Visitorial Powers Restrictions on State Enforcement Authority in the Proposed Regulations Do Not Comply with the Dodd-Frank Act and the *Cuomo* Decision.

Historically, the OCC has claimed that its visitorial powers prevent states from enforcing non-preempted state laws against national banks. Section 1047 of the Dodd-Frank Act now specifically authorizes state Attorneys General to bring actions against national banks to enforce any "applicable law," notwithstanding the OCC's visitorial powers.[9] The Act cites *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710 (2009) as further authority for state enforcement powers. In *Cuomo*, the Court held that the visitorial powers regulations issued by the OCC exceeded the authority granted to the agency under the National Bank Act: "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions.'"[10] However, the OCC attempts to minimize and qualify the Dodd-Frank and *Cuomo* authorization of Attorney General enforcement in its proposed amendment to 12 C.F.R. § 7.4000 (a):

> State officials may not exercise visitorial powers … such as … prosecuting enforcement actions, except in limited circumstances authorized by federal law.

This proposed "visitorial powers" restriction on state enforcement actions conflicts with *Cuomo*,which declared that such enforcement actions are *not* a visitorial power. Furthermore, under the Dodd-Frank Act, states may bring suit to enforce any "applicable law" whether or not there is a federal law that authorizes it. Thus, the Act does not condition state enforcement on authorization by federal law.

The proposed regulation also adds to the lists of visitorial powers: "investigating or enforcing compliance with any applicable federal or state laws concerning those activities."[11] Although the Supreme Court in *Cuomo* held that states may not enforce pre-litigation investigative subpoenas against national banks, it did not hold that every possible type of investigation is prohibited visitation. For example, states could collect complaints from consumers or research the public records without running afoul of the exclusive visitation

[8] A Senate report states that "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 Bank v. Nelson, 517 U.S. 25 (1996), undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." Sen. Comm. on Banking, Housing and Urban Affairs, S.Rep. No. 111-176, at 175 (2010).

[9] "[N]o provision of this title which relates to visitorial powers … shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State 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." Dodd-Frank at § 1047 (a).

[10] *Cuomo* at 2721.

[11] We do not object to the addition of the word "investigating" on the assumption that it does not refer to judicial investigations, such as litigation discovery permitted under the *Cuomo* decision.

provision of the NBA. Consequently, a broad rule prohibiting states from investigating compliance with applicable laws is unwarranted.

The OCC also leaves in place its existing visitorial powers definition, 12 CFR § 7.4000 (a) (2) (iv). This regulation prohibits state Attorneys General from enforcing compliance with any federal laws relating to national banks.[12] The regulation should be amended or withdrawn because, under the Dodd-Frank Act, state Attorneys General are authorized to enforce certain federal laws, as well as rules and regulations promulgated by the Consumer Financial Protection Bureau.[13]

The OCC Does Not Have Authority to Preempt General State Laws

The Dodd-Frank Act does not address general state laws such as a state consumer protection act. The preemption standard for general state laws as applied to national banks is declared in *Barnett*, which held that:

> [i]n defining the pre-emptive scope of statutes and regulations granting a power to national banks … normally Congress would not want States to forbid, or to interfere 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.[14]

Thus, States retain their enforcement powers against national banks provided that enforcement does not prevent or significantly interfere with federally-authorized bank activities. Dodd-Frank also provides that nothing in its provisions may be interpreted to prevent state enforcement actions and proceedings under state law.[15] Therefore, states may bring state law enforcement actions of any kind against national banks, provided they do not prevent or significantly interfere with the powers granted to banks.

The Attorneys General take issue with any implication that the OCC has any power to preempt state laws that are not state consumer financial laws. As amended, the regulations would state that the list of non-preempted state laws includes:

> Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v.

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[12] "[V]isitorial powers include: … Investigating or enforcing compliance with any applicable federal or state laws concerning those activities." ("those activities" refers to activities authorized by federal banking laws.) proposed§ 7.4000 (a) (2) (iv).

[13] "The attorney general ... of any State may bring a civil action in the name of such State against a national bank or Federal savings association... to enforce a regulation prescribed by the Bureau under a provision of this title." Dodd-Frank § 1042(a)(2)(B). Even prior to the Dodd-Frank Act, state Attorneys General were authorized to enforce provisions of other federal consumer financial laws against national banks, such as the Truth in Lending Act, 15 U.S.C. § 1640 (e), or the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601(d) (4).

[14] *Barnett* at 33.

[15] Dodd-Frank at § 1042 (d).

Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.[16]

This regulation appears to assert that state laws, other than those specifically listed, are preempted unless the OCC determines them to be applicable to national banks. However, in Dodd-Frank, Congress clarified where the OCC has the power to preempt state law and on what terms: it may preempt state consumer financial laws if, reviewed on a case-by-case basis, the law violates *Barnett* and prevents or significantly interferes with national banking activities.

Conclusion

The OCC's insistence on maintaining its posture in favor of broad preemption of state law is disappointing and ignores a clear Congressional mandate to the contrary. To comply with the new statutory directives on the preemption of state law, the OCC must review state financial laws on a case-by-case basis to determine whether those laws prevent or significantly interfere with national bank powers. The OCC should not rely on its former general preemption pronouncements, which were based on an improper standard and have been rejected by Congress. With respect to enforcement, we believe that state and federal regulators should work together and share their respective authority to protect consumers and to ensure a fair financial marketplace.

[16] 76 Fed. Reg. at 30571-73 (amending 12 C.F.R. §§ 7.4007(c)(8), 7.4008(e)(8), 34.4(b)(9)).

Sincerely,

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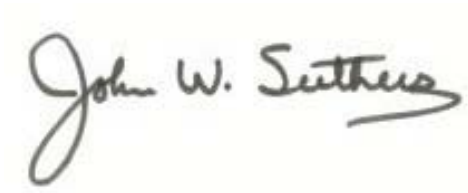

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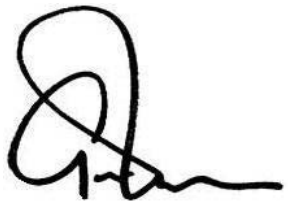

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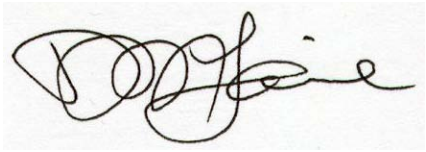

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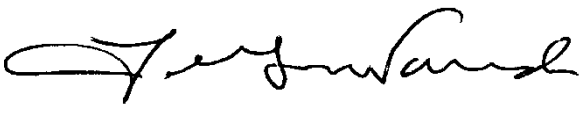

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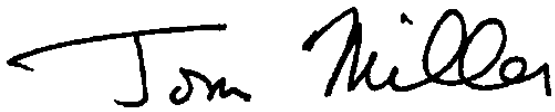

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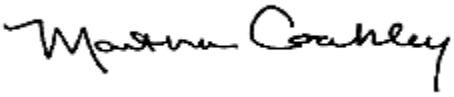

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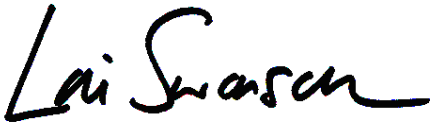

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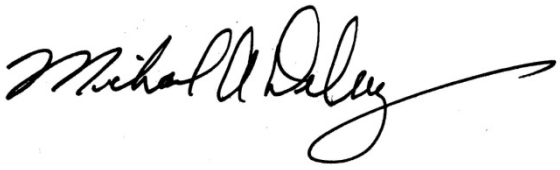

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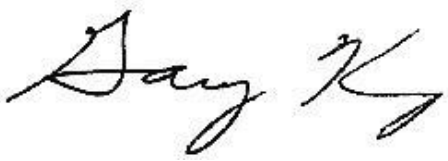

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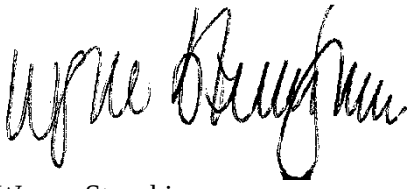

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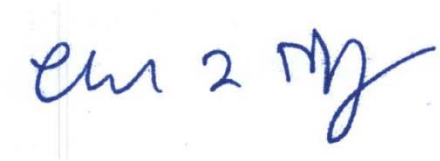

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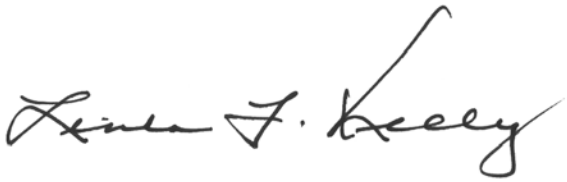

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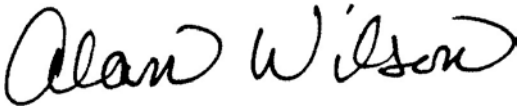

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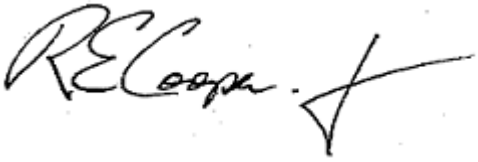

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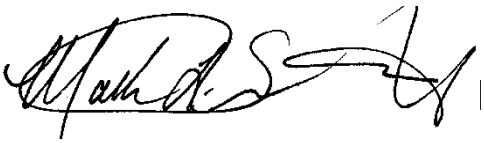

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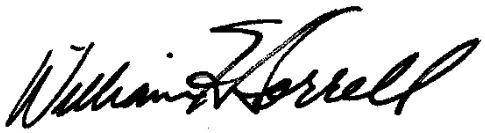

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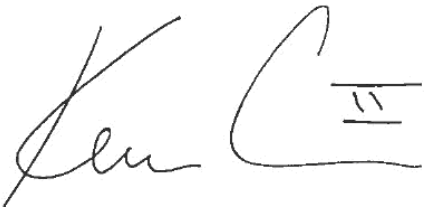

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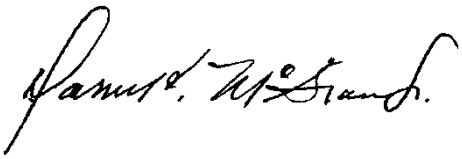

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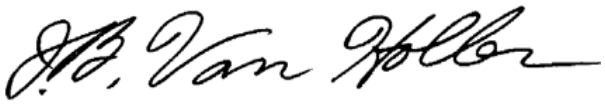

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