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The Honorable James A. Leach
Chairman, Committee on Banking, Finance and Urban Affairs
House of Representatives

Dear Mr. Chairman:

Subject: Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law

This letter responds to your September 21, 1999, request that we provide information on the Office of Thrift Supervision's (OTS) and the Office of the Comptroller of the Currency's (OCC) role in the preemption of state law. As agreed, our objectives were to (1) describe OTS's and OCC's authorities and processes for issuing preemption opinions and regulations, identifying any differences in their approaches; (2) describe how the Alternative Mortgage Transaction Parity Act of 1982 (Parity Act) preempts state law and provide the views of selected state officials on its effect; and (3) describe OTS's and OCC's disclosure procedures for communicating their preemption opinions to federally chartered financial institutions and affected states and the views of selected state officials on these procedures. This letter provides information on these issues.[1] Enclosure I provides a more detailed discussion of the legal framework for federal preemption and OTS's and OCC's approaches. Enclosure II provides a list of OTS and OCC opinions issued from 1994 through 1999, that concluded state laws were preempted.

Background

Preemption of state law is rooted in the Constitution's Supremacy Clause, which provides that federal law is the "supreme law of the land." Because the federal and state governments both have roles in regulating financial institutions, questions can arise as to whether the governing federal statute preempts particular state laws. The courts ultimately are responsible for resolving conflicts between federal and state law; and over the years, they have developed a substantial body of precedent that has guided the analysis of whether any particular federal law or regulation overrides or "preempts" state law (referred to as "preemption analysis").

[1] On November 12, 1999, the Gramm-Leach-Bliley Act, a comprehensive piece of financial services legislation, became law. The act contains preemption provisions relating to insurance and privacy. To date, the federal financial institution regulators have not addressed any preemption issue under the act.

While the courts have addressed preemption questions in a variety of contexts, their analysis of whether federal law preempts state law has fundamentally centered on whether Congress intended for the federal law or regulation to override state law. The courts have found the requisite evidence of an intent to preempt state law either from the face of the statute itself ("express preemption") or from the structure and purpose of the statute ("implied preemption").

The courts have addressed two types of implied preemption of state law: "field" and "conflict" preemption. In the case of field preemption, courts basically have found that the federal government had so occupied the field in a given area that the state had no role to play. Conflict preemption occurs when courts conclude that a state law is in irreconcilable conflict with federal law. In practice, the categories of field and conflict preemption have sometimes tended to overlap, with courts focusing on whether there were conflicts between federal and state law.

Affected parties may seek guidance from agencies requesting their view on whether a particular federal statute preempts a particular state law. In these instances, the agency may issue an advisory opinion in which it opines on the issue. Both OTS and OCC issue advisory opinions on preemption. Federal savings associations and national banks may choose to rely on these opinions and conduct their business accordingly. However, agency guidance is not an indispensable part of the preemption process. Federally chartered thrifts and banks may choose to exercise their powers or go to court for a declaratory judgment without an agency opinion. Ultimately, the courts decide whether federal law preempts state law in a particular area.

Depending on their statutory authority, some federal agencies have issued regulations preempting particular types of state laws. OTS (unlike OCC) has issued broad regulations preempting state laws in a number of areas.

Results in Brief

The statute underlying OTS's preemption determinations is the Home Owners' Loan Act (HOLA), which authorizes OTS to provide for the organization, incorporation, examination, and regulation of federal savings associations. Finding that this authority "occupies the field" of regulation affecting the operation of federal savings associations, OTS and its predecessor agency have issued broad regulations to describe its preemption of state law in certain areas. In addition, OTS has issued advisory opinions that consider whether, based on the HOLA and OTS regulations, state law is preempted. OCC issues opinions considering whether state law is preempted under the National Bank Act (NBA), which provides for the creation, regulation, and operation of national banks and enumerates national bank powers. Applying conflict preemption analysis, OCC issues opinion letters and decisions addressing the NBA's preemption of state laws regarding bank operations. In rendering their opinions on whether particular state laws are preempted, OTS generally relies on field preemption, although its analysis also typically addresses whether there is a conflict between federal and state law, and OCC generally relies on conflict preemption. Generally, both agencies rendered opinions in response to a financial institution's request. These opinions are advisory and subject to court challenge and review. While the statutory authorities OTS and OCC use to formulate the

preemption opinions are different, their approaches to reaching preemption opinions share similar characteristics. In a review of OTS and OCC preemption opinions on similar Automated Teller Machine (ATM) issues, we found no material difference in the resulting opinions.

The Parity Act preempts state laws covering alternative mortgage financing arrangements, such as variable interest-rate loans and loans requiring balloon payments. Its purpose was to eliminate any discriminatory impact that federal regulations had on nonfederally chartered housing creditors. The Parity Act permits state-chartered housing creditors to choose between applicable federal or state law governing alternative mortgage transactions. Officials we interviewed from selected state banking departments said that some consumers do not benefit from their states' more restrictive consumer protection laws because of the Parity Act.

OTS has issued broad regulations preempting state laws in certain areas and OCC has not. In connection with the issuance of these regulations, OTS seeks public comment from affected parties, through the publication of the proposed rule in the Federal Register. When OTS and OCC render their opinions on whether or not a particular state law is preempted, the agencies disclose the opinions essentially the same way: both agencies publish their preemption opinions on their Internet web sites and provide their opinions directly to the parties who originally requested the rulings. OCC also reports its preemption opinions in publications available to state officials and others. There is one notable difference between the agencies' disclosure procedures. OCC is subject to two notice requirements under the Riegle-Neal Act[2] that do not apply to OTS. First, OCC must provide a public notice and comment period if preemption opinions apply to certain types of state laws such as in the area of consumer protection. Second, OCC must report annually to Congress on its preemption opinions. Notwithstanding the OTS and OCC disclosure practices and OCC's statutory notice requirements, the state officials we interviewed expressed concerns regarding OTS's and OCC's disclosure procedures. Most of the state officials we interviewed want a disclosure process in which states are notified in advance and consulted while OTS and OCC are considering opining that a particular state law is preempted. In addition, the state officials want to be notified of final preemption decisions.

Scope and Methodology

To describe OTS's and OCC's statutory authorities and processes for preemption, we analyzed various statutes, including HOLA, the NBA, and the Riegle-Neal Act; OTS regulations and selected preemption opinions issued by OTS and OCC; and case law addressing preemption issues in general as well as OCC and OTS preemption authorities. To ascertain how OTS and OCC disclose preemption opinions, we interviewed officials from OTS and OCC, selected state officials, and officials of an association that represents state bank regulators. We also accessed the OTS and OCC web sites and retrieved and reviewed information related to preemption, including preemption opinions.

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[2] Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. P.L. No. 103-328, 108 Stat. 2338 (1994).

We analyzed the Parity Act to determine how it preempts state law and discussed the provisions with cognizant OTS and OCC officials. We also reviewed preemption opinions based on the Parity Act.

To obtain the views of selected state bank regulators, we interviewed state banking department officials from California, Connecticut, Iowa, New Jersey, and New York. We selected these states based on the following factors: (1) the number of times that OCC and OTS had issued opinions concluding that a particular state's law was preempted, (2) states where state legislatures had enacted laws regulating ATM operations in the state and the laws were the subject of preemption opinions by either OCC or OTS, and (3) states where state officials had expressed particular concerns over federal preemption actions.

We obtained written comments from OTS and OCC officials on a draft of this letter and copies of the agencies' letters are reprinted in enclosures III and IV. These comments are discussed near the end of this letter. We conducted our work in Washington, D.C.; Trenton, NJ; Hartford, CT; and Des Moines, IA between November 1999 and January 2000 in accordance with generally accepted government auditing standards.

OTS's Approach to Preemption

HOLA authorizes OTS to provide for the organization, incorporation, examination, operation, and regulation of federal savings associations. In establishing the statutory scheme for the regulation of federal savings associations, Congress directed OTS's predecessor agency, the Federal Home Loan Bank Board (FHLBB), to consider the best practices of state-chartered thrifts. The Supreme Court has held that HOLA grants OTS broad "cradle to grave" rulemaking authority pursuant to which the agency can adopt comprehensive regulations governing the operations of federal savings associations.[3]

Based on the authority in HOLA, OTS has promulgated regulations that preempt state laws affecting the operations of federal savings associations. In its regulations, OTS bases preemption on a finding that the federal regulatory scheme for federal savings associations "occupies the field" of regulation affecting the operations of these associations. In 1983, FHLBB (OTS's predecessor) issued a broad preemption regulation to this effect, stating that the agency has "plenary and exclusive authority" to regulate federal savings associations and to preempt any state law purporting to address the operations of federal savings associations.[4]

From 1983 through 1996,13 years after the broad preemption regulation was issued, FHLBB (and later OTS) encountered questions from savings associations and state agencies on whether specific state laws were preempted. In response to the number of inquiries OTS received in the lending and deposit-taking areas, in 1996 and in 1997, OTS issued two sets of

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[3] See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) (citations omitted). As discussed more fully in enclosure I, the U.S. Supreme Court has not addressed specifically whether OTS's reliance on field preemption is appropriate.

[4] 12. C.F.R. § 545.2.

regulations describing its preemption of state laws in these areas. In doing so, it provided notice in the Federal Register and solicited public comment. Subject to certain specified exceptions, the regulations authorize federal savings associations to exercise their lending and deposit-taking powers, "without regard to state laws purporting to regulate or otherwise affect activities."[5] The regulations contain a nonexclusive list of examples of the types of state laws that are preempted and specifically preserve specified types of state laws.[6]

In addition to the lending and deposit-taking regulations, in 1992 and 1996, respectively, OTS issued two sets of regulations preempting state branching laws and preempting state laws that apply to an operating subsidiary of a federal thrift to the same extent they would be preempted in the case of a federal thrift. In the area of interstate branching, OTS issued a regulation that allows federal savings associations to establish deposit-taking branches on a nationwide basis in accordance with HOLA, OTS rules, and without regard to any conflicting state laws."[7] OTS's regulation addressing the authority of federal thrifts to establish operating subsidiaries provides that such subsidiaries must be wholly owned or majority owned by a federal savings association and may engage only in activities that are permissible for the parent thrift.[8] In issuing this regulation, OTS explained that "state law is preempted for operating subsidiaries to the same extent that it is for the parent federal savings association . . . because an operating subsidiary . . . is treated as the equivalent of a department of the federal thrift for regulatory and reporting purposes."[9]

When preemption questions arise, a federal savings association (or a state) can take one of two courses of action: (1) it can review any applicable regulations and earlier OTS opinions and draw its own preemption conclusions (or rely on its counsel's opinion) or (2) it can request an opinion from the OTS General Counsel on their view of whether state laws would be preempted under HOLA and OTS's implementing regulations. Between October 1994 and December 1999, OTS issued 24 opinions in response to federal savings associations or states.[10] (The opinions are issued in the form of letters to the party that requested the

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[5] Id. The lending regulation contains a list of examples of the types of state laws that are preempted, which include (1) state licensing, registration, and reporting laws; (2) state laws governing the specific terms of credit agreements and loan-regulated fees; and (3) state laws requiring lenders to comply with disclosure and advertising rules. 12 C.F.R. 560.2(b) (1998). The deposit-taking regulation preempts state laws that purport to impose requirements governing among other things, (1) abandoned and dormant accounts, (2) disclosure requirements, (3) funds availability, (4) service charges and fees, (5) state licensing or registration requirements, and (6) checking accounts. 12 C.F.R. § 557. 12 (1998).

[6] State laws are not preempted to the extent that they only incidentally affect the lending-related or deposit-related operations of federal savings associations or are otherwise consistent with the purposes of the regulations to enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices. The lending-related regulation specifically provides that state laws that are not preempted include those relating to contracts, real property law, homestead laws, tort law, and criminal law. 12 C.F.R. § 560.2(c). The types of state laws that the deposit regulation excludes from preemption include contract, tort, and criminal laws. 12 C.F.R. § 557.13.

[7] 12 C.F.R. § 556.5. Subsection (d) of this section states "[t]his exercise of the OTS's authority is preemptive of any state law purporting to address the subject of branching by a federal savings association."

[8] 12. C.F.R. § 559.3(c),(e)(2) and §559.4.

[9] 61 Fed. Reg. 66, 651, 66563 (Dec. 18, 1996).

[10] Two of the opinions found that state law provisions were not preempted. In one of the opinions, OTS Op. Chief Counsel (Dec. 24, 1996), OTS Chief Counsel concluded that federal law does not preempt the Indiana Deceptive Acts and Practices statute, prohibiting fraudulent and deceptive loan practices. However, in the same opinion, OTS also opined that federal law does

opinion.) In certain of these opinions, OTS opined that state laws pertaining to fiduciary activities and services[11] and ATM location and licensing restrictions were preempted.[12] See enclosure II for a complete listing of the 23 opinions where OTS opined that state law or (local ordinances) was preempted.

OCC's Approach to Preemption

The NBA provides for the creation, regulation, and operation of national banks, including enumerated national bank powers. In addition to the enumerated powers comprising core banking functions, such as lending and deposit-taking, the NBA grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Based on the authority contained in the NBA and Supreme Court interpretations, state laws that limit the operation of national banks have been preempted under the Supremacy Clause when the state law contradicted or impaired the federal law purpose.[13] Beginning in the late 1800s, the U.S. Supreme Court has addressed repeatedly whether federal banking laws preempt state banking laws. In a recent case, the Supreme Court considered whether a federal statute (12 U.S.C. § 92) permitting national banks to sell insurance in small towns preempts a state statute that forbids them to do so.[14] The Supreme Court stated that "grants of both enumerated and incidential 'powers' to national banks are (interpreted as) grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." In that same case, the Supreme Court further noted that state laws are not preempted when Congress "grants an explicit power with an explicit statement that the exercise of that power is subject to state law."[15] The Supreme Court also has held that because national banks are federal instrumentalities they are not generally subject to state regulation unless contemplated by Congress, either expressly or by implication.[16]

Unlike OTS, OCC has not issued broad regulations preempting state law in particular banking areas.[17] Rather, applying conflict preemption analysis, OCC issues interpretations of whether federal laws preempt state laws in opinions and corporate decisions. Opinion letters, much like OTS's opinions, are issued in response to a specific inquiry from an institution or state.

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preempt a provision of the Indiana Uniform Consumer Credit pertaining to disclosure and loan-related charges. In the second opinion, OTS Op. Chief Counsel (Jan. 15, 1999), OTS concluded that HOLA did not preempt a New York ATM lighting requirement.

[11] OTS Op. Chief Counsel (July 1, 1998), 1998 OTS Lexis 7.

[12] OTS Op. Chief Counsel (July 1, 1998), 1998 OTS Lexis 14.

[13] See e.g., First Nat'l Bank of San Jose v. State of California, 262 U.S. 366 (1923) (holding that states cannot seize national bank accounts even if there has been no activity on the account for 20 years.)

[14] Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 32 (1996).

[15] Id. at 1109 (citing 12 U.S.C. 36 (c) , in which for example, Congress predicated the establishment of national bank branches upon compliance with state laws authorizing branching by state banks).

[16] See, e.g., McCulloch v. Maryland, 4 Wheat. 316, 429,436 (1818); Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33-34 (1875); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373, 378 (1954).

[17] OCC did issue a regulation preempting specified state law limitations applying to real estate loans. See 12 C.F.R. § 34.4.

Corporate decisions are issued with a national bank's application for OCC approval of a specified business activity.[18] Specific areas of state law OCC has opined are preempted include those relating to annuity sales, business hours, and consumer convenience and protection. In the area of making loans and taking deposits, OCC's opinions concluded that state laws that interfered with these national bank powers were preempted.

When preemption questions arise for national banks, they can review previous OCC preemption decisions and draw their own conclusions or request an opinion from OCC. National banks can also raise preemption questions as part of a corporate application.[19] Between 1994 and 1999, OCC issued 11 opinions and 18 corporate decisions opining that state law was preempted. See enclosure II, tables II and III, for a complete listing.

OTS and OCC Use Similar Approaches to Preemption

While the statutory authorities OTS and OCC use to formulate the preemption opinions are different, their approaches share common features. Both agencies rely on past court decisions to guide their analyses of whether a federal law or regulation preempts state law. Both agencies respond to requests, usually from financial institutions but sometimes from state officials, for preemption opinions. OCC has a special statutory requirement for reporting and notification that applies only when certain types of state laws are involved. We discuss this requirement in a subsequent section on disclosure practices.

To more fully explore the OTS and OCC approaches to preemption, we reviewed preemption opinions (and in OCC's case, a court brief containing its preemption position) that dealt with similar issues related to one specific subject, ATMs. Many states have laws that limit the ability of out-of-state depository institutions to establish or use ATMs. As a result of these state law restrictions, both OTS and OCC recently considered whether, in their opinion, specific ATM restrictions would be preempted by the governing federal statute. In this area, we found no material difference in the resulting positions on preemption. Discussion of the OTS and OCC analyses follows.

OTS issued two opinions in 1998, concluding that state laws regulating the operations of ATMs are preempted insofar as they apply to the authority of federal savings associations to establish or share ATMs. HOLA contains a specific provision (1) authorizing federal savings associations to establish "remote service units," which include ATMs, and (2) authorizing the OTS director to regulate such operations.[20] In each opinion, OTS found that the state laws directly interfered with the deposit-taking and lending activities of federal thrifts and, therefore, were preempted by the lending and deposit-taking regulations described above.[21]

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[18] These opinions (and corporate decisions) are reviewable by a federal court.

[19] For purposes of the preemption decision, there is no material difference between a preemption legal opinion and a decision on a corporate application.

[20] See 12 U.S.C. § 1464(b)(1)(F).

[21] As we will discuss later, in another opinion OTS did not preempt a New York law containing ATM lighting requirements.

In the first opinion on ATMs issued in 1998, OTS concluded that certain provisions of the Iowa and Wyoming ATM statutes were preempted, with respect to federal thrifts. Specifically, OTS found that the statutes were preempted to the extent that the state laws (1) required out-of-state financial institutions to open an authorized local office before operating ATMs in the state, (2) required all financial institutions to receive state approvals and pay state fees for their ATM activities and to permit state examinations of their ATM operations, (3) required all financial institutions operating ATMs to make specified disclosures of ATM fees at the screen, and (4) required financial institutions to participate in a state-sponsored ATM system and to provide equal access to all other member institutions and their customers.[22] In the second opinion, OTS concluded that provisions of the Massachusetts ATM statute were preempted, with regard to federal savings associations to the extent that the statute imposed similar state approval, assessment, and local office requirements on financial institutions operating ATMs in the state.[23]

In its most recent set of opinions issued in 1999, OTS considered whether federal savings associations are subject to local requirements that would prohibit these associations from charging fees for use of their ATMs.[24] In its opinions, OTS concluded that based on HOLA, federal law totally occupies the field of ATM service fees charged by federal savings associations. In OTS's view, HOLA occupies the field of regulation of a federal savings association's deposit- and loan-related activities, including those conducted electronically. Accordingly, OTS concluded that deposit- and loan-related functions of a federal savings association are governed exclusively by federal law, thereby preempting conflicting local fee restrictions.

In another opinion issued in 1999, OTS addressed the New York ATM Safety Act, which required institutions to provide adequate lighting at ATMs.[25] OTS concluded that federal law did not preempt the New York state law for federal savings associations. In the opinion, OTS concluded that the state's vital interest in protecting the safety of its citizens should prevail.

Like OTS, OCC has considered preemption issues regarding the application of various state ATM restrictions to federally chartered institutions. Specifically, OCC has considered whether national banks must comply with state or local requirements that prohibit national banks from charging fees for use of their ATMs. In these cases, OCC has taken the position that the NBA and applicable regulations authorize national banks to set and charge fees for banking services provided through ATMs. Because the power to set and charge fees is authorized by the NBA, OCC concluded that state or local ATM fee prohibitions placed on

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[22] OTS Op. Chief Counsel July 1, 1998, 1998 OTS LEXIS 6.

[23] OTS Op. Chief Counsel Dec. 22, 1998, 1998 OTS LEXIS 13.

[24] OTS Op. Chief Counsel Nov. 22, 1999. See also OTS Op. Chief Counsel, Dec. 7, 1999.

[25] OTS Op. Chief Counsel Jan. 15, 1999.

national banks pose obstacles to the exercise of national bank powers and, therefore, would be preempted by operation of the Supremacy Clause.[26]

In addition to the issue of state and local ATM fee prohibitions, OCC has issued opinions regarding the applicability to national banks of state statutes limiting the ability of national banks to establish or use ATMs. In a 1998 case, OCC opined that a statute limiting a bank's ability to establish an ATM would be preempted by federal law.[27] OCC reasoned that under the NBA, national banks are authorized to establish ATMs pursuant to their authority to receive deposits, make loans, and engage in other individual activities.[28] While Congress subjects national bank branches to state geographic restrictions, it has not imposed those restrictions on ATM facilities. As OCC pointed out in its opinion, Congress amended the NBA's definition of "branch" in 1996 to expressly exclude ATMs. Based on this amendment, OCC concluded that ATMs established by national banks are no longer branches under federal law and are not subject to state geographic restrictions. In September 1999, the U. S. Court of Appeals for the Eighth Circuit agreed with OCC's view that the NBA preempted the state's ATM geographic restrictions.[29]

Parity Act and State Officials' Related Views

The Parity Act preempts state laws that restrict alternative mortgage financing arrangements such as variable interest-rate loans, balloon payments, and shared appreciation mortgages.[30] Congress enacted the Parity Act to remedy problems that nonfederally chartered housing creditors had experienced when increasingly volatile interest rates impaired their ability to offer traditional fixed-term, fixed-rate mortgages. The Parity Act is an example of express preemption. In the early 1980s, OTS and OCC had adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing, partially preempting state law barriers limiting adjustable-rate transactions.[31] The purpose of the Parity Act was to eliminate any discriminatory impact that the federal regulations had upon nonfederally chartered housing creditors and to provide such creditors parity with federally chartered institutions. The Parity Act provides that all housing creditors may make, purchase, and enforce alternative mortgage transactions as long as the transactions are in conformity

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[26] OCC's Amicus Curiae Brief No. C. 994817 VRW at 9 filed in support of plaintiffs in Bank of America, N.A., and California Bankers Association v. City and County of San Francisco, California and City of Santa Monica, California . The court in this case has issued an injunction against the cities and in favor of the banks concluding that the ordinances were likely preempted by federal law. 1999 W.L. 1243845 (Nov. 29, 1999). See also First Union National Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999) (Connecticut enjoined from asserting enforcement jurisdiction over national bank ATMs).

[27] OCC Interpretive Letter No. 821, Feb. 17, 1998.

[28] Id. at p. 2 (relying on 12 U.S.C. § 24 (Seventh)), OCC had previously established that a national bank may perform authorized activities and functions via electronic means and facilities. See e.g., 12 C.F.R. § 7.1019.

[29] Banc One, Utah v. Guttau, 190 F2d 844 (1999).

[30] The Alternative Mortgage Transaction Parity Act of 1982 (Parity Act) was passed as title VIII of the Garn-St. Germain Depository Institutions Act of 1982, P.L. No. 97-320, 96 Stat. 1469 (1982) (codified as amended at 12 U.S.C. § § 3801-3806).

[31] See 12 U.S.C. § 3801(a)(3). The National Credit Union Administration (NCUA) issued similar regulations.

with the regulations governing alternative mortgage transactions issued by the appropriate federal agency.

OTS's regulations specify that, to be considered an alternative mortgage transaction within the meaning of the Parity Act, a loan must conform to OTS regulations regarding late charges; prepayments; adjustments to the interest rate, payment, balance or term to maturity; and disclosures to the extent to which those regulations would apply if the same loan were originated by a federal savings association. As long as a state-chartered housing creditor complies with the requirements of these OTS regulations in making and enforcing its alternative mortgage transaction loans, it need not comply with conflicting or inconsistent state restrictions.[32] For example, if a state law prohibits creditors from charging customers prepayment penalties on mortgage loans, but the creditor has chosen to comply with applicable federal law and regulation then it does not have to comply with the state law prohibiting prepayment penalties.

The Parity Act may not totally displace state law. As set forth in the act itself, the Parity Act was not intended to make federal law the exclusive source of authority for state-chartered banks' alternative rate mortgage loan-making, but rather to put state-chartered housing creditors on equal footing with federally chartered institutions.[33] Accordingly, state-chartered housing creditors, including state-chartered thrifts and banks, may choose to follow either the federal alternative rate mortgage provisions or the provisions of the appropriate state.[34] States had an opportunity to opt out of the preemptive effect of the Parity Act.[35] Five states opted out during the applicable 3-year period.[36]

Since 1994, OTS has issued six opinion letters relating to the applicability of the Parity Act. These letters responded to requests concerning (1) whether a particular institution would be considered a "housing creditor" or (2) whether a specified transaction constituted an "alternative mortgage transaction."[37]

State banking department officials we interviewed expressed concerns about the effect of the Parity Act on consumers. In general, the officials stated that their states' laws governing

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[32] State-chartered commercial banks are authorized to engage in alternative mortgage transactions made in accordance with regulations issued by OCC for national banks. State-chartered credit unions are authorized to engage in alternative mortgage transactions made in accordance with regulations issued by the NCUA board for federal credit unions. See 12 U.S.C. § 3803(a). All other state-chartered housing creditors, including savings associations and savings banks, are authorized to engage in authorized mortgage transactions made in accordance with OTS regulations for federal savings associations.

[33] See 12 U.S.C. § 3801(b); 12 C.F.R. §7.3000 (1990).

[34] Id.

[35] For a 3-year period that expired on October 15, 1985, a state could have enacted a law or the voters of a state could have voted in favor of a provision that expressly stated that the federal authorization shall not apply to alternative mortgage transactions consummated in that state. 12 U.S.C. § 3804.

[36] The states that have opted out from Parity Act coverage are Maine, Massachusetts, New York, South Carolina, and Wisconsin.

[37] See, e.g., OTS letter dated Oct. 20, 1995, (concluding that a person making two loans a year was not a housing creditor under the Parity Act); OTS letter dated May 3, 1996, (concluding that adjustable rate reverse mortgage loans that may include an equity share feature are alternative mortgage transactions).

mortgage transactions provide some benefits to consumers that federal law does not. When a housing creditor chooses to comply with federal rather than state law, as the Parity Act allows, then consumers do not benefit from the state laws, according to the officials. These officials used, as an example, a state law prohibiting prepayment penalties on alternative mortgage transactions. Moreover, some officials said that consumers would not usually be aware that one set of rules could be applied by one housing creditor, while another set could be applied by another housing creditor. In shopping for a loan, therefore, making comparisons becomes more difficult, the officials maintained. OCC and OTS officials noted, however, that all housing creditors have to comply with certain truth-in-lending and real-estate settlement procedures that provide, for example, for specific disclosures of loan terms.

State officials expressed concerns about federal regulators' ability to assist consumers who have problems with housing creditors who follow federal rules on alternative-mortgage transactions and, more broadly, federal regulators' ability to ensure compliance. Changes in the mortgage banking industry since the Parity Act was passed in 1982 and a 1997 OTS opinion have magnified the state officials' concerns. Lenders other than savings associations and banks have become more active in the home-mortgage market; and a variety of housing-related loan products, such as home equity loans, are offered.

State officials also expressed concerns on a related issue dealing with mortgage lender subsidiaries of federal savings associations. They cited an OTS preemption opinion that concluded that operating subsidiaries of federal savings associations were exempted from state law because they are an integral part of the association's lending activities.[38] Officials from some states said they believe this OTS opinion has prompted some mortgage lenders to become subsidiaries of federal savings associations to avoid state consumer protection laws. We discussed these views with OTS officials. They noted that operating subsidiaries of associations have to be controlled by the association and can only perform the same activities as those of the association. In addition, the association must provide 30-day advance notice to OTS and the Federal Deposit Insurance Corporation before the subsidiary may be created or can undertake a new activity. OTS compliance examinations do include subsidiaries of the association, according to the officials. The OTS officials were not aware of any increase in mortgage subsidiaries affiliating with federal savings associations or any data that could be used to determine if such a pattern existed.

Disclosure Practices and State Officials' Views

Generally, OTS and OCC disclose their preemption decisions to affected parties in a similar manner. Both agencies said they notified the parties who originally requested an agency opinion. Generally, states whose laws are the subject of preemption opinions issued by OTS and OCC are not notified by the agencies, and OTS and OCC are not required to notify the states. However, if certain specific areas of state law are to be addressed in a preemption opinion, OCC is subject to a special statutory notification requirement, which we describe below.

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[38] OTS Op. Chief Counsel, Aug. 19, 1999, 1997 OTS Lexis 9.

As discussed previously, OTS has preempted state law through the issuance of regulations. When doing so, OTS published the proposed rule in the Federal Register and provided an opportunity for interested parties (including states) to comment. OTS officials said the notice published in the Federal Register is the vehicle through which notice is provided to interested parties and to states whose laws may be preempted by the regulation.

OTS officials said opinions are issued to the inquiring institutions, published on OTS's Internet web site, and made available through LEXIS and Westlaw, legal research services. In connection with issuing an opinion, OTS has no formal process by which it contacts or requests comments from the state whose law is at issue unless the state was the requester. Nonetheless, OTS officials said that in connection with issuing an opinion, they occasionally have some contact with or from officials from the subject state.

In general, OCC's disclosure process for its preemption opinions is much like that of OTS.[39] For both its legal opinions and corporate decisions, OCC said it issues its determination to the national bank that made the request and it posts the opinion or the corporate decision on its Internet web site. In addition, two OCC publications include interpretive opinions and corporate decisions where preemptions are reported. The quarterly OCC "Interpretations and Actions" is available through a paid subscription. OCC officials said that eleven state banking departments and some state bankers' associations are subscribers. They said OCC's "Weekly Bulletin" is provided to all state bank regulators and is available on OCC's Internet web site.

A notable difference in OCC's disclosure process from OTS's process is a 1994 statutory requirement that OCC provide an opportunity for public notice and comment when it is considering issuing opinions on the preemption of certain types of state laws. This requirement is contained in the NBA, as amended by Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.[40] Section 43 of the NBA requires that OCC provide a public notice and solicit comments, subject to certain exceptions, before it can issue any opinion letter or interpretive ruling that either (1) concludes that state law is preempted in the areas of consumer protection, community reinvestment, fair lending, or the establishment of intrastate branches or (2) will potentially have certain specified discriminatory effects on national bank branches.[41] The Federal Register notice must include the preemption or discrimination issue and a description of the state law in question. The final preemption opinion must also be published in the Federal Register. Since the passage of section 43, OCC has published the required preemption notice four times, publishing one opinion that state

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[39] As we have previously noted, OCC has not issued broad preemption regulations as OTS has.

[40] P.L. No. 103-328, 108 Stat. 2338 (1994).

[41] See 12 U.S.C. § 43(c)(3). These requirements are waived if (1) essentially no new issue has been raised or the request contains no significant legal basis on which to make a preemption determination, (2) the materials are for intragovernmental use, or (3) specified emergency criteria is met. Section 43 further applies to all banking agencies listed in 12 U.S.C. § 1813 in connection with their issuance of a preemption opinion relating to national banks in the above listed areas.

law was preempted.[42] The NBA also requires that OCC annually report to Congress its preemption actions and the reasons for each action.[43]

Since section 43 requires OCC to publish notice of and request comments on preemption determinations only in the specified subject areas, OCC is not required to use notice-and-comment procedures for its preemption opinions as a matter of course. Also, as noted above, there is no notice-and-comment requirement comparable to section 43 that applies to OTS. Outside of the procedures that OCC is required to follow under section 43, neither agency has in place procedures for soliciting comments from state regulatory officials or for notifying them of final preemption determinations.

Our interviews with five state banking departments identified several concerns with OTS's and OCC's disclosure procedures. All of the state banking officials we interviewed wanted greater notice of and opportunity to comment on preemption issues being considered by OTS or OCC. The state officials said that OTS and OCC generally do not notify them of the issued opinion. Typically, the financial institution that requested an OTS or OCC opinion on whether a particular state law was preempted informed the state bank regulators of the federal preemption decisions. Some state banking officials learned of preemption decisions while addressing a consumer complaint or while conducting a consumer compliance examination. Officials in one state recommended that OTS and OCC notify them electronically about preemption questions being considered and about the final opinions issued. Officials of some state banking departments we interviewed also recommended that OTS have the same section 43 reporting, notice, and comment requirements that OCC has. They also suggested that OCC publish preemption notices in the Federal Register any time it issues an opinion letter and seek comment on state laws being reviewed for possible preemption. As noted above, section 43 requires OCC to use notice-and-comment procedures only for preemption opinions issued in the statutorily designated areas.

Several state banking department officials and officials of the Conference of State Bank Supervisors (CSBS) said they believe Executive Order 13132[44] on federalism indicates that federal bank regulators should consult with state officials when they are considering preempting state law. This order seeks to ensure that the principles of federalism guide agencies' policies,[45] and, in a section entitled "Special Requirements for Preemption," contains

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[42] In the 1995 Texas case where OCC determined that state law was not preempted, it found there was no actual conflict between federal law and a Texas regulation regarding naming and advertising branch facilities. See 60 Fed. Reg. 32,206 (1995). In the 1996 New Jersey case, OCC published for comment a request that it reconsider a prior OCC determination that federal law preempts a New Jersey law that requires all depositories in the state which offer regular checking accounts to offer low-cost or consumer checking accounts. 61 Fed. Reg. 4,515 (1996). To date, OCC has not published its final determination in response to this request. Most recently, on January 14, 2000, OCC published for comment a request for its opinion on whether a Pennsylvania statute regulating auctioneers applies to a national bank that uses an auction format to market and sell certificates of deposit over the Internet. The comment period closes on February 14, 2000. 65 Fed. Reg. 2455 (2000).

[43] 12 U.S.C. § 36(f)(1)(C). This section further applies to all banking agencies listed in 12 U.S.C. § 1813 in connection with their issuance of a preemption opinion relating to national banks in the above listed areas.

[44] 64 Fed. Reg. 43,257 (1999).

[45] The order provides, in relavant part, that it is designed to ". . . guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution. . . "

two provisions regarding federal agency contact with state and local officials.[46] The first provision requires an agency to "consult, to the extent practicable," with appropriate state and local officials to avoid a conflict between state and federally protected interests as soon as the agency foresees the possibility of such a conflict. The second provision states that a federal agency, which plans to preempt state law through rulemaking (or adjudication), shall provide all affected state and local officials notice and an opportunity for appropriate participation in the proceeding. In addition, the order contains specific procedures for federal agencies adopting regulations that have federalism implications and preempt state law.[47]

We asked OTS and OCC officials for their views on the order's applicability to their preemption processes. OTS officials said they believed the notice applied to promulgating regulations and would not apply to preemption opinions. Furthermore, they noted that OTS has not issued any regulations dealing with preemption since the order took effect on November 4, 1999. OTS has issued two opinions since the order took effect. OTS informed us that, as of January 19, 2000, it has discussed with CSBS the possibility of sending copies of proposed OTS regulations in which the states may have an interest to CSBS to be forwarded to the states. OCC officials told us that as of September 17, 1999, they would use the CSBS as an intermediary in obtaining comments from state banking officials on preemption issues raised by proposed regulations. This arrangement was prompted by the executive order, according to OCC officials. OCC has not promulgated regulations concerning preemption issues since the order took effect or issued any opinions.[48]

Based on our review of the executive order and related OMB guidance, it is not clear to what extent the preemption consultation provision outlined above would apply to the issuance of agency preemption opinion letters. The executive order and guidance focus primarily on the rulemaking process. Further, there is no formal mechanism in the order for OMB to review nonregulatory actions, such as opinion letters.

Conclusions

OTS's and OCC's approaches to preemption opinions are similar in certain material respects although their statutory authorities and preemption analyses are different. OTS, however, has issued broad regulations preempting state laws in certain areas and OCC has not. In considering similar issues related to ATMs, OTS and OCC preemption conclusions were similar.

The Parity Act expressly preempts state laws relating to alternative mortgage transactions. State banking department officials we interviewed expressed concerns that consumers in

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[46] These requirements were contained in an earlier Executive Order (12612), which was revoked by this new Order.

[47] By January 31, 2000, each agency was required to submit to OMB "a description of the agency's consultation process." Each description should indicate how the agency identifies those policies with federalism implications and the procedures the agency will use to ensure meaningful and timely consultation with affected state and local officials.

[48] OCC published for comment in the Federal Register a recent request for a preemption opinion. The comment period closes on February 14, 2000. See footnote 42.

their states cannot always benefit from their states' consumer protection laws because state-chartered housing creditors can choose, under the Parity Act, to follow applicable federal law and regulation.

Generally, OTS and OCC indicated they disclose their preemption opinions in the same manner—by notifying the party that requested the opinion, and posting the opinion on their Internet web sites. At times, both agencies have provided notice and an opportunity to comment on preemption issues. OTS has issued regulations describing its preemption of state laws in certain areas. In doing so, it provided notice in the Federal Register and solicited public comment. OCC has not issued preemption regulations similar to OTS.

OCC is subject to a special notification requirement under the NBA. When OCC is considering issuing a determination on whether federal law preempts state law in certain areas, such as consumer protection, it must publish a notice in the Federal Register, solicit comments, and publish its final decision. In addition, OCC must report annually to Congress on its preemption opinions. Outside of these requirements, which apply only to OCC, OCC and OTS generally do not have processes for notifying state regulators of preemption determinations or soliciting their comments. Officials of five state banking departments we interviewed wanted greater notice and opportunity to comment when OTS or OCC considers preempting a state law. They also want to be notified when final opinions are issued.

State banking officials said they believe that Executive Order 13132, effective November 4, 1999, calls for OTS and OCC to consult with state officials when preemption of state laws is being considered. OCC recently established procedures to notify state banking officials and solicit their comments when preemption issues are raised in proposed regulations. In addition, OTS proposes to send copies of proposed regulations in which the states may have an interest to CSBS to forward to the states. OTS and OCC believe that the executive order applies to rulemaking and not to agency opinion letters. Based on our review of the order, it is not clear to what extent the preemption consultation provision outlined above would apply to the issuance of agency preemption opinion letters, since it focuses primarily on the rulemaking process.

Agency Comments and Our Evaluation

We requested comments on a draft of this letter from the Director of the Office of Thrift Supervision and the Comptroller of the Currency. We received written comments from OTS and OCC and these are reprinted in enclosures III and IV, respectively. In addition, each agency provided technical comments, which we incorporated into this letter where appropriate.

OTS commented that we needed to clarify the distinctions between HOLA and OTS's implementing regulations and the Chief Counsel's Office advisory opinions. OTS stated that HOLA and OTS's implementing regulations on deposit-taking and loan activities preempt state law and the Chief Counsel's opinions are opinions on whether and how state laws would apply in the context of this federal framework. In response to OTS comments, we have made changes to the text to clarify the distinction between OTS opinions and regulations.

OTS commented that it is important to note that not every OTS advisory opinion issued on preemption interprets the HOLA and OTS regulations as preempting the state laws at issue. We have added information in this letter on the advisory opinions in which OTS determined that the federal regulatory framework did not preempt state law.

Regarding the issue on the lack of notification to the state bank regulators on OTS actions, OTS advised us that it would establish new procedures to ensure enhanced communication with the states. When OTS is asked to opine on the relationship between HOLA and a specific regulatory or enforcement action the state has proposed or initiated, OTS said it would notify the state attorneys general and bank regulators of the request and send copies of the completed opinions, as they are issued, to the state or states whose laws are addressed in the opinion. Moreover, OTS informed us that it plans to send copies of proposed OTS regulations in which the states may have an interest to CSBS to forward to the states.

OCC suggested that we expand our discussion regarding the roles of the federal and state governments relative to preemption and emphasize the framework of national bank powers Congress created in establishing the national banking system. OCC noted that expanding the discussion of this framework and OCC's role in interpreting the scope of federal banking powers, subject to judicial review, early in the letter would be helpful to readers. On the same point, OCC suggested that details we provide in enclosure I more fully describe the uniquely federal character of national banks and would be helpful to include in the letter itself. OCC stated that it "does not choose 'to preempt,' it is federal law that preempts." OCC commented that we needed to clarify language in the draft that could give any impression to the contrary. We added information to the background section and, in the section on OCC's approach to preemption, expanded the discussion to include additional information on national bank powers, including details from enclosure I. We also made changes elsewhere in the letter to clarify OCC's role in issuing preemption opinions, which are subject to judicial review.

OCC commented that our description of state officials' views—particularly their desire for greater notice of and opportunity to comment on preemption opinions—may be read as suggesting that we believe OCC's current procedures "fall short" of what is required or desirable. We have revised this section to note specifically that the statutory requirement for OCC to use notice-and-comment procedures for preemption opinions applies only to opinions in the statutorily designated subject areas. Our description of state officials' broader interests in being notified of and given the opportunity to comment on the preemption of state law is intended to present their perspectives.

As a related matter, OCC commented that our report appears to assume that "state concerns should influence the decision whether 'to preempt,'" when OCC opinions themselves do not preempt. Essentially, OCC maintains that it is the NBA, and not OCC's opinions, that preempt state law, and that "failure to clarify this point may leave the impression that the OCC disregards or opposes input from the states, when, in fact, the role of both the OCC and the states is circumscribed by the operation of law." We recognize that OCC's preemption opinions are based on the NBA, and that the courts are ultimately responsible for resolving preemption issues. Nevertheless, OCC clearly does have a role to play in interpreting the

NBA, and its opinions are requested and relied upon by national banks in structuring their operations and activities. Congress in the Riegle-Neal Act, and OCC itself, [49] have recognized circumstances in which consultation with interested parties in connection with a preemption determination can be a valuable exercise.

OCC's letter states that the draft's enclosure I notes a regulation duly promulgated by the OCC acting within the scope of its authority has "the same preemptive effect as a federal statute." Neither the draft enclosure I, nor the draft letter contained this phrase. In fact, we pointed out that OCC has not issued broad regulations preempting state laws in particular banking areas. Footnote 2 of enclosure I notes that the Supreme Court has held that an agency, acting within the scope of its authority, may preempt state law (i.e., through a properly adopted regulation). We understand that an agency's preemption regulation is subject to court review, as is an agency's opinion.

The role of the federal courts, OCC pointed out, was recently underscored in litigation where national banks obtained a ruling that state restrictions on ATM deployment and fees are preempted. OCC provided updated information on those ATM cases, and we added it to our discussion of ATM preemption issues in the section "OTS and OCC Use Similar Approaches to Preemption."

As agreed with your office, we plan no further distribution until 30 days from the date of this letter unless you publicly release its contents earlier. We will then send copies of this letter to Representative John LaFalce, Ranking Minority Member of the House Committee on Banking and Financial Services; and Senator Phil Gramm, Chairman, and Senator Paul Sarbanes, Ranking Minority Member, of the Senate Committee on Banking, Housing, and Urban Affairs. We are also sending copies of the report to the Honorable Ellen S. Seidman, Director of the Office of Thrift Supervision and the Honorable John D. Hawke, Jr., Comptroller of the Currency. Copies will be made available to others on request.

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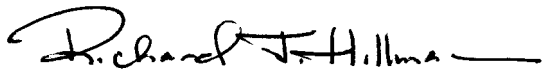
[49] OCC has published notice of and requested comments on preemption opinions even where the requirements of the Riegle-Neal Act may not apply, in order to enhance the decision-making process. See e.g. 65 Fed. Reg. 2455 (2000) (comments sought where bank's request for preemption opinion raised a novel question); 62 Fed. Reg. 1950 (1997) (comments sought "given the broad interest in the issues presented in the request and the benefit the OCC will derive by receiving comments from all parties with an interest in these issues.")

If you have any questions, please contact Richard J. Hillman at (202) 512-8678, Lynn H. Gibson at (202) 512-8153 or Kay Harris, Assistant Director, at (202) 512-8678. Key contributors to this letter were Nancy Eibeck, Rosemary Healy, Marion Pitts, and Sindy Udell.

Sincerely yours,



Richard J. Hillman
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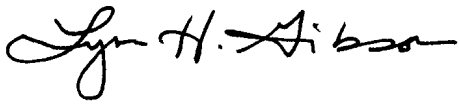

Lynn H. Gibson
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Discussion of Legal Basis for Preemption of State Law

This enclosure provides additional information on federal preemption of state laws as it relates to federal savings associations and national banks. The Office of Thrift Supervision (OTS), the federal regulator of savings associations has issued regulations as well as legal opinions that respond to specific requests regarding the preemption of state law. The Office of the Comptroller of the Currency (OCC), the federal regulator of national banks, has concluded that various state laws are preempted by federal law in legal opinions, interpretative rulings, and decisions issued in connection with bank applications in general. Following a brief overview of preemption analysis, we describe the preemption analyses relied upon by OTS and OCC, respectively.

Legal Framework For Preemption Of State Law

The federal government and the 50 state governments often possess jurisdiction over the same field of law. The resulting concurrent jurisdictional scheme may produce situations where state and federal law conflict. To resolve these conflicts, the Constitution's Supremacy Clause provides that federal law is "the supreme Law of the Land," thereby preempting state law.[1] Federal preemption may arise whenever Congress enacts a statute or a federal agency adopts a regulation in an area in which state legislatures have acted or have the authority to act.[2] Ultimately, conflicts may require judicial resolution. The analysis of whether federal law preempts state law (referred to as "preemption analysis") has turned on whether Congress intended that federal regulation overrides state law. A finding of preemption is compelled if Congress' intent is explicitly stated in the statute's language or implicitly contained in its structure and purpose. As described below, courts traditionally have divided preemption analysis into categories of express and implied preemptions.

Express Preemption

At times, Congress may declare, in express terms, its intention to preclude or override state regulation in a given area. With an express preemption, Congress' intent to preempt state law is clear from the face of the statute. Interpretive questions can still arise with express preemption. For example, a statute may clearly show an intent to preempt state law, but there may be questions concerning the exact scope of the subject that is

[1]U.S. Const. Art. VI, Cl.. 2 states that

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[2]The Supreme Court has held that the reference in the Supremacy Clause to the "Laws of the United States" includes properly adopted federal regulations. Therefore, "a federal agency acting within its scope of its congressionally delegated authority may preempt state regulation." See, e.g., Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) (citations omitted).

preempted. The Parity Act, as discussed in this letter, is an example of express preemption.

Implied Preemption

In addition to express preemption, preemption may be implied from the federal statute's structure and purpose. Courts have identified two types of implied preemptions: "field preemptions" and "conflict preemptions." In the case of a field preemption, a court basically finds that the federal government has so occupied the field in a given area that there is no room for state legislation. This can occur where the statutory structure and purpose show either (1) that Congress intended to so pervade a field of federal regulation that Congress left no room for states to supplement it or (2) the federal interest in the field is so dominant that Congress intended to occupy the field and leave no room for state legislation.[3]

Conflict preemption occurs when a court concludes that state law is in irreconcilable conflict with federal law. In these instances, a court finds that while Congress did not intend necessarily to preempt state regulation in a given area, state law that conflicts directly with federal law or stands as an obstacle to the accomplishment of federal objectives is preempted.[4]

While the different preemption classifications of "field" and "conflict" preemption have been used by the courts, they do not represent distinct categories with exclusive tests for each. Rather, as a practical matter, there can be substantial overlap between the categories, with courts using a similar analysis to address field and conflict preemption. For example, one commentator noted that the Supreme Court's field preemption analyses have shifted toward conflict preemption analysis by focusing on actual conflicts between state and federal law and considering their absence as grounds for not finding field preemption.[5]

Federal preemption in the area of banking law has a long history, as evidenced by numerous Supreme Court cases on preemption issues dating back to the 1870s, when national banks were in their infancy. Federal preemption in the savings association arena does not have the same lengthy history of examination by the Supreme Court. As described in the

[3]See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 203-04 (1983).

[4]Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977).

[5]John Duncan, "The Course of Federal Preemption of State Banking Law, Annual Review of Banking Law," p. 8 (March 1999).

following section in more detail, OTS generally relies on field preemption analysis and OCC generally relies on conflict preemption analysis.[6]

OTS Reliance On Field Preemption Analysis

The Home Owners' Loan Act (HOLA) authorizes OTS "to provide for the organization, incorporation, examination, operation, and regulation" of federal savings associations.[7] In doing so, HOLA directs OTS to "giv[e] primary consideration of the best practices of thrift institutions in the United States" so that savings associations will be available "for the deposit of funds and for the extension of credit for homes and other goods and services."[8] Based on this authority, OTS has promulgated regulations and issued several advisory opinions indicating that state laws affecting the operations of federal savings associations are preempted.[9] In its regulations and opinions, OTS consistently bases its preemption decision on a finding that the federal regulatory scheme for federal savings associations "occupies the field" of regulation affecting the operations of these associations.

In 1982, the U.S. Supreme Court, in Fidelity Federal Savings & Loan Assn. v. de la Cuesta,[10] considered whether OTS' predecessor agency, the Federal Home Loan Bank Board (FHLBB), acted within its statutory authority in issuing a preemptive due-on-sale regulation.[11] In this case, the Supreme Court first concluded that California's due-on-sale law was in conflict with FHLBB's regulation. Based on its conflict analysis, the Supreme Court next considered whether FHLBB had the requisite authority to issue the due-on-sale regulation. The Supreme Court concluded that the subject regulation was within the scope of FHLBB's authority under HOLA, consistent with HOLA's broad purposes, and therefore, preempted conflicting state laws.

[6]OTS relies on conflict preemption when analyzing issues involving the applicability of state law to service corporation subsidiaries of federal savings associations. See n. 33.

[7]12 U.S.C.§ 1464(a); see also 12 U.S.C. § 1463(a).

[8]12 U.S.C.§ 1464(a).

[9]OTS (and OCC) legal opinions are advisory. Such opinions do not have the force of law, so courts do not have to defer to them. The Supreme Court has observed that courts should treat opinion letters and interpretations as guidance if they are consistent with legislative intent. VALIC, 513 U.S. at 259; see also Skidmore v. Swift & Co. See, e.g., 323 U.S. 134, 140 (1944). Recently, the Supreme Court afforded a Comptroller opinion deference in Variable Annuity Life Insurance Co. v. Comptroller of the Currency. 513 U.S. 251(1995). In VALIC, the Supreme Court concluded that the Comptroller's opinion that bank sales of annuities are part of the business of banking was a reasonable determination consistent with 12 U.S.C. § 24 Seventh and therefore was deserving of the Supreme Court deference.

[10]458 U.S. 141 (1982).

[11]Id. A "due-on-sale" clause is a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred.

The Supreme Court, in its opinion, pointed out that FHLBB's regulations under HOLA governed "the powers and operations of every federal savings and loan association from its cradle to its corporate grave."[12] The Supreme Court further concluded that based on HOLA's broad statutory language "Congress gave the FHLBB plenary authority to issue regulations governing federal savings and loans" and expressly approved FHLBB's promulgation of regulations that supersede state laws.[13]

The de la Cuesta Court specifically noted that because it found an actual conflict between federal and state law, it did not decide whether HOLA or the regulations "occupy the field" of due-on-sale law or, more broadly, the entire field of federal savings association regulation.[14] Neither de la Cuesta nor any other Supreme Court opinion has addressed specifically whether OTS's reliance on field preemption is appropriate. In support of its continued reliance on field preemption analysis, OTS relies on the de la Cuesta case highlighting HOLA's broad mandate, and lower court decisions that support OTS's reliance on field preemption analysis and recognize that federal savings associations are uniquely federalized institutions—even distinguishable from national banks.[15]

OTS Preemption Regulations and Opinions

OTS preempts state law through regulation or may issue a preemption letter in response to a specific inquiry. Shortly after the de la Cuesta decision, FHLBB issued a broad preemption regulation. Section 545.2 of OTS's regulations states that the agency has "plenary and exclusive authority" to regulate federal savings associations and preempt "any state law purporting to address the subject of the operations of federal savings association[s]." Because the regulation does not further define "operations," questions subsequently arose regarding whether a specific law affected the "operations" of federal savings association. From 1983 through 1996, for 13 years after FHLBB issued this regulation, FHLBB (and later OTS) relied on this regulation and continued to issue legal opinions to answer specific requests from institutions or less frequently, state agencies, on whether, in its opinion, specific state laws were preempted.

[12]Id. at 145 (quoting People v. Coast Federal Savings & Loan Association, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

[13]Id. at 160-62.

[14]Id. at 159, n. 14. Justice O'Connor's concurring opinion stated that FHLBB's power was not limitless and identified types of state laws, such as tax statutes and zoning ordinances, which are not directly related to savings associations' practices, as not within the agency's power to preempt. Id. at 171-72.

[15]See 61 Fed. Reg. 50951, 50965, (Sept. 30, 1996) (citing People v. Coast Federal Savings & Loan Association, 98 F. Supp. 311 (S.D. Cal. 1951).

To address questions that arose in certain areas, OTS issued regulations describing the scope of preemptions in these areas. The following describes OTS's regulations in the areas of (1) lending and deposit taking and (2) interstate branching and the treatment of operating subsidiaries.

Lending and Deposit-Taking Regulations

In 1996 and 1998, OTS issued two sets of regulations describing its preemption of state laws in the lending and deposit-taking areas, respectively. In the case of lending operations, OTS's 1996 regulations state that they "are intended to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation."[16] Subject to certain exceptions, the regulation authorizes federal savings associations to exercise their lending powers as authorized under federal law "without regard to state laws purporting to regulate or otherwise affect their credit activities." [17] The regulation contains a list of examples of the types of state laws that are preempted, including (1) state licensing, registration, and reporting laws; (2) state laws governing the specific terms of credit agreements and loan-related fees; and (3) state laws requiring lenders to comply with disclosure and advertising rules.[18]

On the deposit-taking side, OTS, in its regulations adopted in 1997, established a preemption standard that is essentially the same as the lending preemption standard. Like the lending preemption regulations, the deposit-taking regulation contains a list of examples of preempted state laws. The list includes laws that purport to impose requirements governing (1) abandoned and dormant accounts, (2) disclosure requirements, (3) funds availability, (4) service charges and fees, and (5) state licensing or registration requirements.[19] These lists are not intended to be exhaustive.[20]

Both the lending and the deposit-taking regulations contain a similar standard for determining whether state law is not preempted. These regulations provide that state laws are not preempted to the extent that they either (1) only incidentally affect the lending operations or deposit-taking of the federal savings association or (2) are otherwise consistent with OTS's ability to occupy the entire field or federal savings associations'

[16]12 C.F.R. § 560.2(a).

[17]Id.

[18]12 C.F.R. § 560.2(b) (1998).

[19]12 C.F.R. § 557.12 (1998).

[20]12 C.F.R. § 557.11.

lending-related or deposit-taking regulations to "enhance safety and soundness and enable federal savings associations to conduct their operations in accordance with best practices."[21] The lending-related regulation specifically identifies certain types of state laws that are not preempted, including laws relating to contracts and real property, homestead, tort, and criminal laws.[22] The types of state laws that the deposit regulation does not preempt include contract, tort, and criminal laws.[23]

Branching, Trust, and Operating Subsidiary Regulations

In addition to these lending and deposit-taking regulations, OTS has issued regulations preempting state branching laws and preempting state law as it applies to an operating subsidiary of a federal thrift to the same extent that it would apply to a federal thrift. In the area of interstate branching, OTS issued a regulation that provides that federal savings associations may establish deposit-taking branches on a nationwide basis in accordance with HOLA and OTS rules and without regard to any state laws purporting to address branching by federal savings associations.[24] The courts have affirmed the authority of OTS (and its predecessor agency FHLBB) to grant interstate branching privileges for federal savings associations and to preempt any inconsistent state laws.[25]

In late 1996, OTS promulgated a regulation that addresses, among other things, the authority of federal thrifts to establish operating subsidiaries and to invest in service corporations.[26] The federal savings association parent of an operating subsidiary must own a majority of the subsidiary. The subsidiary may engage only in activities that are permissible for the parent thrift. A federal savings association parent of a service corporation is not required to own a majority, and the service corporation's activities are not limited to those of the parent if they are authorized by regulation.[27] In connection with the promulgation of the regulation, OTS concluded that "state law is preempted for operating subsidiaries to the same extent that it is for the parent federal savings association. . . because an operating

[21]12 C.F.R. §§ 560.2(a), 557.11(a)(3)

[22]12 C.F.R. § 560.2(c).

[23]12 C.F.R. § 557.13.

[24]12 C.F.R. § 556.5(d).

[25]Conference of State Bank Supervisors v. OTS, 792 F. Supp. 837 (D.D.C. 1992); Independent Bankers Ass'n of America v. FHLBB, 557 F. Supp. 23 (D.D.C. 1982).

[26]12 C.F.R. §§ 559.2-559.13.

[27]12 C.F.R. § 559.3(c)(e). See also 12 C.F.R. § 559.4.

subsidiary. . . is treated as the equivalent of a department of the federal thrift for regulatory and reporting purposes."[28] Following the issuance of this regulation, OTS has issued three opinion letters addressing the operating subsidiary issue.

In these three letters, OTS concluded that certain state laws relating to the licensing of mortgage lenders were preempted regarding the mortgage lending subsidiaries of federal savings associations.[29] For example, in a 1997 opinion letter, OTS declared that New Jersey's Licensed Lenders Act (which imposes licensing and disclosure requirements, net worth standards, and fees restrictions on mortgage lenders and other consumer lenders) was preempted, regarding the mortgage lending activities of a federal thrift's operating subsidiary.[30] OTS asserted that its preemptive power to regulate a federal thrift "is not limited to the depository institution itself, but also reaches its subsidiaries"[31] Moreover, OTS argued, "because operating subsidiaries are an integral part of the operations of federal savings associations, the same regulatory approach must be applied to both if the agency is to fulfill its statutory mandate." Accordingly, OTS concluded that the operating subsidiary was entitled to the benefit of the same broad preemptive shield that protected the lending activities of its parent thrift.

OTS has not relied on field preemption of state laws regarding service corporations. Instead, OTS has said that a state law will be preempted, regarding the activities of a service corporation only if the state law conflicts with federal law.[32]

[28]61 Fed. Reg. 66,561; 66,563 (1996).

[29]OTS Op. Chief Counsel (Aug. 19, 1997); OTS Op. Chief Counsel (July 26, 1999); and OTS Op. Chief Counsel (July 29, 1999).

[30]OTS Op. Chief Counsel (Aug. 19, 1997) 1997 OTS Lexis 9.

[31]Id. Applying the same standards, OTS recently determined that mortgage lender licensing laws and related requirements in Maryland and Connecticut applicable to operating subsidiaries of federal savings associations were preempted. OTS Ops. Chief Counsel (July 26, 1999) CCH Fed. Bank L. Rep., Current Binder PP 83-307, 83-308.

[32]62 Fed. Reg. 66,563. Service corporations engage in activities that are not permissible for the parent thrift and "are not so closely tied to the parent thrift," since they "need not be controlled by [the] parent thrift." Id. Moreover, under HOLA the aggregate, investments of a federal thrift in service corporations are limited to only 3 percent of the thrifts assets under 12 U.S.C. § 1464(c)(4).

OCC Reliance On Conflict Preemption Analysis

The NBA provides for the creation, regulation, and operation of national banks and enumerates national bank powers. In addition to enumerating powers comprising core banking functions such as lending and deposit-taking, the NBA grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking."[33] Based on the authority contained in the NBA and Supreme Court interpretations, state laws that limit the operation of national banks are preempted under the Supremacy Clause when the state law contradicts or impairs the federal law's purpose.[34] Applying conflict preemption analysis, the Comptroller of the Currency generally issues opinion letters, interpretative rulings, and decisions in connection with corporate applications addressing the preemption by the NBA of state law.

Beginning in the late 1800s, the Supreme Court has addressed repeatedly whether federal banking laws preempt state banking laws. Applying conflict analysis, the Supreme Court has held that federal law preempts state law when the state's law contradicts or impairs the federal law's purpose. In a recent case, the Supreme Court considered whether a federal statute (12 U.S.C. § 92) permitting national banks to sell insurance in small towns preempts a state statute that forbids them to do so.[35] The Supreme Court stated that "grants of both enumerated and incidental 'powers' to national banks are (interpreted as) grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." In that same case, the Supreme Court further noted that state laws are not preempted when Congress "grants an explicit power with an explicit statement that the exercise of that power is subject to state law."[36] The Supreme Court also has held that because national banks are federal instrumentalities they are not generally subject to state regulation unless contemplated by Congress, either expressly or by implication.[37]

[33]12 U.S.C. § 24 (Seventh). The Supreme Court has held that the business of banking is not limited to the enumerated powers in section 24 Seventh and that the Comptroller therefore has the discretion to authorize activities beyond those specifically enumerated. Nations Bank v. VALIC, 513 U.S. at 257-258.

[34]See e.g., First Nat'l Bank of San Jose v. State of California, 262 U.S. 366 (1923) (Holding that states cannot seize national bank accounts even if there has been no activity on the account for 20 years.)

[35]Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 32 (1996).

[36]Id. at 1109. (citing 12 U.S.C. 36 (c), in which for example, Congress predicated the establishment of national bank branches upon compliance with state laws authorizing branching by state banks).

[37]See, e.g., McCulloch v. Maryland, 4 Wheat. 316, 429, 436 (1818); Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33-34 (1875); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373, 378 (1954).

OCC Preemption Opinions

Unlike OTS, OCC has not issued broad regulations preempting state law in particular banking areas.[38] Instead, the Comptroller issues its preemption positions in opinion letters in response to specific inquiries, interpretive rulings, and corporate application decisions. For example, the Comptroller has opined that state law is preempted in cases involving annuity sales, business hours, and consumer convenience and protection.[39] Further, in the area of making loans and taking deposits, the Comptroller has maintained consistently that state laws that interfere with these national bank powers are preempted.[40]

In a recent decision pertaining to trust activities of national banks, the Comptroller concluded that national banks' fiduciary capacities are a matter of the law of the state in which the bank conducts the fiduciary activities. However, national banks may advertise and solicit customers for its fiduciary business from other states and operate trust representative offices nationwide. Thus, in its opinion, OCC concluded that state laws are preempted to the extent they impermissibly conflict with the bank's authority to solicit trust business in other states, act as trustee for customers in other states, or maintain a trust representative office in those states.[41]

[38]See 12 C.F.R. 34.4 (preempting specified types of state law limitations applying to real estate loans).

[39]See, e.g., Interpretive Letter 749 (Sept. 13, 1996) (Texas insurance licensing laws that prevent a national bank's authority to sell annuities would be preempted); Interpretive Letter 706 (Jan. 18, 1996) (Alabama law prohibiting Sunday operations of national banks would be preempted).

[40]See, e.g., Interpretive Letter No. 572 (Jan. 15, 1992) ("no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard.") CCH Fed Bank L. Rep transfer Binder 91-83, 342; Interpretive Letter No. 644 (Mar. 24, 1994) (national banks have express authority to lend money and therefore are not subject to the qualification that they must be further authorized by state officials).

[41]OCC Interpretive Letter No. 866 (Oct. 8, 1999).

OTS and OCC Opinions Concluding That State Laws (and Local Ordinances) Are Preempted From 1994 to 1999

Table II.1: OTS Opinions Concluding State Laws (and Local Ordinances) Are Preempted

Date of opinion	State	State laws/provisions
December 7, 1999	Local Ordinance San Francisco, California	A local ordinance prohibiting a financial institution from charging a fee to a customer for accessing an automated teller machine (ATM) of that financial institution with an access device--a card, code or other means of access--to a customer's account not issued by that financial institution.
November 22, 1999	Local Ordinance Santa Monica, California	A local ordinance prohibiting a financial institution from charging a fee to a customer for accessing an ATM of that financial institution with an access device not issued by that financial institution.
July 29, 1999	Maryland	Maryland's Mortgage Lender Law requiring an operating subsidiary of a financial institution to obtain a state license before conducting banking business.
July 26, 1999	Maryland	Maryland's Mortgage Lender Law requiring state licensing and approval for mortgage lenders.
	Connecticut	A law requiring a subsidiary of any financial institution to obtain state approval before engaging in banking business.
March 10, 1999	California	California Unfair Competition Act provisions on lending activities in the areas of advertising, the forced placement of hazard insurance and the imposition of certain specified loans.
January 4, 1999	Connecticut	A provision requiring application and approval from the State Banking Commissioner before opening a de novo branch.
December 22, 1998	Massachusetts	Provisions restricting the establishment and operations of electronic branches, including ATMs, applying to federal savings associations.
July 1, 1998	Iowa	A law that prohibits or limits out-of-state financial institutions from establishing an ATM.
	Wyoming	A law requiring state approval before financial institutions can establish ATMs and fees to be properly disclosed to the consumer.
July 1, 1998	Georgia	A law prohibiting or restricting an out-of-state savings and loan association from engaging in interstate preneed funeral trust services and fiduciary activities.
	Missouri	A law prohibiting or restricting an out-of-state savings and loan association from engaging in interstate preneed funeral trust services and fiduciary activities.
	Illinois	A law prohibiting or restricting an out-of-state savings and loan association from engaging in interstate preneed funeral trust services and fiduciary activities.
	Connecticut	A law prohibiting any corporation other than a bank or an out-of-state bank that maintains a branch in the state from acting in a fiduciary capacity.

Date of opinion	State	State laws/provisions
	Michigan	A law barring out-of-state federal savings associations and federal savings bank from acting as a fiduciary in the state.
	Kansas	A law allowing an out-of-state federal savings bank to act as a fiduciary in the state only if the federal savings bank's home state permits an out-of-state federal savings bank to act in a similar fiduciary capacity.
May 11, 1998	New York	A tax law barring mortgage lenders from passing on to consumers a special mortgage recording tax.
September 2, 1997	Virgin Islands	A Virgin Islands Banking Board Order that prohibits charging against insurance settlement proceeds fees for the inspection of reconstructed properties securing mortgage loans and requires the refund of all such fees collected since September 15, 1995. A statutory provision requiring financial institutions to obtain license to do business in the Virgin Islands.
August 25, 1997	Ohio	Specific provisions adopted by the Ohio legislature did not constitute an opt-out of the Depository Institutions Deregulation and Monetary Control Act of 1980 preemption provisions regarding discount points and federal-related residential mortgage loans secured by a first lien on residential real property made after March 31, 1980.
August 19, 1997	New Jersey	Operating subsidiaries of a federal savings and loan association would be preempted from the New Jersey Licensed Lenders Act when making first and second mortgage loans.
December 24, 1996	Indiana	A provision of the Indiana Uniform Consumer Credit Code requiring specific lending disclosures and certain loan-related charges by savings and loan associations.
August 8, 1996	Louisiana	A law requiring a trustee to be a financial institution organized under the laws of Louisiana or of the United States and domiciled in Louisiana.
	Oregon	A law prohibiting an out-of-state fiduciary from performing as a trustee of a trust holding real estate.
	Texas	A law prohibiting out-of-state fiduciaries from marketing and advertising of trust services and from acting as trustee in the state unless the trust company's state permits Texas-chartered fiduciaries to act in such capacity.
	Virginia	A law prohibiting an out-of-state fiduciary from performing as a trustee of a trust holding real estate.

Date of opinion	State	State laws/provisions
	Wisconsin	A law prohibiting out-of-state trust companies from acting in any fiduciary capacity in Wisconsin unless the foreign trust corporation's home state permits Wisconsin-chartered fiduciaries to act in a similar manner.
June 21, 1996	California	A law prohibiting out-of-state corporations, other than national banks with branch offices in the state and out-of-state banks authorized by the state, to conduct trust business.
	New York	A provision prohibiting out-of-state trust companies from acting as a fiduciary in the state unless their home states permit same for New York chartered trusts.
	Ohio	A law imposing filing and licensing requirements on out-of-state fiduciaries wanting to do trust business in the state.
	Vermont	A law prohibiting savings associations from trust services marketing unless supervised by Vermont Banking Commissioner.
April 30, 1996	Wisconsin	A law restricting prepayment penalties on variable-rate loans.
March 28, 1996	[a]	Any state law requiring a license or prohibiting the performance of trust powers by a federal savings association.
January 18, 1996	Colorado	A law requiring all financial institutions accepting deposits in Colorado to file detailed annual reports with the state.
May 10, 1995	Georgia	Provisions of the Georgia Residential Mortgage Act, involving licensing, registration, advertising, disclosure, escrow accounts, financial reports, maintenance of books and records, and fees for registration and filing.
December 14, 1994	Virginia	Money Order Sales Act requiring a person to obtain a money order license from the State Corporation Commission.
October 18, 1994	Wisconsin	A law requiring a savings association to provide an individual who requests a copy of a credit report without extra charge.
October 17, 1994	Arizona	A law requiring any company that wishes to engage in the mortgage banking business in that state to file an application for a license, register to do business, post bond, and maintain a minimum net worth.
	Maine	A law requiring any company that wishes to originate consumer loans in that state to file an application for a license and to demonstrate that it is financially responsible and prohibiting lenders from taking a security interest in real property for consumer loans under a specified amount.

[a]No specific state law was cited in the opinion.

Source: OTS.

Table II.2: OCC Opinions Concluding State Laws Are Preempted

Date of interpretative opinion	State	State laws/provisions
October 28, 1999	California	Laws prohibiting out-of-state banks from establishing trust offices and prohibiting banks from conducting trust business without prior authorization from the Banking Commissioner.
October 8, 1999	Michigan	A law requiring a state license or approval for a bank to market its services and provide fiduciary services for customers.
February 17, 1998	Connecticut	A law prohibiting out-of-state banks from establishing or using ATMs in the state.
June 27, 1997	Colorado	Colorado Electronic Funds Transfer Act that prohibits national banks from placing their names on ATMs and giving the state regulatory authority over national banks' ATMs.
September 13, 1996	Texas	Texas insurance licensing laws that prevent or significantly interfere with a national bank's authority to sell annuities.
August 9, 1996	Texas	A provision of the Texas Insurance Code that prevents national banks from selling annuities.
January 18, 1996	Alabama	A law prohibiting Sunday operations.
May 15, 1995	Texas	A regulation requiring licensing of loan production offices as a condition for operation, and regulating the types of activities that can be conducted at such offices.
May 3, 1995	Rhode Island	A law prohibiting the use of the word "bank" on signs or documents unless the user is a state-chartered bank.
February 9, 1995	Idaho	Provisions of the Idaho Consumer Credit Code that impose licensing requirements as a condition to extending consumer credit recordkeeping and reporting requirements, and assessments of fees.
March 24, 1994	Georgia	Georgia Residential Mortgage Act that imposes registration and fee requirements as a condition to transacting business directly or indirectly as mortgage brokers or lenders.

Source: OCC

Table II.3: OCC Corporate Decisions Concluding State Laws Are Preempted

Date of corporate decisions	State	State laws/provisions
February 19, 1999	Texas	Provisions of a Texas law prohibiting out-of-state banks from operating branches in the state.
October 15, 1998	Texas	A constitutional provision prohibiting out-of-state banks from conducting business in Texas; a law prohibiting interstate mergers under the Riegle-Neal Act; and a law prohibiting out-of-state national banks from conducting fiduciary activities in Texas.
April 2, 1998	Texas	A law prohibiting interstate mergers under the Riegle-Neal Act; a Texas constitutional provision prohibiting out-of-state national banks from conducting business in Texas; and a law prohibiting out-of-state national banks from conducting fiduciary activities in Texas.
March 4, 1998	Missouri	A law prohibiting an out-of-state national bank from exercising fiduciary powers.
January 15, 1998	Texas	A law prohibiting an out-of-state national bank from having branches in Texas acquired pursuant to the Riegle-Neal Act.
June 1, 1997	Wisconsin	A law prohibiting out-of-state national banks from acting as fiduciaries.
March 27, 1996	Connecticut	Laws prohibiting out-of-state national banks from transacting business in Connecticut unless permitted under state law, requiring state approval for the merger of an out-of-state national bank with a Connecticut bank, and requiring state approval for branching in Connecticut by an out-of-state national bank.
January 29, 1996	West Virginia	A law prohibiting out-of-state national banks from transacting business in West Virginia.
February 16, 1995	Kansas	A law prohibiting out-of-state national banks from branching in Kansas.
March 8, 1995	Maryland	A law prohibiting out-of-state national banks from branching in Maryland.
March 14, 1995	Kentucky	A law prohibiting out-of-state national banks from transacting business in Kentucky.
April 4, 1995	Kansas	A law prohibiting out-of-state national banks owned by bank holding companies from relocating into Kansas.
June 9, 1995	West Virginia	A law prohibiting out-of-state national banks from transacting business in West Virginia.
July 26, 1995	Connecticut	Laws prohibiting out-of-state national banks from transacting business in Connecticut unless permitted under state law, requiring state approval for the merger of an out-of-state national bank with a Connecticut bank, and requiring state approval for branching in Connecticut by an out-of-state national bank.

Date of corporate decisions	State	State laws/provisions
August 15, 1995	West Virginia	A law prohibiting out-of-state national banks from transacting business in West Virginia.
September 11, 1995	West Virginia	A law prohibiting out-of-state national banks from transacting business in West Virginia.
October 5, 1995	Ohio	A law prohibiting out-of-state national banks from branching in Ohio.
October 5, 1995	West Virginia	A law prohibiting out-of-state national banks from transacting business in West Virginia.

Source: OCC.

Comments From the Office of Thrift Supervision

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, DC 20552 • (202) 906-6590

Ellen Seidman
Director

January 24, 2000

Richard J. Hillman
Associate Director, Financial Institutions
and Markets Issues
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Hillman :

This represents the Office of Thrift Supervision's (OTS's) response to the GAO's draft correspondence (Draft) on the preemption of state law by OTS and the Office of the Comptroller of the Currency. You provided the GAO Draft to OTS by cover letter dated January 13, 2000. Our general comments and observations about the subject matter of the Draft are set forth below.

As indicated in the Draft, the Home Owners' Loan Act (HOLA) authorizes OTS to provide for the organization, incorporation, examination, operation, and regulation of federal savings associations. By creating federally chartered financial institutions as a counterpart to existing state-chartered institutions, Congress created the dual banking system. The HOLA is an integral part of that system. Pursuant to this statutory authority, OTS has promulgated regulations to provide a uniform framework governing the operations of federal savings associations. The ability to operate under a uniform federal scheme is one of the hallmarks of the federal thrift charter, particularly for thrifts that operate on a multi-state basis.

In furtherance of this uniform system, the HOLA and OTS's implementing regulations preempt state law for the core operations of federal savings associations. On occasion, institutions ask our Chief Counsel's Office for an opinion on whether and how state laws would apply in the context of this federal framework. As the Draft notes, these opinions are advisory in nature. Elsewhere, however, the Draft blurs the distinction between OTS actions that have the force of law (regulations) and those that are interpretive (Chief Counsel opinions) by referring to both as "decisions".

This distinction is important to us because OTS has chosen to use the regulatory process as a vehicle for obtaining public comment from affected parties, including the states, about the interaction of our statute and regulations with state laws. Informed public comment from all potentially affected entities at an early stage on key issues enhances the quality of our

regulations. When we receive comments during a rulemaking on our interpretation of a regulation, we have the ability and the obligation to fully and fairly consider those comments and, if appropriate, adjust the final rule accordingly. The regulations are then part of the Code of Federal Regulations and readily available to federal savings associations, their customers, and other interested persons.

Thus, when we revised our regulations on lending and deposits, we sought comments on how our regulation of these core areas for federal savings associations interacts with state laws. To get such comments, the proposed regulations, which were published in the Federal Register, included the agency's purpose in adopting the regulation and the standards governing the interaction with state laws. We also recognized that, in addition to providing the purposes and standards we would use in determining which state laws were preempted, we could do even more to help those affected to know how those standards would apply to particular types of laws. We provided illustrative examples in order to assist the institutions we regulate, their customers, and other interested persons understand (and comment on) how these proposed regulations would interact with state laws.

The proposed lending regulation, for example, set forth the agency's purpose and standards in adopting the regulation: to enhance safety and soundness, to enable Federal savings associations to conduct their operations in accordance with best practices by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden, and to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. See 12 CFR § 560.2(a). The illustrative examples in the lending regulation fall into two categories. The first is the types of state laws that are preempted (including licensing requirements, terms of credit, and loan to value ratios). See 12 C.F.R. § 560.2(b). The second, of equal importance, is the types of state laws that generally are not preempted, such as state contract, tort, and criminal laws and other laws that further a vital state interest and either have only an incidental effect on lending or deposits or are not otherwise contrary to the purposes of enhancing safety and soundness and enabling federal savings associations to operate according to best practices. See 12 C.F.R. § 560.2(c).

We apply similar standards in interpreting how the regulations apply to specific facts presented to us in an opinion request. It is important to note that not every OTS opinion issued on preemption interprets the HOLA and OTS regulations as preempting the state laws at issue. The Draft does not mention instances in which OTS determined that federal laws and OTS regulations do not preempt state law. See e.g., opinions dated January 15, 1999 (lighting requirements of New York ATM Safety Act apply to Federal savings associations) and December 24, 1996 (Indiana Deceptive Acts and Practices statute applies to Federal savings associations).

With respect to the issue of providing greater notice to the states, OTS is working to improve communications. We currently publish proposed regulations in the Federal Register with a request for comments and post information about our regulatory proposals and legal opinions on the OTS Website. We have spoken with the Conference of State Bank Supervisors about sending copies of proposed regulations in which the states may have an interest to that organization to forward to the states. We will also change our procedures to notify state attorneys general and bank regulators when we are asked to opine on the relationship between the HOLA and a specific regulatory or enforcement action the state has proposed or initiated. This will provide the appropriate state official a timely opportunity to discuss the state's interests with us directly. Finally, we will send copies of completed opinions, as they are issued, to the state or states whose laws are addressed in the opinion.

We appreciate having the opportunity to meet with your staff on this topic and to provide our comments on the Draft.

Sincerely,

Ellen Seidman

Ellen Seidman
Director

Comments From the Office of the Comptroller of the Currency

Comptroller of the Currency
Administrator of National Banks
Washington, DC 20219

January 31, 2000

Mr. Richard J. Hillman
Associate Director, Financial Institutions and Markets Issues
General Government Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Hillman:

Thank you for providing us with a copy of your draft letter to Chairman Leach that addresses federal preemption of state law with respect to national banks and federal savings associations. We have reviewed the draft and have the following comments.

The Background section of the draft letter begins by mentioning that preemption is rooted in the Supremacy Clause of the U.S. Constitution and says that "conflicts may arise" because the federal and state governments both have roles in regulating financial institutions. We suggest that this discussion be expanded to emphasize the point that preemption issues arise because Congress has legislated in an area without specifying every instance in which its legislation displaces state law. For example, Congress has created the national banking system and established a detailed framework governing its activities and operations, but that statutory framework does not expressly resolve every conflict between federal and state law. The role of the OCC in resolving a conflict is to interpret the meaning and scope of the national banking laws.[1] It is the federal statute that preempts, not the agency, and the ultimate resolution as to any preemption of state law is to be made by federal courts applying well established standards derived from the Supremacy Clause.

[1] As the expert agency on national bank authority, the OCC is often asked to opine as to the scope of a national bank's authority, and sometimes is also asked for an opinion as to the ultimate preemption issue as well. We will often express our opinion about the scope of national bank powers determination without reaching the ultimate preemption issue. National banks also may simply exercise their powers or go to court for a declaratory judgment without an opinion from the OCC as to either the meaning of federal law or preemption.

We think that it would be helpful to establish this framework at the outset of your report. The OCC interprets the scope of federal banking powers, subject to deferential judicial review. The OCC may also opine as to the existence or extent of a conflict between state law and national banking powers, and that issue, too, is reviewable by a federal court. Accordingly, the OCC does not choose "to preempt;" it is federal law that preempts. The OCC renders opinions, using well recognized standards developed by the courts, as to whether or not a federal law does, or does not, preempt a state law, but the ultimate decisions on preemption questions are made by the courts. The phrasing of the draft lends itself to the contrary inference, creating the mistaken impression that the OCC has the authority under the Supremacy Clause to choose "to preempt" state laws in its discretion. We hope that implication can be clarified.

This misimpression also surfaces in other important points discussed in the draft letter. For example, the letter reports concerns expressed to the GAO by state officials that they frequently have no opportunity to comment on OCC preemption opinions before they are issued. Further, it remarks about the lack of OCC procedures for notifying appropriate state regulators to ask for comment on pending preemption opinion requests or to apprise them when the OCC has issued an opinion letter or a decision on an application. The discussion of these points appears to assume that state concerns should influence the decision whether "to preempt."[2] But, as we have indicated, the OCC's opinions and corporate decisions do not preempt. Failure to clarify this point may leave the impression that the OCC disregards or opposes input from the states, when, in fact, the role of both the OCC and the states is circumscribed by the operation of law. Ultimate decisions about the appropriate scope and reach of federal law are committed by the U.S. Constitution to the federal courts.

As noted in Enclosure 1 to the draft letter, a regulation duly promulgated by the OCC acting within the scope of its authority has "the same preemptive effect as a federal statute." A regulation is a more formal way of expressing the OCC's interpretation of a federal statute, and a duly promulgated regulation has the force of law. But the OCC does not choose "to preempt" when it issues a regulation, though that regulation may declare that a statute has preemptive effect. OCC regulations are issued to implement federal laws governing national banks. Before issuing any final regulation, the OCC follows the notice-and-comment procedures required by the Administrative Procedure Act, which afford all interested parties, including state officials, the opportunity to present views on both the substance of the regulation and any preemptive effect it may have. Moreover, as the draft letter notes, the Conference of State Bank Supervisors has recently agreed to serve as coordinator for state

[2] The draft letter notes that the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 requires the OCC to publish certain requests for opinions pertaining to preemption, and that Executive Order 13,132 requires consultation with state officials under certain circumstances. The draft mentions OCC procedures for publishing its preemption opinions, but leaves the impression that these procedures fall short of what is desirable even though they comply with the law and the Executive Order. In our view, the letter should indicate that the OCC complies with the publication requirements that apply.

participation in OCC rulemakings that have federalism implications, as that term is defined in Executive Order 13,132.[3] As is the case with our advisory letters and our decisions on applications, our conclusions about a regulation's preemptive effect are subject to review by the federal courts.

This point is underscored by recent litigation in which national banks have successfully sought rulings by the federal courts that state restrictions on ATM deployment and ATM fees are preempted. The draft letter mentions the OCC's position on these issues, expressed in a 1998 opinion letter and in an *amicus* brief filed last year, that the state laws at issue were preempted. We have an update on those cases; two federal courts have recently taken the same view. The U.S. Court of Appeals for the Eighth Circuit has issued an opinion holding that certain provisions of the Iowa Electronic Funds Transfer Act are preempted by the federal banking laws. Moreover, in the case cited at footnote 15 of the draft letter, the U.S. District Court for the Northern District of California has enjoined the cities of San Francisco and Santa Monica from enforcing ordinances restricting ATM fees. In the context of the draft letter, these decisions are significant not because the courts agreed with our position, but because they unequivocally demonstrate the point that preemption issues ultimately are resolved by the federal courts.[4] We would suggest that the letter discuss them.

It is useful to note that these cases were decided on the basis of a line of Supreme Court and lower federal court precedents that discuss the preemption of state law in the specific context of the national banking statutes. These precedents date to the late 1800s and culminate in the Supreme Court's decision in the *Barnett*[5] case. They recognize national banks as federal instrumentalities whose special federal character is a key factor in the determination of whether state laws are preempted. The statement in the draft letter that "federal and state governments both have roles in regulating financial institutions" is therefore not complete because it suggests a framework under which state law applies unless it is displaced by federal law. That is not true for a nationally chartered bank, which is a creature of federal law. The background discussion in Enclosure 1 more fully captures the uniquely federal character of national banks. We would suggest that this discussion appear much earlier in the draft -- either in the Background section or in the discussion of the OCC's approach -- so that it provides context for a discussion of the OCC's role, as distinguished from that of the federal courts.

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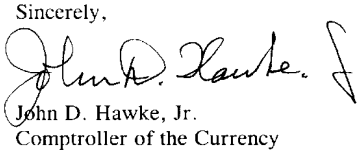
[3] *See* Executive Order 13,132 (August 5, 1999) (requiring federal agencies to consult with the states in certain circumstances).

[4] *Bank One, Utah v. Guttau*, 198 F.3d 844 (8th Cir. 1999) (Iowa location, registration, and advertising restrictions on national banks' ATMs preempted); *Bank of America, N.A. v. City and County of San Francisco*, No. C-99-4817-VRW (Nov. 24, 1999) (San Francisco and Santa Monica city ordinances restricting national banks' ATM fees preempted). *See also First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999) (Connecticut enjoined from asserting enforcement jurisdiction over national bank ATMs).

[5] *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996).

Our comments are intended to highlight the OCC's role with respect to whether the national banking laws preempt state law. Thank you for considering them.

Sincerely,



John D. Hawke, Jr.
Comptroller of the Currency

cc: Ellen Seidman
Director, OTS

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