**EPIC Comments to the Office of the Comptroller of the Currency on Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals.**
**April 8, 2003**
**Docket No. 03-02**

The Electronic Privacy Information Center (EPIC) and U.S. Public Interest Research Group (U.S. PIRG) submit these comments in response to the Office of the Comptroller of the Currency (OCC) notice of proposed rulemaking that, among other things, seeks to amend the current regulation regarding the scope of the agency's visitorial powers over national banks.[1]

EPIC is a not-for-profit research center in Washington, D.C., working to protect privacy, the First Amendment and constitutional values. EPIC has a particular concern in this OCC rulemaking because the proposed rule, if enacted, would threaten the nation's long-standing practice of establishing a federal baseline for privacy protection and allowing the states to provide greater protections if they so choose.

U.S. PIRG serves as the national lobbying office and association for state PIRGs, which are non-profit, non-partisan public interest advocacy organizations. U.S. PIRG and its state member PIRGs have a particular interest in this OCC rulemaking because this proposed rule, if enacted, would threaten the nation's long-standing federalist system, which has allowed states and even local governments to both enforce and enact stronger state consumer protection and privacy laws.

In its proposed rule, the OCC attempts to amend its regulations regarding the visitorial powers over national banks. If adopted, this amendment would have two major effects. First, it would expand the scope of the OCC's exclusive regulatory authority over national banks. Second, it would eliminate the authority of states to sue national banks in court to enforce state laws, including consumer protection and privacy laws.

This sweeping preemption of state enforcement is not supported by Congressional authorization or any reasonable interpretation of federal law. It would also harm consumers who are best served when both state and federal officials can protect them against unlawful business practices.

We urge the OCC to reject the proposed rule.

**Summary**

In 1864, Congress passed the National Bank Act which provides for the creation and operation of federally chartered national banks.[2] The purpose of the Act was to provide the country with one national currency.[3] Congress also sought to protect national banks from unfair state laws designed to disadvantage national banks over their state-domiciled competitors.[4]

Under the Act, Congress charged the OCC with ensuring national banks' compliance with banking laws by vesting it with "visitorial powers" over the institutions. Related banking statutes clarify that these visitorial powers give the agency the authority (i) to supervise national banks through on-site examinations, and (ii) to take administrative enforcement action against national banks, such as proceedings for issuing cease and desist orders and civil penalties or ordering the

removal of a national bank director or officer.[5] The OCC has the exclusive authority to perform these specific functions.[6] A state banking commissioner, for example, may not issue a cease and desist order against a national bank for its failure to comply with banking laws.

The OCC, however, does not enjoy exclusive visitorial powers over national banks. Title 12, U.S.C. § 484 provides several exceptions to the OCC's visitorial powers :

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

For over one hundred years, the Supreme Court and lower courts have interpreted the "vested in the courts of justice" exception to mean that individuals and state officials may sue national banks to enforce state laws, provided that they do not conflict with federal law, discriminate against national banks, or significantly interfere with their authorized activities.[7]

Now, the OCC, through administrative fiat, is attempting to broadly expand the scope of its authority to preclude state consumer protection regulation unrelated to protection of national banks from unfair treatment. This proposal would have the effect of insulating national banks from a host of state consumer protection and privacy laws, and exceeds its Congressional authority. The OCC claims that its administrative visitorial powers grant it the exclusive authority to enforce all laws against national banks, but this claim is not supported by any reasonable interpretation of the law. For the reasons articulated below, we urge the OCC to limit its interpretation of its authority over national banks and their operating subsidiaries to its well established scope.

1. The proposal violates Congressional intent to preserve the rights of states to regulate in the areas of consumer protection and privacy. In 1994 Congress directed the OCC to construe preemption of state consumer protection laws narrowly.[8] As currently conceived, this proposal would preempt a broad range of state consumer protection enforcement activities, and it therefore falls outside the bounds of the OCC's rulemaking authority.

2. The scope of the OCC's exclusive visitorial powers over national banks under 12 U.S.C. § 484(a) extends only to the supervisory examinations and administrative enforcement of banking laws. They do not prevent state officials from enforcing laws of general application.

3. The OCC does not have exclusive examination and regulatory authority over the operating subsidiaries of national banks. Unlike national banks, operating subsidiaries are state chartered corporate entities. States have the authority to license, examine and regulate them.

4. Congress explicitly granted an exception to the OCC's visitorial powers over national banks for actions "vested in the courts of justice." This exception allows state officials to bring judicial actions against national banks for declaratory or injunctive relief even if they do not have the authority to take direct administrative enforcement action such as issuing cease and desist orders.

5. The OCC's proposal undermines the traditional role that states serve as "laboratories of democracy," developing innovative laws in the areas of consumer protection and privacy. State level policy experimentation fosters the development of best practices. Precluding states from enforcing state laws will dilute their effectiveness, and weaken well established principles of federalism.

**Discussion**

**1. The proposal violates Congressional intent to preserve the rights of the states to regulate in the areas of consumer protection and privacy.**

As currently conceived, the OCC's proposal would have the effect of preempting a broad range of state enforcement activity. In proposing such a rule, the OCC patently ignores a Congressional directive that it should construe federal preemption of state consumer protection laws narrowly, and it steps outside the bounds of its rulemaking authority.

When Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, it explicitly recognized that states have a strong interest in the activities of national banks doing business in their jurisdiction.[9] It specifically affirmed the judicial presumption in favor of applying state laws to the activities of national banks, and criticized the OCC for its previous "inappropriately aggressive" preemption actions in the areas of community investment, consumer protection, fair lending and the establishment of intrastate branches.[10] It directed the OCC to preempt state regulatory action "only when the agency has determined that the federal policy interest in preemption is clear."[11]

There is no clear federal policy interest in the OCC's proposal to preempt state enforcement activities over national banks and their operating subsidiaries. In fact, there is a federal policy interest in preserving the rights of the states to enforce their laws. With limited resources, the OCC will not be able to achieve the same level of enforcement activity as it may through shared jurisdiction with the fifty states. If consumers believe that state consumer protection and privacy laws are not being enforced effectively, public confidence in the banking system may erode. In the long run, limiting state enforcement activities could undermine the safety and soundness of the banks. As such, the OCC should be welcoming state enforcement activities, not drafting rules that prohibit them.

In addition, contrary to the OCC's assertion, Congress did not affirm the agency's exclusive jurisdiction to enforce state laws against national banks in the passage of the Riegle Neal Act.[12] Congress passed that statute to allow national banks to establish branches outside their own state. It extended jurisdiction over these interstate branches to the OCC and mandated the OCC to enforce state laws against them. There is nothing in the plain language of the statute that would indicate that Congress granted the OCC exclusive authority over these branches. Furthermore, as the legislative history of the Act reveals, Congress did not intend the Act to limit the ability of states to enforce consumer protection laws against national banks. The Conference Report on the Act reads:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State laws under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.[13]

Given this clearly articulated Congressional intent, it is inappropriate for the OCC to claim that federal law gives it the authority to prevent states from enforcing their consumer protection laws

against national banks.

The OCC may not declare preemption through its regulations without Congressional authorization. Congress has clearly articulated its intent to preserve the rights of states to regulate in the areas of consumer protection and privacy. As a result, this proposal is outside the bounds of the OCC's authority and may not be enacted.

**2. The OCC misinterprets the scope of its visitorial powers to preclude state enforcement of general laws. State enforcement of laws of general application is not a visitorial power.**

Courts have construed the OCC's visitorial powers over national banks to apply only to the agency's regulatory efforts to ensure national banks' compliance with banking laws, and not to state actions to enforce laws of general application.[14] In First National Bank in St. Louis v. Missouri, for example, the defendant national bank claimed that the OCC's exclusive visitorial powers precluded state officials from enforcing state laws against it.[15] The Supreme Court disagreed, explaining that:

> What the State is seeking to do is vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or laws of its creation. . . . Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute.[16]

This interpretation is consistent with the legislative history of the National Bank Act, which associated the OCC's visitorial powers with its supervisory authority to examine the affairs of national banks to ensure compliance with their charters.[17] It also follows from the historical meaning of the term "visitorial." As explained by the Minnesota Supreme Court:

> The idea of visitorial powers is derived from canon law and was, in the 18th century, applied to charitable corporations as part of the common law. In that context it was defined as the exclusive right of the founder of a corporation to make by-laws for the corporation and to adjudge disputes arising thereunder. The visitor's power to adjudicate disputes ended with the by-laws; controversies under the general law were matters for the public courts.[18]

In light of these authorities, the OCC's contention that the visitorial powers provision of section 484 grants it exclusive jurisdiction to determine what standards apply to a national bank's activities and to enforce adherence to these standards is simply false. The OCC's exclusive jurisdiction does not extend to the enforcement of statutes that are not specific to banking industry practices. State officials have a long history of lawfully applying their states' laws to national banks. Indeed, even the cases the OCC cites as providing historical context for section 484's purpose reveal that the agency's visitorial powers do not prevent state officials from enforcing laws of general application against national banks.[19]

In sum, the OCC erroneously misinterprets the scope of its visitorial powers. The law is clear that individuals and states have the power to enforce state laws that apply equally to banks and non-bank entities.

**3. The OCC does not have exclusive examination and regulatory authority over the operating subsidiaries of national banks.**

The OCC asserts that it also enjoys exclusive visitorial authority over national banks' operating subsidiaries. Operating subsidiaries, unlike national banks, are not chartered by the OCC. They are state-chartered, non-bank corporate entities and the OCC cannot sweep them under its jurisdiction without Congressional authorization. States have the authority to license, examine and regulate operating subsidiaries.

In addition, as section 133 of the Gramm-Leach-Bliley Act makes clear, the Federal Trade Commission, and by concurrent jurisdiction the state attorneys general, have authority over any entity that is under the control of a bank, but is not itself a bank.[20] The controlling definition of "bank" under section 133 derives from the Federal Deposit Insurance Act which defines a bank as "any national bank, State bank, District Bank, and any Federal branch and insured branch." [21] This definition clearly does not include operating subsidiaries. Accordingly, the OCC does not have exclusive jurisdiction over national bank operating subsidiaries. A federal district court, in Minnesota v. Fleet Mortgage Corp., recently confirmed this interpretation, holding that an operating subsidiary engaging in mortgage lending is not a bank under section 133.[22] The court concluded the national bank's operating subsidiary was subject to the concurrent jurisdiction of the FTC and the states for violations of the Telemarketing Sales Rule.[23]

The OCC must modify its proposed rule to recognize that operating subsidiaries may not be treated as national banks under the visitorial powers provision of section 484.

**4. The OCC exceeds its authority by disregarding Congress's express authorization that national banks may be subject to actions "vested in the courts of justice."**

Congress explicitly granted an exception to the OCC's visitorial powers over national banks for enforcement actions "vested in the courts of justice." The OCC contends that this grant of power serves only to clarify that the courts may issue subpoenas or writs compelling the production of information or witnesses. The OCC's interpretation, however, is inconsistent with a long line of cases acknowledging the right of individuals and state officials to bring judicial actions for declaratory or injunctive relief to enforce state laws against national banks.

As early as 1905, the Supreme Court recognized that the OCC's visitorial powers over national banks did not "take away the right to proceed to courts of justice to enforce . . . recognized rights."[24] More recently, in First Union National Bank v. Burke, a federal district court expressly acknowledged that states may seek judicial enforcement of their state laws even if they do not have the authority to take direct administrative enforcement action, such as issuing cease and desist orders.[25] The court distinguished between direct administrative enforcement actions and actions "vested in the courts of justice." It preliminarily enjoined the Connecticut Commissioner of Banks from continuing with a pending administrative enforcement proceeding against a national bank, finding that the OCC has exclusive authority to initiate administrative enforcement proceedings against national banks. The court noted, however, that its "order in no way precludes ... the [state] from seeking enforcement of this state banking statute against the plaintiff national banks through the courts."[26]

In commentary to its proposed rule, the OCC states that it disagrees with this court's reading of the "vested in the courts of justice" exception on the grounds that it did not "analyze the purpose, plain language and structure of section 484." The district court, however, was fully briefed on OCC's interpretation of the exception because the agency intervened in the case, asserting that it possessed exclusive regulatory authority over national banks. The court rejected the OCC's argument. Now, the OCC is attempting to circumvent this ruling by rewriting its regulations. This is a clear abuse of its regulatory authority.

Moreover, the OCC's reasoning is not supported by any reasonable interpretation of the statute. In fact, the only case the OCC cites in support of its interpretation of the "vested in the courts of justice" exception is National State Bank, Elizabeth, N.J. v. Long.[27] That case, however, is inapposite to the OCC's proposed interpretation because it involved a state banking commissioner who was improperly attempting to exercise direct administrative enforcement action over a national bank by issuing a cease and desist order. It did not involve a state seeking judicial enforcement of a state law.

Additionally, the OCC's interpretation of this exception is undercut by its position that its proposed rule would not preclude state residents from bringing state actions against national banks. Certainly, private individuals have the right to enforce state laws against national banks in court. Logic then dictates that state officials may enforce those same laws in court on behalf of private individuals. Public enforcement of state laws simply provides an efficient mechanism for aggregating individuals' claims against national banks. If private actions against national banks do not infringe on the OCC's jurisdiction, then the aggregation of those claims brought by state attorney generals also should not infringe on the agency's jurisdiction.

Both individuals and state officials may sue national banks in state courts to enforce state laws. Congress explicitly granted an exception to the OCC's visitorial powers over national banks for enforcement actions "vested in the courts of justice," and the OCC may not void that exception through regulation.

**5. The proposed rule undermines the benefits of our federalist system.**

State regulation plays an important role in our federalist system of government. As Justice Brandeis has observed, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[28]

In particular, states have taken the lead in developing and enforcing legislative safeguards for consumer protection and privacy. Federal consumer protection and privacy laws, as a general matter, operate as regulatory baselines and do not prevent states from enacting and enforcing stronger state statutes. The Electronic Communications Privacy Act, the Right to Financial Privacy Act, the Cable Communications Privacy Act, the Video Privacy Protection Act, the Employee Polygraph Protection Act, the Telephone Consumer Protection Act, the Driver's Privacy Protection Act, and the Gramm-Leach-Bliley Act all allow states to craft protections that exceed federal law.[29] This system fosters the development of best practices.

States enjoy a unique perspective that allows them to craft innovative programs to protect consumers. State legislatures are closer to their constituents and the entities they regulate. They are the first to see trends and problems, and are well-suited to address new challenges and opportunities that arise from evolving technologies and business practices.

The proposed rule would undermine this important role of the states. Preempting states from enforcing their state laws will diminish the effectiveness of those laws. The OCC has limited resources, and its primary mission is to ensure the safety and soundness of financial institutions. It simply will not be able to accomplish the same level of consumer protection and privacy law enforcement as it could with the assistance of fifty states' enforcement authorities. With limited enforcement, state consumer protection and privacy laws will have little effect.

The OCC's proposal is contrary to the core principles of our federalist system. It will inhibit the

development of best practices by individual states and significantly undermine the country's traditional structure of consumer protection.

**Conclusion**

The proposed rule broadly oversteps the bounds of the OCC's authority and attempts to shield banks operating in the states from state privacy and consumer protection regulation. The proposed rule would have the effect of preempting areas of law that traditionally have been governed by the states, leaving consumers with less protection and ultimately undermining public confidence in our banking system. For these reasons, we urge the OCC to reject the proposed rule.

Sincerely,

Marc Rotenberg
Executive Director
Electronic Privacy Information Center

Edmund Mierzwinski
Consumer Program Director
U.S. PIRG

Chris Jay Hoofnagle
Deputy Counsel
Electronic Privacy Information Center

Kerry Smith
Clerk
Electronic Privacy Information Center

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1 Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363 (Feb. 7, 2003) (to be codified at 12 CFR Parts 3, 5, 6, 7, 9, 28, and 34).

2 12 U.S.C. §21 et. seq.

3 12 U.S.C. § 1, and see First Union Nat'l Bank v. Burke, 48 F. Supp. 2d 132, 136 (D. Conn. 1999).

4 See Tiffany v. Nat'l Bank of the State of Missouri, 85 U.S. 409, 412 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they may be located. It was expected that they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition.")

5 Currently, the scope of visitation powers over national banks is codified at 12 U.S.C. § 484. Section 484 does not reference the OCC specifically, but the agency has been granted examination authority under 12 U.S.C. § 481, and administrative enforcement power under 12 U.S.C. § 1818.

6 See Nat'l State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 987-88 (3rd Cir. 1980), Burke, 48 F. Supp. at 145-46.

7 See, e.g., First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 659-61(1923); Guthrie v. Harkins, 199 U.S. 148, 155-59 (1905); First Nat'l Bank of Youngstown v. Hughes, 6 Fed. 737, 740-42 (C.C.A., N.D. Ohio 1881), appeal dism'd, 106 U.S. 523 (1883); Burke, 48 F. Supp. 2d at 150-51; Best v. Nat'l Bank of Oregon, 739 P.2d 554, 563 (Ore. 1987).

8 H.R. Conf. Rep. No. 103-651 at 53-54 (1994).

9 H.R. Conf. Rep. No. 103-651 at 53 (1994).

10 Id.

11 Id. at 54.

12 Pub. L. No. 103-328 (1994).

13 H.R. Conf. Rep. No. 103-651 at 53 (emphasis added).

14 See, e.g., Easton v. Iowa, 188 U.S. 220, 239 (1903) ("Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction."); Nat'l State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 988 (3rd Cir. 1980) ("[T]he appropriate federal banking agency may initiate cease and desist proceedings against any insured bank that violates 'a law.' 12 U.S.C. § 1818(b)(1)...It may be that the word 'law' as used in the statute is not all encompassing and may exclude matters of purely local concern.") Household Retail Services v. Texas, No. 04-00-00734-CV, 2001 Tex. App. LEXIS 5893, at *4 (Tex. App. 2001), quoting State v. Fleet Mortgage Corp., 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("The OCC's jurisdiction does not extend to enforcement of statutes that 'do not directly concern a banking practice' and that 'are not banking industry specific.'")

15 263 U.S. 640, 660 (1923).

16 Id.

17 See Cong. Globe, 38th Cong. 1st Sess., 1432-33 (Apr. 7, 1864):
And be it further enacted, That the Comptroller of the Currency with the approbation of the secretary of the Treasury, as often as shall be deemed necessary or proper, shall appoint a suitable person or persons to make an examination of the affairs of every banking association, which persons shall not be a director or other officer in any association whose affairs he shall be appointed to examine, and who shall have power to make a thorough examination into all the affairs of the association, and in so doing so to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.

18 State v. First Nat'l Bank of St. Paul, 313 N.W.2d 390, 393 (Minn. 1981) (emphasis added).

19 See, e.g., Guthrie v. Harkins, 199 U.S. 148, 158-59 (1905) (holding that the visitorial powers of the National Bank Act did not take away any common law rights of shareholders to seek enforcement of their right to inspect the books of the national bank); Easton v. Iowa, 188 U.S. 220, 239 (1903) ("Undoubtedly a State has the legitimate power to define and punish crimes by

general laws applicable to all persons within its jurisdiction.").

20 Pub. L. No. 106-102, § 133(a) (1999).

21 12 U.S.C. § 1813(a)(1)(A).

22 181 F. Supp. 2d. 995, 1000 (D. Minn. 2001).

23 Id. at 1002.

24 Guthrie v. Harkins, 199 U.S. 148, 159 (1905).

25 48 F. Supp. 2d 132, 150- 1 (D. Conn. 1999)

26 Id.

27 630 F.2d 981, 988 (3rd Cir. 1980).

28 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

29 Respectively at 18 U.S.C. § 2510 et. seq., 12 U.S.C § 3401, 47 USC § 551(g), 18 USC § 2710(f), 29 USC § 2009, 47 USC § 227(e), 18 U.S.C. § 2721, and Pub. L. No. 106-102, §§ 507, 524 (1999)