

ACORN
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center
U.S. PIRG

28 April 2004

Support efforts to overturn the OCC rules
Protect consumers and protect state authority
over unfair banking practices: Support S.J. Res. 31 and S.J. Res. 32

Dear Senator,

We, the undersigned consumer and community groups, write to urge you to support and co-sponsor the Congressional motions of disapproval, S.J. Res. 31 and S.J. Res. 32, offered by Senator Edwards to overturn recent actions by the Office of the Comptroller of the Currency (OCC). The OCC, without Congressional approval, has promulgated two rules, known as the preemption and visitorial powers rules, intended to eviscerate all state legislative and enforcement authority against national banks and even their state-licensed non-bank operating subsidiaries, even where no federal law adequately protects consumers from predatory mortgage lending, deceptive credit card practices or other harms.

Worse, the OCC's actions will have a profound chilling effect on the long-standing dual banking system, making OCC the de facto regulator of state banks and even of mortgage and finance firms competing with national bank operating subsidiaries, since no rational state would impose stricter rules on its own regulated institutions if that would place them at a competitive disadvantage to nationally-chartered banks.

Our organizations have long been active at the state and national levels to protect consumers from unfair and unconscionable banking practices. Throughout, our efforts have been ably buttressed by leadership from the states, both in their innovative legislative ideas and their aggressive enforcement efforts. Yet this unelected regulator would throw that federal-state partnership out with an undemocratic power grab. As a result of OCC actions, consumers in all states will now be at greater risk of exposure to predatory lending, unfair and deceptive activities, and other abusive practices when obtaining loans from national banks and their operating subsidiaries.

States have acted to build on the basic, or minimal, federal protections that exist against abusive lending; however, if it is upheld by the courts, the OCC's final regulation represents a major step backwards in the fight against predatory lending. We cannot afford to have our collective efforts to protect borrowers from losing their homes and the lifetime of savings built up in home equity to be diminished by a renegade federal agency. To preserve homeownership, a competitive dual banking system, and the right of states to protect their citizens, Congress should rescind the OCC's regulation.

The OCC's over-reaching actions have resulted in a justifiable and unified bi-partisan storm of protest from state legislators, state banking commissioners and state attorneys general, as well as from leading scholars.

In recent testimony before the House Financial Services Committee, Diana Taylor, New York State Superintendent of Banks, stated that, "These regulations are not minor or incremental changes. Their scope is nearly unlimited, and their implications are potentially enormous. These regulations exceed the OCC's statutory authority and disregard Congressional intent."

A comment letter signed by all 50 state Attorneys General to the OCC said that, “the OCC’s preemption analysis is one-side and self-serving. The OCC has paid little deference to well-established history and precedent that has allowed the states and the OCC to coexist in a dual regulatory role for over 130 years... There is much work to be done by all regulatory and enforcement agencies on real and pressing problems. The States submit that this is not the time to devote energies to turf battles and empire building.”

In recent testimony to the Senate Banking Committee, Arthur Wilmarth, Professor of Law at George Washington University, stated that “Unless the OCC’s new preemption and visitorial powers rules are overturned by Congress or the courts, the rules will destroy the competitive balance between state and national banks that Congress has long maintained within the dual banking system. In addition, the OCC’s rules regarding operating subsidiaries will seriously infringe upon the states’ authority to regulate state-chartered corporations and to protect consumers from illegal, fraudulent and unfair financial practices.”

Our organizations believe that in issuing these rules the OCC has ignored the most recent statements by both the Congress and the Supreme Court describing the limits of its authority. In the conference report accompanying the 1994 Riegle-Neal Interstate Banking and Branching Efficiency Act, Congress scolded the OCC’s “inappropriately-aggressive” preemption of state consumer laws. In its new preemption rule, the OCC re-wrote and weakened the applicable Supreme Court preemption test from the 1996 *Barnett* decision later codified in the 1999 Gramm-Leach-Bliley Act. The OCC rule downgrades the Court’s strict “prevent(s) or significantly interfere(s)” standard with a sweeping preemption of nearly all state laws even if they merely "obstruct, impair, or condition" a national bank's exercise of powers.

The OCC’s actions, therefore, are not “incremental” as it has claimed, but world-shaking. Its actions threaten the ability of states to protect their citizens from harm and to respond rapidly to local changes in the marketplace. Its actions attempt to eliminate the long-standing and well-settled authority of 700 state examiners and attorneys – based locally in all 50 states – to ensure consumer law compliance by national banks and their operating subsidiaries, without replacing them. The vast majority of the OCC’s existing bank examination staff is dedicated to protecting safety and soundness, not enforcing consumer protection laws. The OCC’s central customer assistance center, located in Texas, has only 40 employees and is only open 4 days each week. The Administration’s budget projects OCC spending as increasing only 2 percent from FY 2004 to FY 2005, which seems to foreclose the possibility of additional staff being dedicated to these expanded responsibilities. In fact, the OCC expects no staffing increases in FY 2005.

The OCC’s actions threaten the rights reserved to the states by our Constitution and extinguish the ability of the states, famously described by Justice Louis Brandeis, to “try novel social and economic experiments without risk to the rest of the country.” More simply, the OCC has shut down the laboratories of democracy and its actions place citizens around the nation at risk of becoming victims of predatory lending or other unfair practices.

Again, we urge your support of S.J. Res. 31 and S.J. Res. 32 to overturn the OCC’s misguided and over-reaching rules. Please contact Ed Mierzwinski at U.S. PIRG (202-546-9707) if you have any questions.

Sincerely,

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