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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Parts 4, 5, 7, 8, 28, and 34**

**[Docket ID OCC-2011-0018]**

**RIN 1557-AD41**

**Office of Thrift Supervision Integration; Dodd-Frank Act Implementation**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is adopting amendments to its regulations governing organization and functions, availability and release of information, post-employment restrictions for senior examiners, and assessment of fees to incorporate the transfer of certain functions of the Office of Thrift Supervision (OTS) to the OCC pursuant to Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The OCC also is amending its rules pertaining to preemption and visitorial powers to implement various sections of the Act; change in control of credit card banks and trust banks to implement section 603 of the Act; and deposit-taking by uninsured Federal branches to implement section 335 of the Act.

**DATES:** July 21, 2011, except for the amendments to 12 CFR 4.73 in amendatory instruction 21, 12 CFR 4.74 in amendatory instruction 23, 12 CFR 4.75 in amendatory instruction 25, 12 CFR 4.76 in amendatory instruction 27, which are effective July 21, 2012; the amendment to 12 CFR 5.50 in amendatory instruction 31, which is effective July 21, 2013; and the amendment to 12 CFR 8.6 in amendatory instruction 43, which is effective December 31, 2011.

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

On May 26, 2011, the OCC published in the Federal Register a notice of proposed rulemaking (NPRM or proposal) to implement Title III, and certain other provisions, of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act or Act). Title III of the Act transfers the powers, authorities, rights and duties of the OTS to other banking agencies, including the OCC, on the “transfer date.” The transfer date is one year after the date of enactment of the Dodd-Frank Act, July 21, 2011. The Dodd-Frank Act also abolishes the OTS ninety days after the transfer date.

Specifically, the Dodd-Frank Act transfers to the OCC all functions of the OTS and the Director of the OTS relating to Federal savings associations. As a result, the OCC will assume responsibility for the ongoing examination, supervision, and regulation of Federal savings associations.<sup>1</sup> The Act also transfers to the OCC rulemaking authority of the OTS relating to all

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<sup>1</sup> Dodd-Frank Act, section 312(b)(2)(B)(i)(I), 124 Stat. at 1522 (to be codified at 12 U.S.C. 5412). Title III also transfers all functions of the OTS relating to state savings associations to the Federal Deposit Insurance Corporation (FDIC) and all functions relating to the supervision of any savings and loan holding company and

savings associations, both state and Federal.<sup>2</sup> The legislation continues in effect all OTS orders, resolutions, determinations, agreements, regulations, interpretive rules, other interpretations, guidelines, procedures and other advisory materials in effect the day before the transfer date, and allows the OCC to enforce these issuances with respect to Federal savings associations, unless the OCC modifies, terminates, or sets aside such guidance or until superseded by the OCC, a court, or operation of law.<sup>3</sup> Title III also transfers OTS employees to either the OCC or FDIC, allocated as necessary to perform or support the OTS functions transferred to the OCC and FDIC, respectively.

## **II. OCC Regulatory Actions to Integrate OTS Functions**

As described in the preamble for the proposed rule, the OCC is undertaking a multi-phased review of its regulations, as well as those of the OTS, to determine what changes are needed to facilitate the transfer of supervisory jurisdiction for Federal saving associations to the OCC. This final rule, described in detail below, is part of the first phase of this review and includes provisions revising OCC rules that will be central to internal agency functions and operations immediately upon the transfer date, such as providing for the OCC's assessment of Federal savings associations and adapting the OCC's rules governing the availability and release of information to cover information pertaining to the supervision of those institutions. This final rule also amends OCC regulations necessary to implement certain revisions to the banking laws

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nondepository institution subsidiaries of such holding companies, as well as rulemaking authority for savings and loan holding companies, to the Board of Governors of the Federal Reserve System (FRB). Dodd-Frank Act, section 312(b)(1) and (2)(A), 124 Stat. at 1521 (to be codified at 12 U.S.C. 5412) (savings and loan holding companies) and (2)(C), 124 Stat. at 1522 (to be codified at 12 U.S.C. 5412) (state savings associations).

<sup>2</sup> Id. at section 312(b)(2)(B)(i)(II), 124 Stat. at 1522 (to be codified at 12 U.S.C. 5412).

<sup>3</sup> Id. at section 316(b), 124 Stat. at 1525 (to be codified at 12 U.S.C. 5414).

that either took effect on the enactment of the Dodd-Frank Act or are effective as of the transfer date.

As part of this first phase of our review of OTS and OCC regulations, the OCC also will issue an interim final rule with a request for comments, effective on publication, that republishes those OTS regulations the OCC has the authority to promulgate and will enforce as of the transfer date, with nomenclature and other technical changes.<sup>4</sup> These republished regulations will supersede the OTS regulations in Chapter V for purposes of OCC supervision and regulation of Federal savings associations, and for certain rules for purposes of the FDIC's supervision of state savings associations. OTS regulations that will be unnecessary following the transfer of OTS functions to the OCC, or that are superseded as of the transfer date by provisions of the Dodd-Frank Act, will be repealed at a later date.

In future phases of our regulatory review, the OCC will consider more comprehensive substantive amendments, as necessary, to these regulations. For example, we may propose to repeal or combine provisions in cases where OCC and former OTS rules are substantively identical or substantially overlap. In addition, we may propose to repeal or modify OCC or former OTS rules where differences in regulatory approach are not required by statute or warranted by features unique to either charter. We expect to publish these amendments in one or more notices of proposed rulemaking, the first of which we expect to issue later in 2011. This substantive review also will provide an opportunity for the OCC to ask for comments suggesting revisions to the rules for both national banks and Federal savings associations that would remove

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<sup>4</sup> Pursuant to section 316(c)(2) of the Dodd-Frank Act, 124 Stat. at 1525 (to be codified at 12 U.S.C. 5415), the OCC and the FDIC published in the Federal Register on July 6, 2011 a joint notice that identified those OTS regulations that each agency will enforce as of the transfer date. 76 FR 39246.

provisions that are “outmoded, ineffective, insufficient, or excessively burdensome,” consistent with the goals outlined in an executive order recently issued by the President.<sup>5</sup>

### **III. Description of the Proposal and Comments Received**

The NPRM contained amendments to OCC rules at 12 CFR part 4 pertaining to its organization and functions, the availability of information under the Freedom of Information Act (FOIA), the release of non-public OCC information, and restrictions on the post-employment activities of senior examiners; and at 12 CFR part 8, pertaining to assessments. This NPRM also proposed to amend 12 CFR parts 5 and 28, pertaining to change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches, respectively, and 12 CFR parts 5, 7 and 34, pertaining to preemption and visitorial powers, pursuant to the Dodd-Frank Act. The public comment period closed on June 27, 2011, and the OCC received a total of 45, including comments from consumer advocacy groups, government agencies, representatives of Congress, associations of state officials, industry trade groups, Federal and state banks and thrifts, and law firms. Set forth below is a detailed description of these comments and the resulting final rule.

### **IV. Section-by-Section Description of Final Rule**

#### **A. Part 4**

The NPRM contained a number of amendments to part 4 to incorporate the supervision of Federal savings associations within the OCC. We received no substantive comments on the proposed amendments to part 4 and therefore adopt them as proposed, with one technical correction to § 4.14 to include cites to OCC rules applicable to savings associations.

#### **1. Organization and Functions (Part 4, Subpart A)**

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<sup>5</sup> Executive Order 13563, “Improving Regulation and Regulatory Review,” 76 FR 3821 (Jan.21, 2011).

Subpart A describes the organization and functions of the OCC and provides the OCC's principal addresses. The final rule amends subpart A to reflect the organizational and functional changes resulting from the transfer of the powers and duties of the OTS to the OCC on the transfer date. Other changes conform this subpart to additional provisions in the Dodd-Frank Act, including the Comptroller's membership on the Financial Stability Oversight Council.

2. Freedom of Information Act (Part 4, Subpart B)

Subpart B contains the OCC's rules for making requests for agency records and documents under the FOIA. The final rule amends subpart B to apply these rules to FOIA requests relating to Federal savings associations received by the OCC as of the transfer date, ensures that records of the OTS are subject to the OCC's FOIA regulations, and makes various technical changes to part 4 to correct technical errors and to update appropriate references to OCC units charged with handling FOIA requests. The final rule also provides that the OTS's former rules will continue to govern requests received by the OTS prior to the transfer date.

3. Non-Public Information (Part 4, Subpart C)

Subpart C contains OCC rules and procedures for requesting access to various types of nonpublic information and the OCC's process for reviewing and responding to such requests. It also clarifies the persons and entities with which the OCC can share non-public information. The final rule amends subpart C to cover OTS nonpublic information transferred to the OCC and, going forward, OCC nonpublic information related to Federal savings associations. The final rule also provides that nonpublic information in the possession of former employees or officials of the OTS will remain subject to confidentiality safeguards and procedures for requesting access to such information. As with FOIA requests, the final rule provides that the OTS's former rules

will continue to govern requests for nonpublic information received by the OTS prior to the transfer date.

4. One-Year Restrictions on Post-Employment Activities of Senior Examiners (Part 4, Subpart E)

Subpart E sets forth the employment restrictions placed on senior examiners for one year after these individuals leave the employment of the OCC. During this period, a former senior examiner of a national bank is prohibited from accepting compensation from the bank or from an entity that controls the bank. The OTS adopted nearly identical rules. The final rule amends subpart E to include senior examiners of savings associations.

**B. Dodd-Frank Act Amendments Affecting Approval of Change in Control Notices and Acceptance of Deposits by Federal Branches (Parts 5 and 28)**

This final rule contains amendments to 12 CFR part 5 to implement section 603 of the Dodd-Frank Act. Section 603 provides for a three-year moratorium (with certain exceptions) on the approval of a change in control of credit card banks, industrial banks and trust banks, if the change in control would result in a commercial firm controlling (directly or indirectly) such a bank. The moratorium took effect on the date of enactment of the Act, i.e., July 21, 2010. The proposal amended 12 CFR 5.50(f) to conform OCC regulations to this section of the Act. We received no comments on this amendment and adopt it as proposed.

Section 6 of the International Banking Act, 12 U.S.C. 3104(b), provides that uninsured Federal branches of foreign banks may not accept deposits in an amount of less than the standard maximum deposit insurance amount (SMDIA). The SMDIA is defined in 12 U.S.C. 1821(a)(1)(E) to mean \$100,000, subject to certain adjustments provided for in the statute. Section 335 of the Dodd-Frank Act, which takes effect on the transfer date, amends 12 U.S.C.

1821(a)(1)(E) to change the amount from \$100,000 to \$250,000. Section 28.16(b) of the OCC's regulations states that an uninsured Federal branch may accept initial deposits of less than \$100,000 only from certain persons. In order to conform this section of the OCC's regulations to the statutory changes and to prevent the need to continually amend this section for changes in the SMDIA, the proposal amended 12 CFR 28.16(b) to refer to 12 U.S.C. 1821(a)(1)(E), rather than the obsolete reference to \$100,000. We received no comments on this amendment and adopt it as proposed.

### **C. Preemption and Visitorial Powers (Parts 5, 7, and 34)**

#### **1. Dodd-Frank Act Provisions Affecting Preemption and Visitorial Powers**

The Dodd-Frank Act contains provisions, effective as of the transfer date (July 21, 2011), that affect the scope of preemption for operating subsidiaries, Federal savings associations, and national banks.<sup>6</sup> The Act also sets forth procedural requirements for future preemption determinations<sup>7</sup> and codifies the Supreme Court's visitorial powers decision in Cuomo v. Clearing House Association, L.L.C.<sup>8</sup>

The Act precludes preemption of state law for national bank subsidiaries, agents and affiliates.<sup>9</sup> The Act also changes the preemption standards applicable to Federal savings associations to conform to those applicable to national banks. The Act specifically provides that, as of the transfer date, determinations by a court or by the OCC under the Home Owners' Loan

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<sup>6</sup> Dodd-Frank Act, sections 1044–1046, 124 Stat. at 2014–2017 (to be codified at 12 U.S.C. 25b, 1465). Section 1044, which amends chapter one of title LXII of the Revised Statutes by inserting a new section 5136C (to be codified at 12 U.S.C. 25b), contains the principal national bank preemption provisions.

<sup>7</sup> Id. at section 1044(a), 124 Stat. at 2015–2016 (to be codified at 12 U.S.C. 25b).

<sup>8</sup> 129 S. Ct. 2710 (June 29, 2009).

<sup>9</sup> Dodd-Frank Act, sections 1044(a), 1045, 124 Stat. at 1376, 2016, 2017 (to be codified at 12 U.S.C. 25b).

Act (HOLA) with respect to Federal savings associations must be made in accordance with the laws and legal standards applicable to national banks regarding the application of state law.<sup>10</sup>

The Act further provides that “state consumer financial laws”<sup>11</sup> may be preempted only if: (1) application of such a law would have a “discriminatory effect” on national banks compared with state-chartered banks in that state; (2) “in accordance with the legal standard for preemption in the decision of the Supreme Court in” Barnett Bank of Marion County, N.A. v. Nelson,<sup>12</sup> the state consumer financial law “prevents or significantly interferes with the exercise by the national bank of its powers” (Barnett standard); or (3) the state consumer financial law is preempted by a provision of Federal law other than Title LXII of the Revised Statutes.<sup>13</sup>

The Dodd-Frank Act imposes new procedures and consultation requirements with respect to how the OCC may reach certain future preemption determinations and clarifies the criteria for judicial review of these determinations. Specifically, the Act requires that the OCC make preemption determinations with regard to state consumer financial laws under the Barnett standard by regulation or order on a “case-by-case basis” in accordance with applicable law.<sup>14</sup> The Act defines “case-by-case basis” as a determination by the Comptroller as to the impact of a “particular” state consumer financial law on “any national bank that is subject to that law” or the

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<sup>10</sup> Id. at section 1046, 124 Stat. at 2017 (to be codified at 12 U.S.C. 1465).

<sup>11</sup> The Dodd-Frank Act defines the term “state consumer financial law” to mean a state law that (1) does not directly or indirectly discriminate against national banks and that (2) directly and specifically (3) regulates the manner, content, or terms and conditions of (4) any financial transaction or related account (5) with respect to a consumer. Id. at section 1044(a), 124 Stat. at 2014-2015 (to be codified at 12 U.S.C. 25b). The Dodd-Frank Act does not address the application of state law that is not a “state consumer financial law” to national banks.

<sup>12</sup> 517 U.S. 25 (1996).

<sup>13</sup> Dodd-Frank Act, section 1044(a), 124 Stat. at 2015 (to be codified at 12 U.S.C. 25b).

<sup>14</sup> Id.

law of any other state with substantively equivalent terms.<sup>15</sup> When making a determination under this provision that a state consumer financial law has substantively equivalent terms as the law the OCC is preempting, the OCC must first consult with and take into account the views of the Consumer Financial Protection Bureau (CFPB).<sup>16</sup>

The Dodd-Frank Act also requires there to be substantial evidence, made on the record of the proceeding, to support an OCC order or regulation that declares inapplicable a state consumer financial law under the Barnett standard.<sup>17</sup> Finally, the Act requires the OCC to conduct a periodic review, subject to notice and comment, every five years after issuing a preemption determination relating to a state consumer financial law and to publish a list of such preemption determinations every quarter.<sup>18</sup>

Other features of the Dodd-Frank Act address the authority of state attorneys general to enforce applicable Federal and state laws. The National Bank Act, at 12 U.S.C. 484, vests in the OCC exclusive visitorial powers with respect to national banks, subject to certain express exceptions.<sup>19</sup> On June 29, 2009, the Supreme Court issued its opinion in Cuomo. The Court held that when a state attorney general files a lawsuit to enforce a state law against a national bank, “[s]uch a lawsuit is not an exercise of ‘visitorial powers’ and thus the Comptroller erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions’ in

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<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id. at section 1044(a), 124 Stat. at 2016 (to be codified at 12 U.S.C. 25b).

<sup>18</sup> Id.

<sup>19</sup> Section 484 provides that “[n]o 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.”

state courts.”<sup>20</sup> Conversely, the decision recognized the “regime of exclusive administrative oversight by the Comptroller”<sup>21</sup> applicable to national banks. Accordingly, under Cuomo, a state attorney general may bring an action against a national bank in a court of appropriate jurisdiction to enforce non-preempted state laws, but is restricted in conducting non-judicial investigations or oversight of a national bank.<sup>22</sup>

The Dodd-Frank Act codifies the Supreme Court’s decision in Cuomo regarding enforcement of state law against national banks by providing that no provision “of this title”<sup>23</sup> or other limits restricting the visitorial powers to which a national bank is subject shall be construed to limit or restrict the authority of any state attorney general to “bring an action against a national

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<sup>20</sup> 129 S. Ct. at 2721.

<sup>21</sup> Id. at 2718.

<sup>22</sup> The Court stated that:

The request for information [by the Attorney General] in the present case was stated to be “in lieu of” other action; implicit was the threat that if the request was not voluntarily honored, that other action would be taken. All parties have assumed, and we agree, that if the threatened action would have been unlawful the request-cum-threat could be enjoined. Here the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General’s issuance of subpoena on his own authority under New York Executive Law, which permits such subpoenas in connection with his investigation of “repeated fraudulent or illegal acts. . . in the carrying on, conducting or transaction of business.” See N.Y. Exec. Law Ann. §63(12) (West 2002). That is not the exercise of the power of law enforcement “vested in the courts of justice” which 12 U.S.C. §484(a) exempts from the ban on exercise of supervisory power.

Accordingly, the injunction below is affirmed as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions.

Cuomo, 129 S. Ct. at 2721-2722 (emphasis added).

<sup>23</sup> Dodd-Frank Act, section 1047(a), 124 Stat. at 2018 (to be codified at 12 U.S.C. 25b) (referring to Title LXII of the Revised Statutes).

bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.”<sup>24</sup>

In addition, the Act provides that these visitorial powers provisions shall apply to Federal savings associations and their subsidiaries to the same extent and in the same manner as if they were national banks or national bank subsidiaries.<sup>25</sup>

## 2. Description of the Proposal

The proposal amended provisions of the OCC’s regulations relating to preemption (12 CFR 7.4007, 7.4008, 7.4009, and 34.4) (2004 preemption rules), operating subsidiaries (12 CFR 5.34 and 7.4006), and visitorial powers (12 CFR 7.4000) to implement the provisions of the Dodd-Frank Act that affect the scope of national bank and Federal thrift preemption and codify Cuomo.

First, we proposed rescission of 12 CFR 7.4006, which is the OCC’s regulation concerning the application of state laws to national bank operating subsidiaries. The proposal also made conforming revisions to the OCC’s operating subsidiary rules at 12 CFR 5.34(a) and paragraph (e)(3) to refer to new 12 U.S.C. 25b, which includes the codification of the Dodd-Frank Act preclusion of operating subsidiary preemption.<sup>26</sup>

To implement the Act’s changes to the preemption standards under the HOLA to conform to those applicable to national banks, we proposed adding new §§ 7.4010(a) and 34.6 to our regulations. The new sections provide that state laws apply to Federal savings associations

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<sup>24</sup> Id.

<sup>25</sup> Id. at section 1047(b), 124 Stat. at 2018 (to be codified at 12 U.S.C. 1465).

<sup>26</sup> Id. at section 1045, 124 Stat. at 2017 (to be codified at 12 U.S.C. 25b) provides that Title LXII of the Revised Statutes and section 24 of the Federal Reserve Act (12 U.S.C. 371) do not preempt, annul, or affect the applicability of state law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

and their subsidiaries to the same extent and in the same manner as those laws apply to national banks and their subsidiaries, respectively. The proposal also added § 7.4010(b) to similarly subject Federal savings associations and their subsidiaries to the same visitorial powers provisions in the Dodd-Frank Act that apply to national banks and their subsidiaries.

In addition, the proposal made conforming changes to the 2004 preemption rules at 12 CFR 7.4007 (concerning deposit-taking), 7.4008 (non-real estate lending), and 34.4 (real estate lending) to reflect the Act's provisions concerning preemption of state consumer financial laws. Those rules had provided that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized . . . powers are not applicable to national banks." The proposal noted that, while the phrase "obstruct, impair or condition" had been drawn from and was intended to be consistent with the standards cited by the Supreme Court in Barnett, the terminology had resulted in misunderstanding and confusion. Accordingly, the proposal removed that phrase from these preemption rules. The proposal further clarified that a state law is not preempted to the extent that result is consistent with the Barnett decision. The proposal also deleted § 7.4009, which had provided only that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities under Federal law do not apply to national banks" without identifying any types of state laws that would be preempted.

Finally, the proposal made several changes to the OCC's visitorial powers regulation, 12 CFR 7.4000, to conform the regulations to the Supreme Court's decision in the Cuomo case as adopted by the Dodd-Frank Act. First, it added a reference to 12 U.S.C. 484 in the general rule, set forth § 7.4000(a)(1), that only the OCC may exercise visitorial powers with respect to national banks subject to certain exceptions. Second, to incorporate the Cuomo Court's

recognition that nonjudicial investigations of national banks generally constitute an exercise of visitorial powers, the proposal revised the definition of “visitorial powers” in § 7.4000(a)(2)(iv) to clarify that those powers include “investigating or enforcing compliance with any applicable Federal or state laws concerning those activities.” Third, the proposal added a new paragraph (b) to provide that “[i]n accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L.L.C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce a non-preempted state law against a national bank and to seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.”

### 3. Comments on the Proposal

Commenters who disagreed with the preemption provisions of the proposal generally relied on several principal arguments:

- First, that the Barnett standard preemption provision is a new statutory “prevent or significantly interfere” standard that the proposal impermissibly seeks to broaden. These commenters referred to portions of the language of the statute and legislative history in support of their assertion that the Dodd-Frank Act adopts a new preemption standard, narrower than the Barnett decision’s “conflict” preemption analysis.
- Second, that the “obstruct, impair, or condition” language introduced in the 2004 preemption rules, which the OCC proposed to delete, is inconsistent with Barnett and with the “prevent or significantly interfere” preemption standard. Many of these commenters asserted that the preemption rules adopted by the OCC in 2004 were impliedly repealed by the Dodd-Frank Act. Therefore, these commenters disagree with

the OCC's conclusion that any portions of the 2004 preemption rules and precedents based on those rules remain applicable.

- Third, by retaining, rather than repealing, rules that preempt categories of state laws, that the proposal would circumvent the Dodd-Frank Act procedural and consultation requirements. These commenters asserted that the preemption of categories and/or terms of state laws is equivalent to "occupation of the field," rather than conflict, preemption. These commenters also believe that the Dodd-Frank Act procedural requirements apply to, and therefore (retroactively) invalidate, certain precedents, including the 2004 preemption rules, adopted prior to the Dodd-Frank Act.

In addition, some of these commenters objected to preemption of state and local laws on grounds that preemption is bad public policy and asserted that preemption had resulted in predatory lending to vulnerable consumers and the financial and subprime mortgage lending crises. A few commenters also asserted that the Dodd-Frank Act limits the OCC's preemption authority to state consumer financial laws only.

Some of these commenters further asserted that the proposed visitorial powers amendments:

- Could be construed as prohibiting all types of investigative activities by state officials, including collecting complaints from consumers or researching public records.
- Do not reflect the authority of state attorneys general to enforce compliance with certain Federal laws and regulations to be issued by the CFPB.<sup>27</sup>

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<sup>27</sup> Id. at section 1042(a)(2)(B), 124 Stat. at 2013 (to be codified at 12 U.S.C. 5552) (pertaining to the ability of state attorneys general to enforce certain new regulations promulgated by the CFPB).

- Incorrectly narrow the definition of visitorial powers to the investigation and enforcement of “non-preempted,” rather than “applicable” law.

Commenters who supported the preemption and visitorial powers portions of the proposal expressed agreement with the analysis of the Dodd-Frank Act preemption provisions and legislative history set out in the preamble to the proposal. In the view of these commenters, the Barnett standard preemption provision adopts the conflict preemption standard that is the fundamental legal standard of the Barnett decision. Some commenters agreed that the “obstruct, impair, or condition” phrasing used in the 2004 preemption rules was a distillation of this conflict preemption standard. These commenters agreed with the position stated in the preamble to the proposal that eliminating this language does not impact the continued applicability of precedents based on those rules.

In addition, supporting commenters argued that a contrary position would also have negative consequences for national banks because it would eliminate legal certainty concerning which laws apply to their operations. These commenters asserted that consumer loans and deposit products are subject to comprehensive regulation, and preemption has served to provide clarity and certainty as to which regulatory requirements and standards apply to national banks. These commenters opined that preemption of multiple, differing, and sometimes conflicting, state and local laws and regulations is crucial to the ability of banks and thrifts to conduct multi-state operations in a safe and sound manner to the benefit of consumers, small businesses, and the United States economy as a whole. They voiced concern that the imposition of an overlay of potentially 50 state and an indeterminate number of local government rules on top of myriad Federal requirements would have a costly consequence that could materially affect banks and their ability to serve consumers efficiently and effectively across the nation and could deter

future product innovation and modernized, more effective consumer disclosures.<sup>28</sup> These commenters cited studies showing that compliance with a multiplicity of state laws can increase costs for consumers and loan losses for banks and decrease credit availability. Some commenters also noted that uniform national laws, and the court and regulatory determinations pursuant to them, have been used in the past as a device to open markets, redress local protectionist measures, reduce the price of credit, increase the availability of credit, and increase the efficiency of banks.

Bank and thrift commenters described the scope of their operations and provided examples of the burdens the application of state and local laws and regulations would impose. According to these institutions, the burdens of having to comply with multiple state and local laws would impair their efficiency in offering core banking products, such as checking accounts, credit cards, mortgage loans, and deposit products. Some commenters also voiced concern that their ability to prudently underwrite loans, offer borrowers needed flexibility, and provide effective consumer disclosures would be compromised by application of various state laws.

Finally, commenters also disputed the contention that preemption encouraged lenders to engage in predatory lending practices that contributed to the subprime mortgage crisis. Some commenters also suggested that the final rule include additional provisions to: clarify that the OCC's regulations concerning non-interest fees and charges (12 CFR 7.4002), adjustable rate mortgages (12 CFR 34.21) and debt cancellation contracts (12 CFR 37.1) remain in effect; revise, rather than eliminate, 12 CFR 7.4009 to conform with §§ 7.4007, 7.4008, and 34.4;

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<sup>28</sup> One commenter noted that a bank operating across state lines could find itself subject to the law of the state where it provides the product or service, the law of the state where its branch is located, or the law of the state where the customer is located. The bank could also be subject to laws at the county, municipal, or other level in any or all of these states. The laws of these locations could be different, and failure to comply with each state and local law could subject the bank to fines, penalties, and litigation, and as result cause it to discontinue activities in certain states to the potential detriment of its customers.

clarify that the abrogation of 12 CFR 7.4006 will not be given retroactive effect,<sup>29</sup> confirm that the 2004 preemption rules will also apply to Federal savings associations, to the same extent that those rules apply to national banks; and confirm that all prior OTS preemption actions that are consistent with the holding in Barnett, including those based on the HOLA, also continue to be effective.

#### 4. Discussion

The OCC has carefully considered all of the points raised by all of the commenters. As described in detail in the next section and for the reasons next discussed, the OCC is issuing a final rule that is substantially the same as the proposal with additional instructive commentary and certain modifications to the visitorial powers provisions to address specific concerns that commenters raised and a clarifying change to §§ 7.4010(a) and 34.6 regarding the applicability of state law to Federal savings associations.

##### a. The Role of Preemption in the U.S. Banking System

As noted above, in addition to comments on specific aspects of the proposed rule, some commenters urged general disfavor of the concept of Federal preemption as applied to the powers of national banks, and some also contended that preemption in the context of national banks contributed to predatory lending practices, which, in turn contributed to the recent financial crisis. Both of these concerns are important to address as threshold matters.

When Congress established the fundamental structure of the U.S. banking system in 1863, it created national banks and a national banking system to operate in parallel with the existing state banking system – a “dual banking system.” Congress did not abolish state

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<sup>29</sup> One commenter also requested clarification that the Dodd-Frank elimination of agent preemption does not apply to employees of national banks and Federal thrifts. Employees of national banks and Federal thrifts acting within the scope of their employment are not acting as agents of these institutions. Therefore, the elimination of preemption for agents has no affect on these employees.

banking, but it did include explicit protections in the new framework so that national banks would be governed by Federal standards administered by a new Federal agency – the Office of the Comptroller of the Currency – and not by state authority.

Perhaps not surprisingly, the independence of national banks from state authority over their banking business has produced tensions and disputes over the years. Yet, a long series of Supreme Court decisions beginning in the earliest years of the national banking system have confirmed the fundamental principle of Federal preemption as applied to national banks: that the Federally-granted banking powers of national banks are governed by national standards set at the Federal level, subject to supervision and oversight by the OCC. These characteristics are fundamental to the duality of the “dual banking system.” Thus established, the twin pillars of the national and state banking systems have been fundamental to the structure – and success – of the U.S. banking system for nearly 150 years. The Supreme Court’s Barnett decision was a particularly thorough treatment of this background, applying a conflict preemption standard consistent with over a century of Supreme Court precedent as the yardstick for determining when state law applied to a national bank.

With this design, the state and national banking systems have grown up around each other in this “dual banking system.” Encompassing both large institutions that market products and services regionally, nationally and globally, and smaller institutions that focus their business on their immediate communities, this dual system is diverse, with complex linkages and interdependencies. In this context, and over time, a benefit has been that the “national” part of the dual banking system, the part that has allowed large and small banks to operate under uniform national rules across state lines, has helped to foster the growth of national products and services and multi-state markets. And the system also has supported the contributions of the

state systems, allowing states to serve as a “laboratory” for new approaches applicable to their state-supervised institutions.

Throughout our history, uniform national standards have proved to be a powerful engine for prosperity and growth. National standards for national banks have been very much a part of this history, benefiting individuals, business and the national economy. In the 21<sup>st</sup> Century, the Internet and the advent of technological innovations in the creation and delivery of financial products and services has accentuated the geographic seamlessness of financial services markets, highlighting the importance of uniform standards that attach based on the product or service being provided, applying wherever and however the product or service is provided. However, the premise that Federally-chartered institutions would be subject to standards set at the Federal, rather than state-by-state level, does not and should never mean that those institutions are subject to lax standards. National banks are subject to extensive regulation at the Federal level – which is being considerably enhanced by many provisions of the Dodd-Frank Act – and to regular, and in some cases, continuous examination of their operations.

Because of the degree of regulation and supervision to which national banks are subject, national banks – and other Federally-regulated depository institutions – had limited involvement in subprime lending and the worst subprime loans were originated by nonbank lenders and brokers<sup>30</sup> where national bank preemption was not applicable. National bank preemption did not

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<sup>30</sup> See Testimony of Comptroller of the Currency John C. Dugan to the Financial Crisis Inquiry Commission, App. B (April 8, 2010); Department of the Treasury, Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation (Jun. 17, 2009), at 69-70 (“worst abuses were made by firms not covered by the CRA,” which applies only to insured depository institutions); Mason, Joseph R., Kulick, Robert B. and Singer, Hal J., The Economic Impact of Eliminating Preemption of State Consumer Protection Laws, 12 U. PA. J. Bus. L. 781 at 782 (2010) (the “overwhelming majority of subprime mortgage loans were originated by companies that were not subject to preemption. . . .”); Committee on Financial Services, H.R. Rep. No 111-94, Mortgage Reform and Anti-Predatory Lending Act (May 4, 2009) (“Subprime lenders included banks, bank affiliates, and non-bank mortgage companies. According to Mortgage Bankers Association (MBA), more than half of subprime mortgages were made by mortgage brokers and lenders with no Federal supervision; a quarter were made by finance companies

and does not prevent regulation of nonbank mortgage lenders and brokers, and going forward, the CFPB’s authority in this area will bring a new level of Federal standards, oversight and enforcement over this “shadow banking system.” Concerns that have been expressed that Federal consumer protection rules were not sufficiently robust should be addressed by the CFPB’s authority and mandate to write strong Federal consumer protection standards, and its research-based and consumer-tested rulemaking processes envisioned under the Dodd-Frank Act.

b. The Barnett Standard Preemption Provision

With respect to the specifics of the proposal, the OCC concludes that the Dodd-Frank Act does not create a new, stand-alone “prevents or significantly interferes” preemption standard, but rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court’s Barnett decision. This result follows from the language of the statute; is supported by language of other, integrally-related portions of the Dodd-Frank Act preemption provisions; was so described by its sponsors at the time of enactment as intending that result; is consistent with the interpretation Federal courts have accorded virtually identical preemption language in the Gramm-Leach-Bliley Act of 1999 (GLBA); and subsequently has been explained as embodying the intent of the sponsors of the language.

As described in the preamble to the proposal, the language of the Barnett standard preemption provision differs substantially from earlier versions of the legislation. Its sponsors have explained that this change was intended to provide consistency and legal certainty by preserving the preemption principles of the Supreme Court’s Barnett decision, while specifying a

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that are affiliates of bank holding companies and indirectly regulated by the Federal Reserve Board; and the rest were made by institutions directly regulated by Federal financial regulators such as banks, thrifts, and credit unions.”); Barney Frank, Chairman of the House Financial Services Committee, Lessons of the Subprime Crisis, Boston Globe, September 14, 2007, at 11A (“Reasonable regulation of mortgages by the bank and credit union regulators allowed the market to function in an efficient and constructive way, while mortgages made and sold in the unregulated sector led to the crisis.”).

process for preemption determinations, and integrating that process with other reforms implemented by the Dodd-Frank Act, prospectively. For example, when asked by Senator Carper to confirm that Section 1044 retained the Barnett standard for determining preemption of state consumer financial law passed by the Senate, Chairman Dodd confirmed that was so.<sup>31</sup>

Some commenters assert, however, that the Barnett standard provision and the colloquy between Senators Carper and Dodd point to an intention to adopt a new “prevent or significantly interfere” preemption test for state consumer financial law. However, this assertion fails to take

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<sup>31</sup> As passed by the Senate on May 20, 2010, the legislation incorporated the “Carper Amendment,” which provided that a state consumer financial law could be “preempted in accordance with the legal standards of the decision of the Supreme Court of the United States in *Barnett Bank v. Nelson* (517 U.S. 25 (1996)).” 156 Cong. Rec. S3866 (daily ed. May 18, 2010). The final version of Section 1044 enacted by Congress reflects the revision to the Carper Amendment made by the Conference Committee. When discussing that revision, Senator Carper and Senator Dodd had the following exchange:

Senator Carper: Mr. President, I am very pleased to see that the conference committee . . . retained my amendment regarding the preemption standard for State consumer financial laws with only minor modifications. I very much appreciate the effort of Chairman Dodd in fighting to retain the amendment in conference.

Senator Dodd: I thank the Senator. As the Senator knows, his amendment received strong bipartisan support on the Senate floor and passed by a vote of 80 to 18. It was therefore a Senate priority to retain his provision in our negotiations with the House of Representatives.

Senator Carper: One change made by the conference committee was to restate the preemption standard in a slightly different way, but my reading of the language indicates that the conference report still maintains the Barnett standard for determining when a State law is preempted.

Senator Dodd: The Senator is correct. That is why the conference report specifically cites the *Barnett Bank of Marion County, N.A. v. Nelson*, Florida Insurance Commissioner, 517 U.S. 25 (1996) case. There should be no doubt the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case.

Senator Carper: I again thank the Senator. This will provide certainty to everyone – those who offer consumers financial products and to consumer[s] themselves.

156 Cong. Rec. S5902 (daily ed. July 15, 2010) (colloquy between Senator Carper and Chairman Dodd).

See also 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement by Senator Tim Johnson). And see letter from Senator Thomas R. Carper and Senator Mark Warner to Acting Comptroller John Walsh (April 4, 2011); OCC Interpretive Letter 1132 (letter from Acting Comptroller Walsh to Senators Warner and Carper) (May 12, 2011) (responding to Senators Carper and Warner and providing further detail on the OCC’s analysis of the Dodd-Frank Act preemption provisions), available at <http://www.occ.gov/static/interpretations-and-precedents/may11/int1132.pdf>; Letter from Senator Thomas R. Carper and Senator Mark Warner to Treasury Secretary Timothy Geithner (July 8, 2011).

account of both the context and entirety of the colloquy and is not sustained by the language of the statute, or by the Barnett decision itself. Section 1044 of the Dodd-Frank Act provides in pertinent part that a state consumer financial law as applied to a national bank will be preempted only if, “in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [Barnett], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers....”<sup>32</sup> The “legal standard for preemption” employed in the Court’s decision is conflict preemption, applied in the context of powers granted national banks under Federal law.<sup>33</sup> “Prevent or significantly interfere” is not “the legal standard for preemption in the decision”; it is part of the Court’s discussion of its reasoning; an observation made describing other Supreme Court precedent that is cited in the Court’s decision.<sup>34</sup>

Therefore, in order to apply the Barnett standard preemption provision in section 1044, the first step is that the preemption analysis must be “in accordance with the legal standard for preemption in the decision of the Supreme Court” in Barnett. Thus, the analysis should be a conflict preemption legal standard, and the analysis should be in accordance with the Court’s reasoning applying that standard in the Barnett decision. The “prevent or significantly interfere” phrase that follows then provides a touchstone to that conflict preemption standard and analysis.<sup>35</sup> The phrase cannot be a new, stand-alone standard, divorced from the reasoning of the

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<sup>32</sup> Dodd-Frank Act, section 1044(a), 124 Stat. at 2015 (to be codified at 12 U.S.C. 25b).

<sup>33</sup> The Barnett decision describes in detail the analysis under the Barnett conflict preemption standard. 517 U.S. at 32-35.

<sup>34</sup> 517 U.S. at 33-34.

<sup>35</sup> We note that a recent decision by the U.S. Court of Appeals for the 11<sup>th</sup> Circuit reached the same result. Baptista v. JPMorgan Chase Bank, N.A., 640 F.3d 1194, 1197 (11<sup>th</sup> Cir. May 11, 2011) (“Thus it is clear that under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes—that is, the test for conflict preemption.”).

decision without ignoring the language that precedes it, which directs that the legal standard be the standard for preemption “in the decision” of the Court. That standard is conflict preemption, as supported by the reasoning of the decision, which includes, but is not bounded by, the “prevent or significantly interfere” formulation. If Congress had intended a different preemption analysis than the conflict preemption analysis in Barnett, it would have been rejecting not just Barnett, but also, as described above, well over a century of judicial precedent upon which the decision was founded. We decline to infer that result from legislative language that begins by stating that preemption would be determined “in accordance with the legal standard for preemption in the decision of the Supreme Court” in Barnett.

This result is supported by other portions of the Dodd-Frank Act and relevant precedent.<sup>36</sup> Specifically, in the same section 1044, the related requirement that the OCC must have “substantial evidence” on the record to support adoption of preemption rules or orders refers to “the legal standard of the decision of the Supreme Court in” the Barnett decision, not to any single phrase used in that decision.<sup>37</sup> It would not make sense for this “substantial evidence” requirement to require compliance with a different preemption standard than the standard intended by the Barnett standard preemption provision.

Other textual support is found in the Dodd-Frank Act section providing that Federal savings associations are to be subject to the same preemption standards applicable to national

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<sup>36</sup> See, e.g., Dodd-Frank Act, section 1046(a), 124 Stat. at 2017 (to be codified at 12 U.S.C. 1465).

<sup>37</sup> See id. at section 1044(a), 124 Stat. at 2016 (to be codified at 12 U.S.C. 25b) (providing that regulations and orders promulgated under Barnett standard preemption do not affect the application of a state consumer financial law to a national bank unless substantial evidence made on the record of the proceeding supports the specific finding of preemption “in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996).”).

banks. Subsection (a) of section 1046 states that preemption determinations for Federal savings associations under the Home Owners' Loan Act "shall be made in accordance with the laws and legal standards applicable to national banks regarding preemption of state law." The heading of subsection (b), which immediately follows, is "Principles of Conflict Preemption Applicable," which can only refer to the national bank preemption standards to which Federal savings associations are made subject by subsection (a).

The Barnett standard preemption provision also uses language virtually identical to that used in section 104(d)(2)(A) of the GLBA.<sup>38</sup> The leading case applying that standard similarly treated the phrase "prevents or significantly interferes" as a reference to the whole of the Court's Barnett preemption analysis and referred to the GLBA statutory language as "the traditional Barnett Bank standards."<sup>39</sup>

Accordingly, because we conclude that the Dodd-Frank Act preserves the Barnett conflict preemption standard, precedents consistent with that analysis – which may include regulations adopted consistent with such a conflict preemption justification – are also preserved.<sup>40</sup> Further, as of July 21, 2011, those rules and precedents will apply to Federal savings associations to the same extent that they apply to national banks.

c. Deletion of "Obstruct, Impair, or Condition" Preemption Formulation and Retention of the 2004 Preemption Rules

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<sup>38</sup> See 15 U.S.C. 6701(d)(2)(A).

<sup>39</sup> Association of Banks in Insurance Inc. v. Duryee, 270 F.3d 397, at 405, 408 (6<sup>th</sup> Cir. 2001).

<sup>40</sup> One commenter asserted that the Dodd-Frank Act expressly preserves only the OCC's rules concerning the law applicable to interest rates charged by national banks, and those applicable to prior contracts. This does not mean, however, that the 2004 preemption rules and precedents in other areas have become invalid. It is well settled that "repeals by implication are not favored and will not be found unless an intent to repeal is 'clear and manifest.'" Rodriguez v. U.S., 480 U.S. 522, 524 (1987) (internal citations omitted). Rather, regulatory provisions and other precedents that are consistent with standards in the Dodd-Frank Act are preserved.

Some commenters asserted that the “obstruct, impair, or condition” phrasing in the 2004 preemption rules was not only inconsistent with Barnett but also inconsistent with the new, narrower “prevents or significantly interferes” standard that they assert is imposed by the Dodd-Frank Act. As discussed above, we conclude that the Dodd-Frank Act Barnett standard is the conflict preemption standard employed in the Court’s decision, not a new test. The question remains, however, of the relationship between that standard and the “obstruct, impair or condition” formulation. As we noted in the preamble to the proposal, the words “obstruct, impair or condition” as used in the 2004 preemption rules were intended to reflect the precedents cited in Barnett, not to create a new preemption standard. Nevertheless, we acknowledge that the phrase created confusion and misunderstanding well before enactment of the Dodd-Frank Act. We also recognize that inclusion of the “prevents or significantly interfere” conflict preemption formulation in the Barnett standard preemption provision may have been intended to change the OCC’s approach by shifting the basis of preemption back to the decision itself, rather than placing reliance on the OCC’s effort to distill the Barnett principles in this manner.<sup>41</sup>

For these reasons, the OCC is deleting the phrase in the final rule.<sup>42</sup> Eliminating this language from our regulations will remove any ambiguity that the conflict preemption principles of the Supreme Court’s Barnett decision are the governing standard for national bank preemption. In response to concerns raised by commenters about Dodd-Frank Act legislative intent,

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<sup>41</sup> As we noted in note 31, the colloquy between Senators Carper and Dodd clearly demonstrates that Congress did not intend to change the Barnett standard. But the final language in section 1044 could be read as a rejection of the “obstruct, impair, or condition” formulation used in the 2004 preemption rules.

<sup>42</sup> We decline commenters’ request that we also delete this language from the OCC’s bank operations rule at 12 CFR 7.4009 rather than eliminating the rule in its entirety. We have not had occasion to apply this rule to particular types of state laws and therefore its removal should not create uncertainty about the validity of prior precedent. The application of state consumer financial laws to national bank operations continues to be subject to a Barnett conflict preemption analysis.

misunderstanding and potential misapplication of the “obstructs, impairs or conditions” formulation, and the relevant legislative history, the OCC also has reconsidered its position concerning precedent that relied on that standard. To the extent that an existing preemption precedent is exclusively reliant on the phrase “obstructs, impairs, or conditions” as the basis for a preemption determination, we believe that validity of the precedent would need to be reexamined to ascertain whether the determination is consistent with the Barnett conflict preemption analysis as discussed above.<sup>43</sup>

Some commenters also asserted that the preemption rules promulgated by the OCC in 2004 are not consistent with the Dodd-Frank Act, or with Barnett, because they identify categories and/or terms of state laws that are preempted; some of these commenters equated listing of categories of preempted state laws with field preemption. However, these rules are not based on a field preemption standard.<sup>44</sup> They were based on the OCC’s conclusion that the listed types and terms of state laws would be preempted by application of the conflict preemption standard of the Barnett decision.

The essence of the Barnett conflict preemption analysis is an evaluation of the extent and nature of an impediment posed by state law to the exercise of a power granted national banks under Federal law.<sup>45</sup> The “conflict” that is analyzed in conflict preemption is the nature and scope of that impediment. Where the same type of impediment exists under multiple states’

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<sup>43</sup> Under some circumstances, however, the preemptive effect of the former regulation could be preserved under Section 1043 of the Dodd-Frank Act. See Dodd-Frank Act, section 1043, 124 Stat. at 2014 (to be codified at 12 U.S.C. 5553). The OCC has not identified any OCC-issued preemption precedent that rested only on the “obstruct, impair, or condition” formulation.

<sup>44</sup> See McCormick v. Wells Fargo Bank, No. 3:08-0944, 2009 WL 151588, at \*2 (S.D. W.Va. Jan 22, 2009).

<sup>45</sup> As noted by the Court in Barnett, these Federal powers granted national banks may be “both enumerated and incidental.” 517 U.S. at 32.

laws, a single conclusion of preemption can apply to multiple laws that contain the same type of impediment – that generate the same type of conflict with a Federally-granted power.

Accordingly, a conflict preemption analysis can be state law-specific, or it can apply to provisions or terms in more than one law that present the same type of conflict.<sup>46</sup> But in all cases,<sup>47</sup> there must be a conflict that triggers preemption under the standard articulated in the Barnett decision.<sup>48</sup> As detailed below, the Dodd-Frank Act’s case-by-case procedural requirement applicable to future determinations regarding preemption of state consumer financial laws allows categorical determinations where multiple state laws are identified. The Act defines “case-by-case basis” as a determination by the Comptroller as to the impact of a “particular” state consumer financial law on “any national bank that is subject to that law” or the law of any other state with substantively equivalent terms.

The types and terms of laws that are set out in the 2004 preemption rules were based on the OCC’s experience with the potential impact of such laws on national bank powers and operations.<sup>49</sup> We have re-reviewed those rules in connection with this rulemaking to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict

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<sup>46</sup> See Dodd-Frank Act, section 1044(a), 124 Stat. at 2015 (to be codified at 12 U.S.C. 25b).

<sup>47</sup> The Barnett standard preemption provision of Dodd-Frank applies to questions concerning the applicability of state consumer financial laws to national banks; the principles of preemption articulated in the Barnett decision apply to questions concerning the application of all types of state laws to national banks. Contrary to a few commenters’ assertions, nothing in Dodd-Frank affects the OCC’s authority to address preemption questions concerning laws other than “state consumer financial laws.”

<sup>48</sup> This is in contrast to the OTS’s preemption rules, which assert an “occupation of the field” preemption standard for Federal savings associations. See, e.g., 12 CFR 557.11(b), 560.2(a).

<sup>49</sup> Id. at §§ 7.4007, 7.4008, 34.4; see 69 FR 1904, 1911 (Jan. 13, 2004) (final preemption rules); see also 68 FR 46119, 46128 (Aug. 5, 2003) (proposed preemption rules).

preemption in the Supreme Court’s Barnett decision.<sup>50</sup> For example, in the lending arena, based upon our assessment as the primary Federal supervisor of national banks, state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning the protection of collateral value, credit enhancements, risk mitigation, loan-to-value standards, loan amortization and repayment requirements, circumstances when a loan may be called due and payable, escrow standards, use of credit reports to assess creditworthiness of borrowers, and origination, managing, and purchasing and selling extensions of credit or interests therein, would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

Similarly, disclosure laws that impose requirements that predicate the exercise of national banks’ deposit-taking or lending powers on compliance with state-dictated disclosure requirements clearly present a significant interference, within the meaning of Barnett, with the exercise of those national bank powers. This type of law falls squarely within the precedent recognized in the Supreme Court’s Barnett decision, notably the Franklin Nat’l Bank decision specifically discussed and relied upon in Barnett.<sup>51</sup>

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<sup>50</sup> We also have added a clarification in the final rule to specifically state that the OCC will use the Barnett standard for determining that state laws are applicable to national banks. This clarification does not effect any substantive change, but simply modifies the reference to state laws that are not preempted because they have only an insignificant effect upon national bank powers according to the Barnett conflict standard, notwithstanding the type of state law involved.

<sup>51</sup> Barnett, 517 U.S. at 33; Franklin Nat’l Bank of Franklin Square v. New York, 347 U.S. 373 (1954). See also American Bankers Ass’n v. Lockyer, 239 F. Supp. 2d 1000, 1014-1018 (E.D. Cal. 2002) (the monetary and non-monetary costs of a mandatory disclosure scheme constituted a significant interference with national banks’ powers under the National Bank Act); Rose v. Chase Bank, N.A., 513 F.3d 1032 (9<sup>th</sup> Cir. 2008) (a state may not by statute attach civil liability to the offer of convenience checks that do not carry state-mandated disclosures.) Lockyer and Rose cited and relied on the preemption standard in Barnett.

And state laws that would alter standards of a national bank's depository business – setting standards for permissible types and terms of accounts and for funds availability, similarly would significantly interfere with management of a core banking business. Moreover, the imposition of state-based standards on national banks' depository activities implicates aspects of a bank's overall risk management and funding strategies, including liquidity, interest rate risk exposure, funding management, and fraud prevention. State and local law directives or instructions affecting these areas are significant, within the meaning of Barnett, since they affect whether and how the bank may offer a core banking product and manage some of its most basic funding functions in operating a banking business.

Several commenters identified particular types of laws in the foregoing categories and explained how they impaired or otherwise burdened their operations. Those commenters also emphasized that to the extent that multiple states' requirements may be asserted, the significance of the interference is magnified. Based upon the OCC's supervisory experience, these concerns are valid.

#### d. Dodd-Frank Act Procedural and Consultation Requirements

Some commenters asserted that maintaining any of the preemption rules contravenes the new Dodd-Frank Act preemption procedures. These commenters contend that OCC can preempt only on a "case-by-case basis" if a "particular" state law, or an equivalent one, prevents or significantly interferes with the exercise of bank powers, after consultation with the CFPB. However, these provisions clearly apply to determinations made under the Barnett standard provisions of the Dodd-Frank Act that are not effective until July 21, 2011. Actions and regulations in effect prior to the effective date are not subject to the case-by-case requirement, but, as discussed above, the continued validity of those precedents applicable to state consumer financial laws is subject to

the standards of section 1044(b)(1). Future preemption determinations would be subject to the new Dodd-Frank Act procedural provisions. Where Congress wanted to make wholesale changes to existing preemption standards, it clearly did so, as it did by eliminating field preemption for Federal thrifts and preemption for operating subsidiaries, and those standards operate prospectively.<sup>52</sup>

e. Visitorial Powers Amendments

As explained above, some commenters voiced concern about the proposed revision to the definition of visitorial powers at § 7.4000(a)(2)(iv) to include “[i]nvestigating or enforcing compliance with any applicable Federal or state laws concerning those activities.” This addition, consistent with the concept of visitation, was intended to include direct investigations of national banks such as through requests for documents or testimony directed to the bank to ascertain the bank’s compliance with law through mechanisms not otherwise authorized under the rule. It would not include collecting information from other sources or from the bank through actions that do not constitute visitations or as authorized under Federal law. In response to commenters and to better reflect the Cuomo decision, we have revised the final rule to clarify this point.

Commenters also opined that the proposed definition does not reflect the authority of state attorneys general to enforce certain Federal laws and certain regulations to be issued by the CFPB. We believe this authority is addressed in current § 7.4000(a)(3), which provides that the

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<sup>52</sup> See Dodd-Frank Act, sections 1046(a), 1044(a), 124 Stat. at 2017, 2015 (to be codified at 12 U.S.C. 1465, 25b). Earlier versions of the legislation would have had a retroactive impact by creating various new standards for preemption under the National Bank Act, invalidating an extensive body of national bank judicial, interpretive and regulatory preemption precedent. See H.R. 4173, 111<sup>th</sup> Cong. § 4404 (as passed by the House of Representatives on Dec. 11, 2009). The final version of the Dodd-Frank Act legislation enacted by Congress did not adopt this approach. See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 272-73 (1994) (recognizing presumption against retroactive legislation).

OCC has exclusive visitorial powers “[u]nless otherwise provided by Federal law,” and in § 7.4000(b)(1).

Finally, some commenters asserted that the phrase “non-preempted state law” used in the proposal could be interpreted more narrowly than the “applicable law” phrasing used in the Dodd-Frank Act. We intended the authority addressed in current § 7.4000(a)(3) in combination with the phrase “non-preempted state law” to have the result sought by these commenters, but we understand the commenters’ concern regarding the clarity of this result. Accordingly, we have changed the language of the final rule to simply use the term “applicable law.” We note, however, that this is an exception from a prohibition of certain visitorial actions by an attorney general (or other chief state law enforcement officer), not an authorization. In the case of both non-preempted state law and Federal law, the law in question still must provide authority for the attorney general to enforce and seek relief as authorized under that applicable law.

#### 5. Description of the Final Rule

For the reasons set forth in this preamble, the final rule amends provisions of the OCC’s regulations relating to preemption (12 CFR 7.4007, 7.4008, 7.4009, and 34.4), operating subsidiaries (12 CFR 5.34 and 7.4006), and visitorial powers (12 CFR 7.4000) as follows:

- The final rule adds §§ 7.4010(a) and 34.6 to provide that Federal savings associations and their subsidiaries are subject to the same laws and legal standards, including OCC regulations, as are applicable to national banks and their subsidiaries regarding the preemption of state law. The final rule also adds § 7.4010(b) to subject Federal savings associations and their subsidiaries to the same visitorial powers provisions in the Dodd-Frank Act that apply to national banks and their subsidiaries.

- The final rule makes conforming changes to §§ 7.4007, 7.4008, and 34.4. It revises paragraphs (b) in § 7.4007, (d) in § 7.4008, and (a) in § 34.4 by removing “state laws that obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized . . . powers are not applicable to national banks.” The final rule further clarifies that a state law is not preempted to the extent consistent with the Barnett decision.
- The final rule deletes § 7.4009.
- The final rule deletes § 7.4006, which governs applicability of state laws to national bank operating subsidiaries. The final rule also makes conforming revisions to 12 CFR 5.34(a) and paragraph (e)(3) by expressly referencing the new section 12 U.S.C. 25b adopted by the Dodd-Frank Act.
- The final rule makes a number of changes to § 7.4000 to conform the regulations to the Supreme Court’s decision in the Cuomo case as adopted by the Dodd-Frank Act. First, it adds a reference to 12 U.S.C. 484 in § 7.4000(a)(1). Second, it revises paragraph (a)(2)(iv) to read “[e]nforcing compliance with any applicable Federal or state laws concerning those activities, including through investigations that seek to ascertain compliance through production of non-public information by the bank, except as otherwise provided in paragraphs (a), (b) and (c).” Third, it adds a new paragraph (b), which specifically provides that “[i]n accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitatorial powers under

12 U.S.C. 484.” Fourth, it redesignates paragraphs (b) and (c) as new paragraphs (c) and (d) and makes conforming revisions to § 7.4000(c)(2), which provides an exception from the general rule in § 7.4000(a)(1) for such visitorial powers as are vested in the courts of justice.

We did not propose changes to 12 CFR 7.4002, 34.21, and 37.1 and therefore make no changes to these provisions in this final rule. However, we agree with commenters that these rules remain in effect.

#### **D. Assessments (Part 8)**

##### **1. Background**

The Dodd-Frank Act transfers authority to collect assessments for Federal savings associations from the OTS to the OCC.<sup>53</sup> This authority is effective as of the transfer date, July 21, 2011.<sup>54</sup> The Dodd-Frank Act also provides that, in establishing the amount of an assessment, the Comptroller may consider the nature and scope of the activities of the entity, the amount and type of assets it holds, the financial and managerial condition of the entity, and any other factor that is appropriate.<sup>55</sup>

Prior to the transfer date, the OCC and the OTS assessed banks and savings associations, respectively, using different methodologies, although the agencies’ methodologies generally resulted in similar levels of assessments. Under the OTS assessment system, assessments were

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<sup>53</sup> See Dodd-Frank Act, section 318(b), 124 Stat. at 1526-1527 (to be codified at 12 U.S.C. 16) (authorizing the Comptroller to collect assessments, fees, or other charges from entities for which it is the appropriate Federal banking agency). See also id. at section 312(c), 124 Stat. at 1522 (to be codified at 12 U.S.C. 1813) (amending the Federal Deposit Insurance Act to designate the OCC as the appropriate Federal banking agency for Federal savings associations); section 369, 124 Stat. at 1563 (to be codified at 12 U.S.C. 1467) (amending the HOLA to authorize the Comptroller to assess savings associations and affiliates of savings associations for the cost of examinations as the Comptroller “deems necessary or appropriate”).

<sup>54</sup> Id. at section 312(a), 124 Stat. at 1521 (to be codified at 12 U.S.C. 5412).

<sup>55</sup> Id. at section 318(b), 124 Stat. at 1526-1527 (to be codified at 12 U.S.C. 16).

due each year on January 31 and July 31, and were calculated based on an institution's asset size, condition, and complexity.<sup>56</sup> The asset size component of the assessment was calculated using a table and formula contained in the OTS's regulation.<sup>57</sup> The OTS set specific rates that apply to the table through a Thrift Bulletin on assessments and fees.<sup>58</sup>

The condition component in the OTS's regulation applied to savings associations with Uniform Financial Institutions Rating System (UFIRS) ratings of 3, 4, or 5. The condition surcharge is determined by multiplying a savings association's size component by 50%, in the case of any association that receives a composite UFIRS rating of 3, and 100% in the case of any association that receives a composite UFIRS rating of 4 or 5. Under the OTS regulation, there was no cap on the condition surcharge.

The assessment for complexity was based on a savings association's trust assets and on certain non-trust assets. The OTS charged a complexity component for trust assets if a savings association had more than \$1 billion in one of three components: trust assets managed by the savings association, the outstanding principal balance of assets that are covered by recourse obligations or direct credit substitutes, and the principal amount of loans that the institution services for others. The OTS charged the complexity component for these categories of assets above \$1 billion under tiers and rates set out in a Thrift Bulletin.

If a savings association administers trust assets of \$1 billion or less, the OTS could assess fees for its examinations and investigations of those institutions. The OTS also could assess a savings association for examination or investigation of its affiliates. Again, these fees were set in a Thrift Bulletin.

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<sup>56</sup> 12 CFR part 502.

<sup>57</sup> *Id.* at § 502.20.

<sup>58</sup> Thrift Bulletin 48-29 (Dec. 2, 2010).

Under the OCC's assessment regulation, set forth at 12 CFR part 8, assessments for each national bank are due on March 31 and September 30 of each year.<sup>59</sup> The semiannual assessment for each national bank is based on an institution's asset size and is calculated using a table and formula in the OCC's regulation.<sup>60</sup> The OCC sets the specific rates for the table each year in the Notice of Comptroller of the Currency Fees (Notice of Fees).<sup>61</sup> The OCC may provide a reduced semiannual assessment for each non-lead bank within a bank holding company.<sup>62</sup>

In addition to the semiannual assessment, the OCC applies a separate assessment for its examination of "independent credit card banks" and "independent trust banks."<sup>63</sup> A bank is an independent credit card bank if it engages primarily in credit card operations and is not affiliated with a full-service national bank.<sup>64</sup> The assessment is based on "receivables attributable," defined as the total amount of outstanding balances due on credit card accounts owned by the bank (the receivables attributable to those accounts), minus receivables retained on the bank's balance sheet.

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<sup>59</sup> Part 8 contains parallel assessment rules for Federal branches and agencies.

<sup>60</sup> 12 CFR 8.2(b).

<sup>61</sup> Notice of Comptroller of the Currency Fees for Year 2011 (Dec. 1, 2010), available at <http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-41.html>.

<sup>62</sup> A "lead bank" is defined in the OCC's regulation as the largest national bank controlled by a company based on the total assets held by each national bank controlled by that company. 12 CFR 8.2(a)(6)(ii)(A). A "non-lead bank" means a national bank that is not the lead bank controlled by a company that controls two or more national banks. Id. at § 8.2(a)(6)(ii)(B). The percentage of the discount for non-lead banks is set in the annual Notice of Fees.

<sup>63</sup> Id. at §§ 8.2(c), 8.6(c). The OCC also assesses a fee for special examinations and investigations, such as special examinations and investigations of affiliates of national banks. Id. at § 8.6.

<sup>64</sup> A "full service national bank" is defined as a bank that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of permissible banking activities. Id. at §§ 8.2(c)(3)(iii), 8.6(c)(3)(ii).

An “independent trust bank” is a national bank with trust powers that has fiduciary and related assets, does not primarily offer full-service banking, and is not affiliated with a full-service national bank.<sup>65</sup> The independent trust assessment is made up of a minimum amount, set in the Notice of Fees, and an additional amount for banks with over \$1 billion in fiduciary and related assets. The specific rate applicable to fiduciary and related assets above \$1 billion is also set in the annual Notice of Fees.

The OCC applies a condition-based surcharge to the semiannual assessment of national banks.<sup>66</sup> The condition surcharge applies to national banks with UFIRS ratings of 3, 4, or 5. The condition surcharge is determined by multiplying the general semiannual assessment by 1.5, in the case of any national bank that receives a composite UFIRS rating of 3, and 2.0 in the case of any national bank that receives a composite UFIRS rating of 4 or 5. The condition surcharge is assessed against, and limited to, the first \$20 billion of a national bank’s book assets.

## 2. Description of the Final Rule

The OCC received two comments concerning the proposed changes to part 8 and the assessment of savings association, both supporting the proposal’s approach to integrating savings associations into the OCC’s assessment structure. The OCC is adopting the final rule as proposed.

The final rule amends part 8 to assess Federal savings associations using the same methodologies, rates, fees, and payment due dates that apply currently to national banks. The OTS’s existing assessment regulation is no longer in effect and will be repealed at a later date.

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<sup>65</sup> Id. at § 8.6(c)(3)(iii).

<sup>66</sup> Id. at § 8.2(d).

As a result, the next assessment for savings associations will occur in September 2011, and not July 2011.

Under the OCC's assessment system, some savings associations will pay marginally more assessments than in the past, while others will pay lower assessments. However, during the first two assessment cycles after the transfer date, the OCC will base savings association assessments on either the OCC's assessment regulation (as amended to include Federal savings associations) or the former OTS assessment structure, whichever yields the lower assessment for that savings association. After the March 2012 assessment, all national banks and Federal savings associations will be assessed using the OCC's assessment structure. The OCC intends to implement this phase-in through an amended Notice of Fees. The OCC believes that this phase-in will allow savings associations sufficient time to adjust to the OCC's assessment program.

One commenter suggested that the OCC add the phase-in period for Federal savings associations to the regulatory text. The OCC believes that the amended Notice of Fees discussed above, as well as the discussion of the phase-in included in the proposed rule and this preamble, provide sufficient guidance to Federal savings associations concerning the OCC's intention to delay application of higher assessments for affected Federal savings associations for two assessment cycles. Given the temporary nature of the phase-in, we decline to include a reference to the phase-in period in the regulatory text.

This commenter also suggested that the OCC provide an alternate assessment statement to Federal savings associations to show savings associations what the assessment would have been under the OCC's assessment structure, had it been applied. The commenter stated that this will assist those Federal savings associations that will pay marginally more under the OCC's assessment structure better prepare for the shift to OCC assessments in 2012. We agree that such

notice would be helpful and plan to notify those Federal savings associations that will pay a lower assessment during the phase-in of the amount their assessments would have been under the OCC's assessment structure.

The final rule also implements section 605(a) of the Dodd-Frank Act, which provides the OCC (and other appropriate Federal banking agencies) with authority to conduct examinations of depository-institution permissible activities of nondepository institution subsidiaries of depository institution holding companies. Section 605 provides specific authority for the OCC and other regulators to assess such nondepository institution subsidiaries for the costs of examination. The final rule implements this new statutory assessment authority.

#### **V. Effective Date**

This final rule is effective on July 21, 2011, except as noted in the DATES section. A final rule may be published with an effective date that is less than 30 days from publication if an agency finds good cause and publishes such with the final rule.<sup>67</sup> The purpose of a delayed effective date is to permit regulated entities to adjust their behavior before the final rule takes effect. As described above, the OCC is amending its rules to implement various provisions of the Dodd-Frank Act, including the Act's transfer of functions of the OTS to the OCC, the Act's provisions regarding preemption and visitorial powers, and the Act's amendments relating to the change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches. The changes relating to the transfer of the OTS's functions to the OCC are essential to facilitating a seamless transition when the OCC assumes responsibility for supervising Federal savings associations on the transfer date (July 21, 2011) and must be in effect on that date in order to ensure that the appropriate regulatory structure is in place. Specifically with regard to

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<sup>67</sup> 5 U.S.C. 553(d)(3).

the preemption and visitorial powers rules, it is important for the industry to have guidance by the effective date of the relevant Dodd-Frank Act amendments, July 21, 2011. Finally, the amendments relating to the change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches simply implement statutory changes made effective upon the enactment of the Dodd-Frank Act on July 21, 2010. For these reasons, the OCC finds good cause to dispense with a delayed effective date.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4802) (RCDRIA) requires that regulations imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of the calendar quarter after publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time. The RCDRIA does not apply to the amendments to parts 4, 5, 7, 8, 28 and 34 of this final rule because these amendments do not impose any additional reporting, disclosure, or other requirements.

## **VI. Regulatory Analysis**

### **1. Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the Federal Register along with its rule. We have concluded that the final rule does not have a significant economic impact on a substantial number of small entities currently supervised by the OCC (i.e., national banks and Federal branches and agencies of foreign banks). In addition,

although the final rule will directly affect all Federal savings associations, we have concluded that it does not have a significant economic impact on a substantial number of small Federal savings associations. Specifically, the amendments to part 4 do not contain new compliance requirements. Any costs that may be associated with integrating the functions of the two agencies, and other changes to part 4, will be borne by the OCC. In addition, there are no costs directly associated with the amendments to 12 CFR 5.50(f) and part 28, implementing sections 603 and 335 of the Dodd-Frank Act, respectively, or with the amendments necessary to apply national bank preemption standards to Federal savings associations. Furthermore, we have determined that the amendments to the preemption and visitorial powers provisions affecting national banks will not have a significant economic impact on a substantial number of small entities. Lastly, although the amendments to part 8, assessments, will economically impact a substantial number of small savings associations, this impact will not be significant. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a final regulatory flexibility analysis is not needed.

## 2. Paperwork Reduction Act

The rule contains several currently approved collections of information under the Paperwork Reduction Act (44 U.S.C. 3501-3520).<sup>68</sup> The amendments adopted today do not introduce any new collections of information into the rules, nor do they amend the rules in a way that substantively modifies the collections of information that OMB has approved. Therefore, no PRA submissions to OMB are required, with the exception of non-substantive submissions to OMB to adjust the number of respondents.

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<sup>68</sup> See OMB Control Nos. 1557-0014, 1557-0200 and 1557-0223.

### 3. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this final rule is not subject to section 202 of the Unfunded Mandates Act.

#### **List of Subjects**

##### 12 CFR Part 4

National banks, Savings associations, Organization and functions, Reporting and recordkeeping requirements, Administrative practice and procedure, Freedom of Information Act, Records, Non-public information, Post-employment activities.

##### 12 CFR Part 5

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

##### 12 CFR Part 7

Computer technology, Credit, Insurance, Investments, National banks, Savings associations, reporting and recordkeeping requirements, Securities, Surety bonds.

##### 12 CFR Part 8

National banks, Savings associations, Reporting and recordkeeping requirements.

12 CFR Part 28

Foreign banking, National banks, Reporting and recordkeeping requirements.

12 CFR Part 34

Mortgages, National banks, Savings associations, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as follows:

**PART 4 - ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS**

1. The authority citation for part 4 is revised to read as follows:

**Authority:** 12 U.S.C 1, 12 U.S.C. 93a, 12 U.S.C. 5321, 12 U.S.C. 5412, and 12 U.S.C. 5414. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p-1, 1831o, 1867, 1951 et seq., 2601 et seq., 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq.; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e. Subpart E is also issued under 12 U.S.C. 1820(k).

2. Revise § 4.2 to read as follows:

**§ 4.2 Office of the Comptroller of the Currency.**

The OCC is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction. The OCC examines, supervises, and regulates national banks, Federal branches and agencies of foreign banks, and Federal savings associations to carry out this mission. The OCC also issues rules and regulations applicable to state savings associations.

#### **§ 4.3 [Amended]**

3. Amend § 4.3 in the third sentence by adding “a member of the Financial Stability Oversight Council,” after “Federal Deposit Insurance Corporation,”.

4. Revise § 4.4 to read as follows:

#### **§ 4.4 Washington office and website.**

The Washington office of the OCC is the main office and headquarters of the OCC. The Washington office directs OCC policy, oversees OCC operations, and is responsible for the direct supervision of certain national banks and Federal savings associations, including the largest national banks and the largest Federal savings associations (through the Large Bank Supervision Department); other national banks and Federal savings associations requiring special supervision; and Federal branches and agencies of foreign banks (through the Large Bank Supervision Department). The Washington office is located at 250 E Street, SW., Washington, DC 20219. The OCC’s website is at [www.occ.gov](http://www.occ.gov).

5. Amend § 4.5 by:

a. Revising paragraph (a); and

b. In paragraph (b), adding “and savings association” after “support the bank”.

The revision reads as follows:

**§ 4.5 District and field offices.**

(a) District offices. Each district office of the OCC is responsible for the direct supervision of the national banks and Federal savings associations in its district, with the exception of the national banks and Federal savings associations supervised by the Washington office. The four district offices cover the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. The office address and the geographical composition of each district follows:

<b>District</b>	<b>Office address</b>	<b>Geographical composition</b>
Northeastern District	Office of the Comptroller of the Currency, 340 Madison Avenue, 5th Floor New York, NY 10173–0002	Connecticut, Delaware, District of Columbia, northeast Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Vermont, the Virgin Islands, Virginia, and West Virginia.
Central District	Office of the Comptroller of the Currency, One Financial Place, Suite 2700, 440 South LaSalle Street, Chicago, IL 60605	Illinois, Indiana, central and southern Kentucky, Michigan, Minnesota, eastern Missouri, North Dakota, Ohio, and Wisconsin.
Southern District	Office of the Comptroller of the Currency, 500 North Akard Street, Suite 1600, Dallas, TX 75201	Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas.
Western District	Office of the Comptroller of the Currency, 1225 17th Street, Suite 300, Denver, CO 80202	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa, Kansas, western Missouri, Montana, Nebraska, Nevada, New Mexico, Northern Mariana Islands, Oregon, South Dakota, Utah, Washington, Wyoming, and Guam.

\* \* \* \* \*

6. Amend § 4.6 by:

a. Revising the section heading;

b. In paragraph (a):

i. Adding in the first sentence “and Federal savings associations” after “examines national banks”; “(with respect to national banks) and 1463(a)(1) and 1464 (with respect to

Federal savings associations)” after “12 U.S.C. 481”; and “(with respect to national banks and Federal savings associations)” after “12 U.S.C. 1820(d)”; and

ii. Adding in the second sentence “and Federal savings association” after “every national bank”.

c. In paragraph (b):

i. Adding in the introductory text “or a Federal savings association” after “a national bank”;

ii. Adding in paragraphs (b)(1), (b)(2), (b)(4), and (b)(5) “or Federal savings association” after “bank” each time it appears; and

iii. In paragraph (b)(3) removing “, the OCC” in the introductory text and revising paragraphs (b)(3)(i) and (b)(3)(ii); and

iv. In paragraph (b)(4), adding “, OTS” after “OCC”.

d. In paragraph (c), adding “or Federal savings association” after “national bank”.

The revisions read as follows:

#### **§ 4.6 Frequency of examination of national banks and Federal savings associations.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(i) The bank or Federal savings association was assigned a rating of 1 or 2 for management as part of the bank's or association's rating under the Uniform Financial Institutions Rating System; and

(ii) The bank or Federal savings association was assigned a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System.

\* \* \* \* \*

**§ 4.7 [Amended]**

7. In paragraph (a) of § 4.7, remove the phrase “(h) and (i)” and add in its place “(g) and (h)”.

8. Amend § 4.11 by:

a. In paragraph (a), removing “industry” and adding in its place “and savings association industries” after the word “banking”;

b. Adding paragraph (b)(4).

The addition reads as follows:

**§ 4.11 Purpose and scope.**

\* \* \* \* \*

(b) \* \* \*

(4) This subpart does not apply to FOIA requests filed with the Office of Thrift Supervision (OTS) before July 21, 2011. These requests are subject to the rules of the OTS in effect on July 20, 2011.

9. Amend § 4.12 by:

a. Removing “and” at the end of paragraph (b)(8) and removing the period and adding “; and” at the end of paragraph (b)(9); and

b. Adding paragraph (10).

The addition reads as follows:

**§ 4.12 Information available under the FOIA.**

\* \* \* \* \*

(b) \* \* \*

(10) Any OTS information similar to that listed in paragraphs (b)(1) through (9) of this section, to the extent this information is in the possession of the OCC.

\* \* \* \* \*

10. Amend § 4.14 by:

a. Adding in paragraph (a)(7), footnote 1, first sentence, “and Federal savings associations” after “banks” and removing “, such as the Consolidated Report of Condition and Income (FFIEC 031-034),”;

b. Removing the phrase “part 11 or 16” in paragraph (a)(9) and adding in its place the phrase “parts 11, 16, 194 or 197”;

c. Removing “and” at the end of paragraph (a)(10);

d. Removing the period at the end of paragraph (a)(11) and adding in its place “; and”;

e. Adding paragraph (a)(12); and

f. Revising paragraph (c).

The additions and revision read as follows:

**§ 4.14 Public inspection and copying.**

(a) \* \* \*

(12) Any OTS information similar to that listed in paragraphs (a)(1) through (a)(12) of this section, to the extent this information is in the possession of the OCC.

\* \* \* \* \*

(c) Addresses. The information described in paragraphs (a)(1) through (10) and (a)(11) of this section is available from the Disclosure Officer, Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219. The information described in paragraph (a)(11) of this section in the case of both banks and Federal savings

associations is available from the Licensing Manager at the appropriate district office at the address listed in § 4.5(a), or in the case of banks and savings associations supervised by Large Bank Supervision, from the Large Bank Licensing Expert, Licensing Department, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**§ 4.15 [Amended]**

11. Amend § 4.15 by:

a. Adding in paragraph (b)(1) “through the OCC’s FOIA Web portal at <https://appsec.occ.gov/publicaccesslink/palMain.aspx> or” after “must submit the request or appeal”; and

b. Removing in paragraph (c)(2) “OCC’s Director of Communications or that person’s” and adding in its place “Comptroller or the Comptroller’s”.

**§ 4.16 [Amended]**

12. Amend § 4.16:

a. In paragraph (b)(1)(i) introductory text by adding “or to the Federal Home Loan Bank Board, the predecessor of the OTS,” after “OCC”;

b. In paragraph (b)(1)(i)(C) by removing “OCC” and adding “from the OCC or the Federal Home Loan Bank Board, the predecessor of the OTS” after “confidentiality”;

c. In paragraph (b)(1)(ii) introductory text by adding “or to the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”;

d. In paragraph (b)(1)(ii)(B) by adding “or the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”; and

e. In paragraph (b)(2)(iv) by adding “or the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”.

13. Revise § 4.18 to read as follows:

**§ 4.18 How to track a FOIA request.**

(a) Tracking number. (1) Internet requests. The OCC will issue a tracking number to all FOIA requesters automatically upon receipt of the request (as described in § 4.15(g)) by the OCC's Communications Department via the OCC's Freedom of Information Request Portal, <https://appsec.occ.gov/publicaccesslink/palMain.aspx>. The tracking number will be sent via electronic mail to the requester.

(2) If a requester does not have Internet access. The OCC will issue a tracking number to FOIA requesters without Internet access within 5 days of the receipt of the request (as described in § 4.15(g)) in the OCC's Communications Department. The OCC will mail the tracking number to the requester's physical address, as provided in the FOIA request.

(b) Status of request. FOIA requesters may track the progress of their requests via the OCC's Freedom of Information Request Portal, <https://appsec.occ.gov/publicaccesslink/palMain.aspx>. Requesters without Internet access may continue to contact the Disclosure Officer, Communications Division, Office of the Comptroller of the Currency, at (202) 874-4700 to check the status of their FOIA request(s).

14. Amend § 4.31 by:

- a. Adding in paragraph (a)(5) "Federal savings associations," after "national banks,";
- b. Adding in paragraph (b)(3) "or state savings association" after "state bank"; and
- c. Adding paragraph (b)(5).

The addition reads as follows:

**§ 4.31 Purpose and scope.**

\* \* \* \* \*

(b) \* \* \*

(5) This subpart does not apply to requests for non-public information filed with the Office of Thrift Supervision (OTS) before July 21, 2011. These requests are subject to the rules of the OTS in effect on July 20, 2011.

15. Amend § 4.32 by:

a. Revising paragraph (b)(1)(i);

b. In paragraph (b)(1)(ii) adding “or the OTS” after “OCC”, removing “the OCC’s”, and adding “either agency’s” after “with”;

c. Adding in paragraph (b)(1)(iii) “or OTS” after “compiled by the OCC”;

d. Revising paragraph (b)(1)(v);

e. Adding in paragraph (b)(1)(vi) “, Federal savings associations, and savings and loan holding companies” after “national banks”;

f. Removing the second sentence in paragraph (b)(2); and

g. Revising paragraph (e).

The revisions read as follows:

**§ 4.32 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) A record created or obtained:

(A) By the OCC in connection with the OCC's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a national bank, a

Federal savings association, a bank holding company, a savings and loan holding company, or an affiliate; or

(B) By the OTS in connection with the OTS's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a Federal savings association, a savings and loan holding company, or an affiliate;

\* \* \* \* \*

(v) Testimony from, or an interview with, a current or former OCC employee, officer, or agent or a former OTS employee, officer, or agent concerning information acquired by that person in the course of his or her performance of official duties with the OCC or OTS or due to that person's official status at the OCC or OTS; and

\* \* \* \* \*

(e) Supervised entity includes a national bank or Federal savings association, a subsidiary of a national bank or Federal savings association, or a Federal branch or agency of a foreign bank licensed by the OCC as defined under 12 CFR 28.11(g) and (h), or any other entity supervised by the OCC.

\* \* \* \* \*

16. Revise § 4.35(a)(5) to read as follows:

**§ 4.35 Consideration of requests.**

(a) \* \* \*

(5) Notice to subject national banks and Federal savings associations. Following receipt of a request for non-public OCC information, the OCC generally notifies the national bank or Federal savings association that is the subject of the requested information, unless the OCC, in

its discretion, determines that to do so would advantage or prejudice any of the parties in the matter at issue.

\* \* \* \* \*

17. Amend § 4.37 by:

a. In paragraph (a):

i. Adding in the paragraph heading “; former OTS employees or agents” after “former OCC employees or agents”;

ii. Adding “or former OTS employee or agent,” after “former OCC employee or agent” each time that phrase appears;

iii. Adding at the end of paragraph (a)(2)(ii), “and former OTS employees or agents”;

b. In paragraph (b):

i. Adding in paragraph (b)(1)(i) introductory text “Federal savings association,” after “national bank,”;

ii. Revising paragraph (b)(2) introductory text;

iii. Adding at the end of paragraph (b)(2)(ii) “or Federal savings association”;

iv. Adding in paragraph (b)(3) introductory text “ Federal savings association,” after “national bank,”; and

c. In paragraph (c), adding in the first sentence “and state savings association” after “state bank”.

The revision reads as follows:

**§4.37 Persons and entities with access to OCC information; prohibition on dissemination.**

\* \* \* \* \*

(b) \* \* \*

(2) Exception for national banks and Federal savings associations. When necessary or appropriate for business purposes, a national bank, Federal savings association, or holding company, or any director, officer, or employee thereof, may disclose non-public OCC information, including information contained in, or related to, OCC reports of examination, to a person or organization officially connected with the bank or Federal savings association as officer, director, employee, attorney, auditor, or independent auditor. A national bank, Federal savings association, or holding company or a director, officer, or employee thereof, may also release non-public OCC information to a consultant under this paragraph if the consultant is under a written contract to provide services to the bank or Federal savings association and the consultant has a written agreement with the bank or Federal savings association in which the consultant:

\* \* \* \* \*

**§ 4.39 [Amended]**

18. In § 4.39(a), add “OCC or OTS” after “former”.

**Appendix A to Subpart C of Part 4 [Amended]**

19. In Appendix A to subpart C of part 4:

a. In I. Model Stipulation, second paragraph, add “, 1463(a)(1), 1464(a)(1), and 1464(d)(1)(B)(i)” after 12 U.S.C. 481”; and

b. In II. Model Protective Order, add “, 1463(a)(1), 1464(a)(1), and 1464(d)(1)(B)(i)” after 12 U.S.C. 481” in the second paragraph.

20. Amend § 4.73 by:

a. In the definition of “Consultant”:

i. Adding “savings association,” after “national bank,”;

- ii. Adding “savings and loan holding company,” after “bank holding company,” each time it appears; and
- iii. Adding “savings association,” after “such bank,”;
- b. In the definition of “Control” adding “or in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a), as applicable under the circumstances” after “1841(a)”;
- c. Adding definitions of “Savings association” and “Savings and loan holding company” in alphabetical order; and
- d. Revising the definition of “Senior examiner”.

The additions and revision read as follows:

**§ 4.73 Definitions.**

\* \* \* \* \*

Savings association has the meaning given in section 3 of the FDI Act (12 U.S.C. 1813(b)(1)).

Savings and loan holding company means any company that controls a savings association or any other company that is a savings and loan holding company (as provided in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a)).

Senior examiner. For purposes of this subpart, an officer or employee of the OCC is considered to be the “senior examiner” for a particular national bank or savings association if—

(1) The officer or employee has been authorized by the OCC to conduct examinations on behalf of the OCC or had been authorized by the Office of Thrift Supervision (OTS) to conduct examinations on behalf of the OTS;

(2) The officer or employee has been assigned continuing, broad, and lead responsibility for examining the national bank or savings association; and

(3) The officer's or employee's responsibilities for examining the national bank or savings association—

(i) Represent a substantial portion of the officer's or employee's assigned responsibilities; and

(ii) Require the officer or employee to interact routinely with officers or employees of the national bank or savings association, or its affiliates.

21. Effective July 21, 2012, in § 4.73, revise the definition of Senior examiner to read as follows:

**§ 4.73 Definitions.**

\* \* \* \* \*

Senior examiner. For purposes of this subpart, an officer or employee of the OCC is considered to be the “senior examiner” for a particular national bank or savings association if—

(1) The officer or employee has been authorized by the OCC to conduct examinations on behalf of the OCC;

(2) The officer or employee has been assigned continuing, broad, and lead responsibility for examining the national bank or savings association; and

(3) The officer's or employee's responsibilities for examining the national bank or savings association—

(i) Represent a substantial portion of the officer's or employee's assigned responsibilities; and

(ii) Require the officer or employee to interact routinely with officers or employees of the national bank or savings association, or its affiliates.”

22. Revise § 4.74 to read as follows:

**§ 4.74 One-year post-employment restrictions.**

An officer or employee of the OCC who serves, or former officer or employee of the OTS who served, as the senior examiner of a national bank or savings association for two or more months during the last twelve months of such individual's employment with the OCC or OTS may not, within one year after leaving the employment of the OCC or OTS, knowingly accept compensation as an employee, officer, director or consultant from the national bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls the national bank or savings association.

23. Effective July 21, 2012, revise § 4.74 to read as follows:

**§ 4.74 One-year post-employment restrictions.**

An officer or employee of the OCC who serves as the senior examiner of a national bank or savings association for two or more months during the last twelve months of such individual's employment with the OCC may not, within one year after leaving the employment of the OCC, knowingly accept compensation as an employee, officer, director or consultant from the national bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls the national bank or savings association.

24. Revise § 4.75 to read as follows:

**§ 4.75 Waivers.**

The post-employment restrictions set forth in section 10(k) of the FDI Act (12 U.S.C. 1820(k)) and § 4.74 do not apply to any officer or employee of the OCC, or any former officer or employee of the OCC or OTS, if the Comptroller of the Currency certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the OCC's supervisory program.

25. Effective July 21, 2012, revise § 4.75 to read as follows:

**§ 4.75 Waivers.**

The post-employment restrictions set forth in section 10(k) of the FDI Act (12 U.S.C. 1820(k)) and § 4.74 do not apply to any officer or employee of the OCC, or any former officer or employee of the OCC, if the Comptroller of the Currency certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the OCC's supervisory program.

26. Amend § 4.76 by revising paragraph (a) to read as follows:

**§ 4.76 Penalties.**

(a) Penalties under section 10(k) of FDI Act (12 U.S.C. 1820(k)). If a senior examiner of a national bank or savings association, after leaving the employment of the OCC or OTS, accepts compensation as an employee, officer, director, or consultant from that bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls that bank or savings association in violation of § 4.74, then the examiner shall, in accordance with section 10(k)(6) of the FDI Act (12 U.S.C. 1820(k)(6)), be subject to one of the following penalties—

(1) An order—

(i) Removing the individual from office or prohibiting the individual from further participation in the affairs of the relevant national bank, savings association, bank holding company, savings and loan holding company, or other company that controls such institution for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than \$250,000.

\* \* \* \* \*

27. Effective July 21, 2012, amend § 4.76 by revising paragraph (a) to read as follows:

**§ 4.76 Penalties.**

(a) Penalties under section 10(k) of FDI Act (12 U.S.C. 1820(k)). If a senior examiner of a national bank or savings association, after leaving the employment of the OCC, accepts compensation as an employee, officer, director, or consultant from that bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls that bank or savings association in violation of § 4.74, then the examiner shall, in accordance with section 10(k)(6) of the FDI Act (12 U.S.C. 1820(k)(6)), be subject to one of the following penalties—

(1) An order—

(i) Removing the individual from office or prohibiting the individual from further participation in the affairs of the relevant national bank, savings association, bank holding company, savings and loan holding company, or other company that controls such institution for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than \$250,000.

\* \* \* \* \*

**PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES**

28. The authority citation for part 5 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 93a, 215a-2, 215a-3, 481, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

29. Amend § 5.34 by revising paragraph (a) and the first sentence of paragraph (e)(3) to read as follows:

**§ 5.34 Operating subsidiaries.**

(a) Authority. 12 U.S.C. 24 (Seventh), 24a, 25b, 93a, 3101 et seq.

\* \* \* \* \*

(e) \* \* \*

(3) Examination and supervision. An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank, except as otherwise provided with respect to the application of state law under sections 1044(e) and 1045 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b). \* \* \*

\* \* \* \* \*

30. Amend § 5.50 by redesignating paragraph (f)(6) as paragraph (f)(7) and adding a new paragraph (f)(6) to read as follows:

**§ 5.50 Change in bank control; reporting of stock loans.**

\* \* \* \* \*

(f) \* \* \*

(6) Disapproval of notice involving credit card banks or trust banks. (i) In general. The OCC shall disapprove a notice if the proposed change in control occurs before July 21, 2013 and would result in the direct or indirect control of a credit card bank or trust bank, as defined in section 2(c)(2)(F) and (D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(F)

and (D)), by a commercial firm. For purposes of this paragraph a company is a “commercial firm” if the annual gross revenues derived by the company and all of its affiliates from activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) and, if applicable, from the ownership or control of one or more insured depository institutions, represent less than 15 percent of the consolidated annual gross revenues of the company.

(ii) Exception to disapproval. Paragraph (f)(6)(i) of this section shall not apply to a proposed change in control of a credit card bank or trust bank that:

(A)(1) Is in danger of default, as determined by the OCC;

(2) Results from the merger or whole acquisition of a commercial firm that directly or indirectly controls the credit card bank or trust bank in a bona fide merger with or acquisition by another commercial firm, as determined by the OCC; or

(3) Results from the acquisition of voting shares of a publicly traded company that controls a credit card bank or trust bank, if, after the acquisition, the acquiring shareholder (or group of shareholders acting in concert) holds less than 25 percent of any class of the voting shares of the company; and

(B) Has obtained all regulatory approvals otherwise required for such change of control under any applicable Federal or state law, including review pursuant to section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)) and 12 CFR 5.50.

\* \* \* \* \*

#### **§ 5.50 [Amended]**

31. Effective July 21, 2013, amend § 5.50 by removing paragraph (f)(6) and redesignating paragraph (f)(7) as paragraph (f)(6).

## **PART 7—BANK ACTIVITIES AND OPERATIONS**

32. The authority citation for part 7 is revised to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 25b, 71, 71a, 92, 92a, 93, 93a, 371, 371a, 481, 484, 1465, 1818 and 5412(b)(2)(B).

### **Subpart D—Preemption**

33. Amend § 7.4000 by:

- a. Revising the first sentence of paragraph (a)(1);
- b. Revising paragraph (a)(2)(iv);
- c. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively;
- d. Adding a new paragraph (b); and
- e. Revising newly designated paragraph (c)(2).

The additions and revisions read as follows:

#### **§ 7.4000 Visitorial powers.**

(a) \* \* \*

(1) Under 12 U.S.C. 484, only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks. \* \* \*

(2) \* \* \*

(iv) Enforcing compliance with any applicable Federal or state laws concerning those activities, including through investigations that seek to ascertain compliance through production of non-public information by the bank, except as otherwise provided in paragraphs (a), (b), and (c) of this section.

\* \* \* \* \*

(b) Exclusion. In accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484.

(c) \* \* \*

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary.

\* \* \* \* \*

**§ 7.4006 [Removed and Reserved]**

34. Remove and reserve § 7.4006.

35. Amend § 7.4007 by:

a. Removing paragraph (b)(1);

b. Redesignating paragraph (b)(2) introductory text as paragraph (b) introductory text;

c. Redesignating former paragraphs (b)(2)(i) through (vii) as paragraphs (b)(1) through (7), respectively;

d. Revising paragraph (c) introductory text;

e. Revising footnote 5 in paragraph (c)(3); and

f. Revising paragraph (c)(8).

The revisions read as follows:

**§ 7.4007 Deposit-taking**

\* \* \* \* \*

(c) State laws that are not preempted. State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996):

\* \* \* \* \*

(3) Criminal law;<sup>5</sup>

<sup>5</sup> But see the distinction drawn by the Supreme Court in Easton v. Iowa, 188 U.S. 220, 238 (1903), where the Court stated that “[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction \* \* \*. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.” Id. at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

\* \* \* \* \*

(8) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.

36. Amend § 7.4008 by:

- a. Removing paragraph (d)(1);
- b. Redesignating paragraph (d)(2) introductory text as paragraph (d) introductory text;
- c. Redesignating former paragraphs (d)(2)(i) through (x) as paragraphs (d)(1) through (10), respectively; and
- d. Revising paragraphs (e) introductory text, footnote 7 in paragraph (e)(3), and paragraph (e)(8).

The revisions read as follows:

**§ 7.4008 Lending.**

\* \* \* \* \*

(e) State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996):

\* \* \* \* \*

(3) Criminal law;<sup>7</sup>

<sup>7</sup> See supra note 5 regarding the distinction drawn by the Supreme Court in Easton v. Iowa, 188 U.S. 220, 238 (1903).

\* \* \* \* \*

(8) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996) or that is made applicable by Federal law.

**§ 7.4009 [Removed and Reserved]**

37. Remove and reserve § 7.4009.

38. Add § 7.4010 to read as follows:

**§ 7.4010 Applicability of state law and visitorial powers to Federal savings associations and subsidiaries.**

(a) In accordance with section 1046 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b), Federal savings associations and their subsidiaries

shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.

(b) In accordance with section 1047 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1465), the provisions of section 5136C(i) of the Revised Statutes regarding visitorial powers apply to Federal savings associations and their subsidiaries to the same extent and in the same manner as if they were national banks or national bank subsidiaries.

## **PART 8—ASSESSMENT OF FEES**

39. The authority citation for part 8 is revised to read as follows:

**Authority:** 12 U.S.C. 16, 93a, 481, 482, 1467, 1831c, 1867, 3102, 3108, and 5412(b)(1)(B); and 15 U.S.C. 78c and 78l.

40. Section 8.1 is revised to read as follows:

### **§ 8.1 Scope and application.**

The assessments contained in this part are made pursuant to the authority contained in 12 U.S.C. 16, 93a, 481, 482, 1467, 1831c, 1867, 3102, and 3108; and 15 U.S.C. 78c and 78l.

41. Section 8.2 is revised to read as follows:

### **§ 8.2 Semiannual assessment.**

(a) Each national bank and each Federal savings association shall pay to the Comptroller of the Currency a semiannual assessment fee, due by March 31 and September 30 of each year, for the six month period beginning on January 1 and July 1 before each payment date. The Comptroller of the Currency will calculate the amount due under this section and provide a notice of assessments to each national bank and each Federal savings association no later than 7

business days prior to March 31 and September 30 of each year. The semiannual assessment will be calculated as follows:

<b>If the bank's or Federal savings association's total assets (consolidated domestic and foreign subsidiaries) are:</b>		<b>The semiannual assessment is:</b>		
<b>Over—</b>	<b>But not over—</b>	<b>This amount— base amount</b>	<b>Plus marginal rates</b>	<b>Of excess over—</b>
Column A	Column B	Column C	Column D	Column E
Million	Million			Million
\$0	\$2	\$X1	0	
2	20	X2	Y1	\$2
20	100	X3	Y2	20
100	200	X4	Y3	100
200	1,000	X5	Y4	200
1,000	2,000	X6	Y5	1,000
2,000	6,000	X7	Y6	2,000
6,000	20,000	X8	Y7	6,000
20,000	40,000	X9	Y8	20,000

40,000	250,000	X10	Y9	40,000
250,000		X11	Y10	250,000

(1) Every national bank and every Federal savings association falls into one of the asset-size brackets denoted by Columns A and B. A bank's or Federal savings association's semiannual assessment is composed of two parts. The first part is the calculation of a base amount of the assessment, which is computed on the assets of the bank or Federal savings association up to the lower endpoint (Column A) of the bracket in which it falls. This base amount of the assessment is calculated by the OCC in Column C.

(2) The second part is the calculation of assessments due on the remaining assets of the bank or Federal savings association in excess of Column E. The excess is assessed at the marginal rate shown in Column D.

(3) The total semiannual assessment is the amount in Column C, plus the amount of the bank's or Federal savings association's assets in excess of Column E times the marginal rate in Column D:  $\text{Assessments} = C + [(\text{Assets} - E) \times D]$ .

(4) Each year, the OCC may index the marginal rates in Column D to adjust for the percent change in the level of prices, as measured by changes in the Gross Domestic Product Implicit Price Deflator (GDPIPD) for each June-to-June period. The OCC may at its discretion adjust marginal rates by amounts less than the percentage change in the GDPIPD. The OCC will also adjust the amounts in Column C to reflect any change made to the marginal rate.

(5) The specific marginal rates and complete assessment schedule will be published in the "Notice of Comptroller of the Currency Fees," provided for at §8.8 of this part. Each semiannual assessment is based upon the total assets shown in the national bank's or Federal savings association's most recent "Consolidated Reports of Condition and Income" (Call Report) or

“Thrift Financial Report,” as appropriate, preceding the payment date. Each bank or Federal savings association subject to the jurisdiction of the Comptroller of the Currency on the date of the second or fourth quarterly Call Report or Thrift Financial Report, as appropriate, required by the Office under 12 U.S.C. 161 and 12 U.S.C. 1464(v) is subject to the full assessment for the next six month period.

(6)(i) Notwithstanding any other provision of this part, the OCC may reduce the semiannual assessment for each non-lead bank or non-lead Federal savings association by a percentage that it will specify in the “Notice of Comptroller of the Currency Fees” described in §8.8.

(ii) For purposes of this paragraph (a)(6):

(A) Lead bank or lead Federal savings association means the largest national bank or Federal savings association controlled by a company, based on a comparison of the total assets held by each national bank or Federal savings association controlled by that company as reported in each bank's or Federal savings association's Call Report or Thrift Financial Report, as appropriate, filed for the quarter immediately preceding the payment of a semiannual assessment.

(B) Non-lead bank or non-lead Federal savings association means a national bank or Federal savings association that is not the lead bank or lead Federal savings association controlled by a company that controls two or more national banks or Federal savings associations.

(C) Control and company with respect to national banks have the same meanings as these terms have in sections 2(a)(2) and 2(b), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)(2) and (b)).

(D) Control and company with respect to Federal savings associations have the same meanings as these terms have in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).

(b)(1) Each Federal branch and each Federal agency shall pay to the Comptroller of the Currency a semiannual assessment fee, due by March 31 and September 30 of each year, for the six month period beginning on January 1 and July 1 before each payment date. The Comptroller of the Currency will calculate the amount due under this section and provide a notice of assessments to each national bank no later than 7 business days prior to March 31 and September 30 of each year.

(2) The amount of the semiannual assessment paid by each Federal branch and Federal agency shall be computed at the same rate as provided in the Table in 12 CFR 8.2(a); however, only the total domestic assets of the Federal branch or agency shall be subject to assessment.

(3) Each semiannual assessment of each Federal branch or agency is based upon the total assets shown in the Federal branch's or agency's Call Report most recently preceding the payment date. Each Federal branch or agency subject to the jurisdiction of the OCC on the date of the second and fourth Call Reports is subject to the full assessment for the next six-month period.

(4)(i) Notwithstanding any other provision of this part, the OCC may reduce the semiannual assessment for each non-lead Federal branch or agency by an amount that it will specify in the "Notice of Comptroller of the Currency Fees" described in §8.8.

(ii) For purposes of this paragraph (b)(4):

(A) Lead Federal branch or agency means the largest Federal branch or agency of a foreign bank, based on a comparison of the total assets held by each Federal branch or agency of

that foreign bank as reported in each Federal branch's or agency's Call Report filed for the quarter immediately preceding the payment of a semiannual assessment.

(B) Non-lead Federal branch or agency means a Federal branch or agency that is not the lead Federal branch or agency of a foreign bank that controls two or more Federal branches or agencies.

(c) Additional assessment for independent credit card banks and independent credit card Federal savings associations— (1) General rule. In addition to the assessment calculated according to paragraph (a) of this section, each independent credit card bank and independent credit card Federal savings association will pay an assessment based on receivables attributable to credit card accounts owned by the bank or Federal savings association. This assessment will be computed by adding to its asset-based assessment an additional amount determined by its level of receivables attributable. The dollar amount of the additional assessment will be published in the “Notice of Comptroller of the Currency of Fees,” described at §8.8.

(2) Independent credit card banks and independent credit card Federal savings associations affiliated with full-service national banks or Federal savings associations. The OCC will assess an independent credit card bank and an independent credit card Federal savings association in accordance with paragraph (c)(1) of this section, notwithstanding that the bank or Federal savings association is affiliated with a full-service national bank or full service Federal savings association, if the OCC concludes that the affiliation is intended to evade this part.

(3) Definitions. For purposes of this paragraph (c), the following definitions apply:

(i) Affiliate, with respect to national banks, has the same meaning as this term has in 12 U.S.C. 221a(b).

(ii) Affiliate, with respect to Federal savings associations, has the same meaning as in 12 U.S.C. 1462(9).

(iii) Engaged primarily in card operations means a bank described in section 2(c)(2)(F) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(F)) or a bank or a Federal savings association whose ratio of total gross receivables attributable to the bank's or Federal savings association's balance sheet assets exceeds 50%.

(iv) Full-service national bank is a national bank that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of permissible banking activities.

(v) Full-service Federal savings association is a Federal savings association that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of activities permissible for Federal savings associations.

(vi) Independent credit card bank is a national bank that engages primarily in credit card operations and is not affiliated with a full-service national bank.

(vii) Independent credit card Federal savings association is a Federal savings association that engages primarily in credit card operations and is not affiliated with a full-service Federal savings association.

(viii) Receivables attributable is the total amount of outstanding balances due on credit card accounts owned by an independent credit card bank or an independent credit card Federal savings association (the receivables attributable to those accounts) on the last day of the

assessment period, minus receivables retained on the bank's or Federal savings association's balance sheet as of that day.

(4) Reports of receivables attributable. Independent credit card banks and independent credit card Federal savings associations will report receivables attributable data to the OCC semiannually at a time specified by the OCC.

(d) Surcharge based on the condition of the bank or Federal savings association. Subject to any limit that the OCC prescribes in the "Notice of Comptroller of the Currency Fees," the OCC shall apply a surcharge to the semiannual assessment computed in accordance with paragraphs (a) through (c) of this section. This surcharge will be determined by multiplying the semiannual assessment computed in accordance with paragraphs (a) through (c) of this section by—

(1) 1.5, in the case of any bank or Federal savings association that receives a composite rating of 3 under the Uniform Financial Institutions Rating System (UFIRS) and any Federal branch or agency that receives a composite rating of 3 under the ROCA rating system (which rates risk management, operational controls, compliance, and asset quality) at its most recent examination; and

(2) 2.0, in the case of any bank or Federal savings association that receives a composite UFIRS rating of 4 or 5 and any Federal branch or agency that receives a composite rating of 4 or 5 under the ROCA rating system at its most recent examination.

42. Section 8.6 is revised to read as follows:

**§ 8.6 Fees for special examinations and investigations.**

(a) Fees. Pursuant to the authority contained in 12 U.S.C. 16, 481, 482, 1467, and 1831c, the Office of the Comptroller of the Currency may assess a fee for:

(1) Examining the fiduciary activities of national banks and Federal savings associations and related entities;

(2) Conducting special examinations and investigations of national banks, Federal branches or agencies of foreign banks, and Federal savings associations;

(3) Conducting special examinations and investigations of an entity with respect to its performance of activities described in section 7(c) of the Bank Service Company Act (12 U.S.C. 1867(c)) if the OCC determines that assessment of the fee is warranted with regard to a particular bank or Federal savings association because of the high risk or unusual nature of the activities performed; the significance to the bank's or Federal saving association's operations and income of the activities performed; or the extent to which the bank or Federal savings association has sufficient systems, controls, and personnel to adequately monitor, measure, and control risks arising from such activities;

(4) Conducting special examinations and investigations of affiliates of national banks, Federal savings associations, and Federal branches or agencies of foreign banks;

(5) Conducting examinations and investigations made pursuant to 12 CFR part 5, Rules, Policies, and Procedures for Corporate Activities; and

(6) Conducting examinations of depository-institution permissible activities of nondepository institution subsidiaries of depository institution holding companies pursuant to section 605(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1831c).

(b) Notice of Comptroller of the Currency fees. The OCC publishes the fee schedule for fiduciary activities, special examinations and investigations, examinations of affiliates and

examinations related to corporate activities in the “Notice of Comptroller of the Currency Fees” described in § 8.8.

(c) Additional assessments on trust banks and trust Federal savings associations —(1) Independent trust banks and independent trust Federal savings associations. The assessment of independent trust banks and independent trust Federal savings associations will include a fiduciary and related asset component, in addition to the assessment calculated according to §8.2 of this part, as follows:

(i) Minimum fee. All independent trust banks and independent trust Federal savings associations will pay a minimum fee, to be provided in the “Notice of Comptroller of the Currency Fees.”

(ii) Additional amount for independent trust banks and independent trust Federal savings associations with fiduciary and related assets in excess of \$1 billion. Independent trust banks and independent trust Federal savings associations with fiduciary and related assets in excess of \$1 billion will pay an amount that exceeds the minimum fee. The amount to be paid will be calculated by multiplying the amount of fiduciary and related assets by a rate or rates provided by the OCC in the “Notice of Comptroller of the Currency Fees.”

(iii) Surcharge based on the condition of the bank or of the Federal savings association. Subject to any limit that the OCC prescribes in the “Notice of Comptroller of the Currency Fees,” the OCC shall adjust the semiannual assessment computed in accordance with paragraphs (c)(1)(i) and (ii) of this section by multiplying that figure by 1.5 for each independent trust bank and independent trust Federal savings association that receives a composite rating of 3 under the Uniform Financial Institutions Rating System (UFIRS) at its most recent examination and by 2.0 for each bank that receives a composite UFIRS rating of 4 or 5 at such examination.

(2) Trust banks affiliated with full-service national banks and trust Federal savings associations affiliated with full-service Federal savings associations. The OCC will assess a trust bank and a trust Federal savings association in accordance with paragraph (c)(1) of this section, notwithstanding that the bank is affiliated with a full-service national bank, or that the Federal savings association is affiliated with a full-service Federal savings association, if the OCC concludes that the affiliation is intended to evade the assessment regulation.

(3) Definitions. For purposes of this paragraph (c) of this section, the following definitions apply:

(i) Affiliate, with respect to a national bank, has the same meaning as this term has in 12 U.S.C. 221a(b);

(ii) Affiliate, with respect to Federal savings associations, has the same meaning as in 12 U.S.C. 1462(9).

(iii) Full-service national bank is a national bank that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of permissible banking activities.

(iv) Full-service trust Federal savings association is a Federal savings association that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of activities permissible for Federal savings associations.

(v) Independent trust bank is a national bank that has trust powers, does not primarily offer full-service banking, and is not affiliated with a full-service national bank;

(vi) Independent trust Federal savings association is a Federal savings association that has trust powers, does not primarily offer full-service banking, and is not affiliated with a full-service Federal savings association;

(vii) Fiduciary and related assets for national banks are those assets reported on Schedule RC-T of FFIEC Forms 031 and 041, Line 10 (columns A and B) and Line 11 (column B), any successor form issued by the FFIEC, and any other fiduciary and related assets defined in the “Notice of Comptroller of the Currency Fees”; and

(viii) Fiduciary and related assets for Federal savings associations are those assets reported on Schedule FS of OTS Form 1313, Line FS21, any successor form issued by the OCC, and any other fiduciary and related assets defined in the “Notice of Comptroller of the Currency Fees.”

43. Effective December 31, 2011, add the word “and” at the end of paragraph (vi), revise paragraph (c)(3)(vii), and remove paragraph (c)(3)(viii).

The revision reads as follows:

**§ 8.6 Fees for special examinations and investigations.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(vii) Fiduciary and related assets are those assets reported on Schedule RC-T of FFIEC Forms 031 and 041, Line 10 (columns A and B) and Line 11 (column B), any successor form issued by the FFIEC, and any other fiduciary and related assets defined in the “Notice of Comptroller of the Currency Fees.”

**§ 8.7 [Amended]**

44. Amend § 8.7. paragraph (a) by:

a. Removing “and” after “Federal branch,” and adding “, and each Federal savings association” after “each Federal agency” in the first sentence; and

b. Adding “, each Federal savings association,” after “each national bank” in the second sentence.

## **PART 28—INTERNATIONAL BANKING ACTIVITIES**

45. The authority citation for part 28 continues to read as follows:

Authority: 12 U.S.C. 1 et seq., 24(Seventh), 93a, 161, 602, 1818, 3101 et seq., and 3901 et seq.

### **§ 28.16 [Amended]**

46. Section 28.16 is amended by removing in paragraph (b) introductory text the term “\$100,000” and adding in its place “the standard maximum deposit insurance amount as defined in 12 U.S.C. 1821(a)(1)(E)”.

## **PART 34—REAL ESTATE LENDING AND APPRAISALS**

47. The authority citation for part 34 is revised to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 25b, 29, 93a, 371, 1465, 1701j-3, 1828(o), 3331 et seq., 5101 et seq., and 5412(b)(2)(B).

### **Subpart A—General**

48. Amend § 34.4 by:

- a. Revising paragraph (a) introductory text;
- b. Revising paragraph (b) introductory text;
- c. Revising footnote 2 in paragraph (b)(3); and
- d. Revising paragraph (b)(9).

The revisions read as follows:

**§ 34.4 Applicability of state law.**

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

\* \* \* \* \*

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996):

\* \* \* \* \*

(3) Criminal law;<sup>2</sup>

<sup>2</sup> But see the distinction drawn by the Supreme Court in Easton v. Iowa, 188 U.S. 220, 238 (1903), where the Court stated that “[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction \* \* \*. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.” Id. at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

\* \* \* \* \*

(9) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), or that is made applicable by Federal law.

49. Add § 34.6 to subpart A to read as follows:

**§ 34.6 Applicability of state law to Federal savings associations and subsidiaries.**

In accordance with section 1046 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b), Federal savings associations and their subsidiaries shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.

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Date: July 14, 2011

John Walsh  
Acting Comptroller of the Currency.

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