

United States Senate

WASHINGTON, DC 20510

December 15, 2023

The Honorable Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Dear Acting Comptroller Hsu:

We write to ask that you address the Office of the Comptroller of the Currency's (OCC) longstanding expansion of its preemption authority to undermine state consumer protections. Enacted in the wake of the Great Recession, the 2010 *Dodd-Frank Wall Street Reform and Consumer Protection Act* establishes the limited conditions under which federal law trumps state consumer protection laws.¹ However, in the years since *Dodd-Frank*'s passage, the OCC has pushed beyond Congress's directives to block legitimate efforts by states to defend their consumers from harmful bank practices.

Section 1044 of the *Dodd-Frank Act* governs federal preemption of state consumer protection laws with respect to national banks. Crafted in response to concerns that federal preemption by the OCC and the Office of Thrift Supervision (OTS) prevented states from going after the reckless subprime lending practices that precipitated the financial crisis,² Section 1044 sets forth three conditions under which federal law preempts state consumer protection law: (1) the state law favors state banks over national banks, (2) the state law "prevents or significantly interferes with" a national bank's exercise of its powers pursuant to the Supreme Court's decision in *Barnett Bank v. Nelson*, or (3) a federal law other than the *National Bank Act* preempts the state law.³ In the Senate Banking Committee report on *Dodd-Frank*, the Committee explained that the law's preemption standard "would return [the standard] to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."⁴

Section 1044 also contains strict procedural requirements to ensure compliance with its substantive standards. The OCC may only determine that an individual state law is preempted under

¹ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Sec. 1044, Public Law 111-203 (codified at 12 U.S.C. § 25b).

² S. Rep. No. 111-176, at 16-17 (2010) ("Where federal regulators refused to act [to stop predatory mortgage lending], the states stepped into the breach. . . . Unfortunately, rather than supporting [state] anti-predatory lending laws, federal regulators preempted them."); *id.* at 17 (criticizing the OCC and OTS for having "actively created an environment where abusive mortgage lending could flourish without State controls"); Congressional Research Service, "Federal Preemption in the Dual Banking System: An Overview and Issues for the 116th Congress," May 17, 2019, p. 14, <https://crsreports.congress.gov/product/pdf/R/R45726>.

³ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Sec. 1044, Public Law 111-203 (codified at 12 U.S.C. § 25b).

⁴ S. Rep. No. 111-176, at 175 (2010) (citation omitted).

the *Barnett Bank* standard by issuing a regulation or order on a “case-by-case basis,” supported by “substantial evidence, made on the record of the proceeding.”⁵ In addition, before determining that another state law is substantively equivalent to a state law that the OCC is preempting, the OCC must first consult with the Consumer Financial Protection Bureau (CFPB) and take the CFPB’s views into account.⁶ And every five years, the OCC must re-evaluate each of its preemption determinations by seeking public notice and comment; by publicly explaining its decisions to either maintain, amend, or rescind its determinations; and by submitting a report to the Congressional committees that oversee the agency regarding its review.⁷

The OCC, however, has not operated consistent with Congress’s carefully calibrated regime in the years since *Dodd-Frank*.

First, the OCC has improperly sidestepped Section 1044 to justify preempting broad categories of state consumer protection law. Section 1044 states that a state consumer protection law is preempted “only if” one of three specified statutory conditions is met.⁸ However, in 2020, the OCC issued an interpretive letter asserting that an OCC action with “indirect . . . effects on a state consumer financial law” is not a preemption determination and therefore is not subject to the substantive or procedural requirements in Section 1044.⁹ We strongly disagree with this position. As both the United States and a coalition of state attorneys general have recently argued in court, *Dodd-Frank* specifies only three situations in which state consumer protection laws regulating national banks may be preempted,¹⁰ and “indirect” preemption is simply not one of them. If an OCC “interpretation” expanding the preemptive scope of a federal statute “is not pre-emption, nothing is.”¹¹

Second, the OCC has issued regulations that contravene the terms of Section 1044. In 2011, the agency re-published three blanket preemption rules originally issued in 2004—the same regulations criticized by the Senate Banking Committee’s report on *Dodd-Frank*—which superseded entire swaths of state consumer protection law on topics including terms of credit, mortgage escrow accounts, access to credit reports, and disclosure and advertising.¹² The OCC disregarded the core requirements of the *Dodd-Frank Act* when doing so. The agency refused to justify its blanket preemption regulations under the “prevent or significantly interfere” standard in Section 1044, asserting that its earlier justification for the regulations under a different standard sufficed.¹³ The OCC also inexplicably argued that its 2011 regulations were not subject to *Dodd-*

⁵ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Sec. 1044, Public Law 111-203 (codified at 12 U.S.C. § 25b).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Office of the Comptroller of the Currency, “OCC Chief Counsel’s Interpretation: 12 U.S.C. § 25b,” Interpretive Letter 1173, December 2020, <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-176a.pdf>.

¹⁰ Brief for the United States as Amicus Curiae at 14, *Flagstar Bank v. Kivett*, No. 22-349 (U.S. Aug. 30, 2023); Plaintiffs’ Opposition to Defendants’ Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs’ Motion for Summary Judgment at 5-7, *California v. OCC*, 584 F. Supp. 3d 844 (N.D. Cal. 2022).

¹¹ *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 535 (2009).

¹² 12 C.F.R. § 7.4007; 12 C.F.R. § 7.4008; 12 C.F.R. § 34.4.

¹³ Office of the Comptroller of the Currency, Federal Register Notice, “Office of Thrift Supervision Integration; Dodd-Frank Act Implementation,” pp. 43555-56, July 21, 2011, <https://www.govinfo.gov/content/pkg/FR-2011-07-21/pdf/2011-18231.pdf>; George Washington University Law School, “Policy Brief: The OCC’s Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations,” Arthur E. Wilmarth, Jr.,

Frank's "case-by-case" requirement, and that the agency did not need to consult with the CFPB before issuing the blanket rules, because the 2004 regulations were published before *Dodd-Frank*'s enactment.¹⁴ In our view, however, the OCC's position is untenable: the 2011 regulations were subject to *Dodd-Frank*'s requirements because those regulations became effective the same day that Section 1044 became effective.¹⁵ In other words, the OCC's 2011 regulations cannot be reconciled with the text and Congressional intent of Section 1044.¹⁶

Third, the OCC has not reviewed its preemption determinations every five years as required by Section 1044. The *Dodd-Frank Act*'s periodic review requirement is an important mechanism for public examination and thoughtful consideration of the OCC's prior preemption determinations. But in the twelve years since *Dodd-Frank* became effective—a period during which the OCC should have conducted a minimum of two cycles of reviews for each of its preemption determinations—the OCC has conducted none.¹⁷ By refusing to conduct any review of the agency's preemption determinations since Section 1044 became effective, the OCC has operated contrary to the requirements in *Dodd-Frank*.

Fourth and finally, the OCC has unduly interfered with states' abilities to gather information about credible violations of non-preempted state consumer protection laws, as a coalition of 21 state attorneys general has recently argued.¹⁸ Under a 2002 agency advisory letter, state attorneys general are discouraged from contacting national banks about allegations of illegal behavior, and national banks are discouraged from responding to state requests for such information.¹⁹ The OCC's policy has meaningfully hamstrung states in their efforts to protect consumers from harmful national bank practices, despite a 150-year history of dual enforcement by both state governments and the federal government over national banks.²⁰ Although states may not exercise visitatorial powers over national

November 8, 2021, p. 7, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2828&context=faculty_publications.

¹⁴ Office of the Comptroller of the Currency, Federal Register Notice, "Office of Thrift Supervision Integration; Dodd-Frank Act Implementation," p. 43557, July 21, 2011, <https://www.govinfo.gov/content/pkg/FR-2011-07-21/pdf/2011-18231.pdf>.

¹⁵ Office of the Comptroller of the Currency, Federal Register Notice, "Office of Thrift Supervision Integration; Dodd-Frank Act Implementation," p. 43549, July 21, 2011, <https://www.govinfo.gov/content/pkg/FR-2011-07-21/pdf/2011-18231.pdf>; George Washington University Law School, "Policy Brief: The OCC's Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations," Arthur E. Wilmarth, Jr., November 8, 2021, pp. 7-8 (pointing out that Section 1043 of the *Dodd-Frank Act* "reveals Congress's unmistakable intention that the OCC's preexisting preemption rules and orders would *not* apply to transactions by national banks *after* July 21, 2010, *unless* the OCC revised those rules and orders to bring them into full compliance with [12 U.S.C.] Section 25b"), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2828&context=faculty_publications.

¹⁶ See *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1193 (9th Cir. 2018); *Clark v. Bank of Am., N.A.*, No. SAG-18-3672, 2020 WL 902457, at *5 (D. Md. Feb. 24, 2020).

¹⁷ George Washington University Law School, "Policy Brief: The OCC's Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations," Arthur E. Wilmarth, Jr., November 8, 2021, p. 9, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2828&context=faculty_publications.

¹⁸ Letter from State Attorneys General to the Office of the Comptroller of the Currency, December 6, 2023, <https://ag.ny.gov/sites/default/files/letters/multistate-ltr-to-occ.pdf>.

¹⁹ Office of the Comptroller of the Currency, "Questions Concerning Applicability and Enforcement of State Laws: Contacts From State Officials," Advisory Letter 2002-9, November 2002, <https://www.occ.gov/news-issuances/advisory-letters/2002/advisory-letter-2002-9.pdf>.


²⁰ Letter from National Association of Attorneys General to Office of the Comptroller of the Currency, October 6, 2003, p. 1, https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2009/OCC%20Comments100603.pdf.

banks, state attorneys general have unquestioned authority to enforce non-preempted state laws under governing Supreme Court precedent,²¹ an authority which Congress expressly codified in Section 1047 of the *Dodd-Frank Act*.²² As such, the OCC should issue new supervisory guidance directing national banks to comply with state information requests regarding non-preempted laws—as banks did for many years prior to the OCC’s 2002 letter—thereby enabling states with far more capacity than the OCC to investigate credible allegations of illegal activity and boosting consumer confidence in the safety and soundness of national banks.²³ For consumers to truly benefit from our nation’s dual-enforcement system, federal regulation should—consistent with Congressional intent—be a floor, not a ceiling, for consumer protection.²⁴


It is long past time for the OCC to stop “pick[ing] and choos[ing] what portion of the law binds” it.²⁵ Accordingly, we urge the OCC to (1) conduct the agency’s statutorily mandated and long overdue review of its preemption determinations; (2) rescind any regulations, orders, interpretive letters, or other guidance that contravene Section 1044, including the agency’s 2011 preemption regulations and its 2020 interpretive letter; and (3) issue supervisory guidance directing all national banks to comply with state requests for information regarding credible allegations involving non-preempted state consumer protection laws. To better understand the OCC’s efforts to apply governing preemption standards, we ask that you provide a briefing and written update by December 29, 2023.

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren
United States Senator



Jack Reed
United States Senator

²¹ *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 529 (2009).

²² *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Sec. 1047, Public Law 111-203 (codified at 12 U.S.C. § 25b(i)).

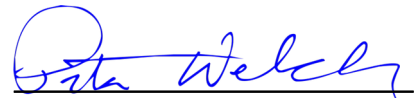
²³ Written Testimony of Travis Plunkett and Edmund Mierzwinski to the U.S. House of Representatives Committee on Financial Services, June 24, 2009, pp. 33-39
https://consumerfed.org/elements/www.consumerfed.org/file/Testimony_of_CFA_USPIRG_et_al_Regulatory_Restructuring_HFSC_6_24_09.pdf.

²⁴ *Id.* See also S. Rep. No. 111-176, at 174 (2010) (“Federal consumer financial laws have historically established only minimum standards and have not precluded the States from enacting more protective standards. [Title X of the *Dodd-Frank Act*] maintains that status quo.”).

²⁵ *First Nat’l Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).



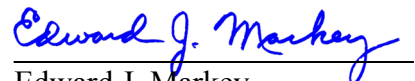
Tammy Duckworth
United States Senator



Peter Welch
United States Senator



Sheldon Whitehouse
United States Senator



Edward J. Markey
United States Senator



Bernard Sanders
United States Senator