Remarks by
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A long time ago the legendary Will Rogers used to say that San Antonio was one of just three places – the others being New Orleans and San Francisco – with so much character that no one could ever confuse them with typical U.S. cities. I love those cities too, but I am very grateful for the opportunity to be back here – particularly because it is an opportunity to re-connect with many good friends who are here today.

In reflecting on my topic for today, I made a wild guess that you might expect me to talk about the preemption regulations recently issued by the OCC, and the current controversy surrounding them. I'm not going to surprise you on that score; actually, this is a welcome opportunity to step back and describe what we have done, and to expand on some of the issues that have arisen as a result.

First, let me describe what we did. We acted on two regulations, adopting a new regulation, which I'll call the "preemption rule," and amending our existing regulation on the OCC's exclusive "visitorial powers" with respect to national banks.

The preemption rule adds provisions to our regulations expressly addressing the applicability of certain types of State laws to national banks' lending, deposit-taking, and other Federally authorized activities. With regard to all three categories, the preemption rule states the general principle that, except where made applicable by Federal law, State laws do not apply to national banks if they "obstruct, impair, or condition" the bank's exercise of powers granted under Federal law. We tried to be very clear in the preamble to the rules that these words are not designed to create a new standard of preemption, but rather to distill the various phrases the Supreme Court has used in its preemption decisions. In the lending and deposit-taking areas, the preemption rule then lists specific types of State laws that are preempted and thus not applicable to national banks. In other words, the rule preempts the types of laws that are listed in the rule; other types of laws remain subject to case-by-case evaluation under established judicial standards.

In the lending area, examples of preempted laws include laws that restrict or prescribe the terms of credit, amortization schedules, permissible security property, escrow accounts, disclosures and advertising, and laws that would require a State license as a condition of national banks' ability to make loans. For deposit-taking (in addition to laws dealing with disclosure requirements and licensing and registration requirements), the laws listed include laws that address abandoned and dormant accounts, checking accounts, and funds availability. In both areas, the listed types of laws either are preempted under longstanding, pre-existing OCC regulations, have been addressed in OCC preemption opinions, have been found to be preempted by the courts, or have been determined to be preempted by the OTS with respect to Federal thrifts.

The preemption rule also contains two new provisions that expressly prohibit abusive or predatory lending practices. First, the rule prohibits national banks from making any consumer loan based predominantly on the foreclosure or liquidation value of a borrower's collateral, rather than on the borrower's ability to repay the loan according to its terms. This anti-predatory lending standard applies uniformly to all consumer lending activities of national banks, regardless of the location from which the bank conducts those activities or where its customers reside. This standard strikes at the heart of predatory lending, namely lending practices that effectively swindle a homeowner out of his or her property.

Second, the preemption rule provides that, in connection with *any* type of lending, national banks shall not engage in unfair and deceptive practices within the meaning of Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits "unfair or deceptive acts or practices" in interstate commerce. Although we do not have the statutory authority to define particular acts or practices as "unfair" or "deceptive" under the FTC Act, we added an express reference to Section 5 to our rule in response to commenters who urged us to affirm that the principles of the Act apply to national banks. We viewed this addition as particularly appropriate in light of the fact that the OCC pioneered the use of Section 5 as a basis for enforcement actions against banks that have engaged in such conduct.

These new standards are comprehensive and they apply nationwide, to all national banks. They apply strong protections for national bank customers in every State – including the majority of States that do not have their own anti-predatory lending standards.

Our new regulations have stirred quite a bit of controversy, based in part, in my view, of some misunderstandings of what they do and do not do. So, it also is important to emphasize several things that the preemption rule does *not* do. The final rule *does not* immunize national banks from all State laws, and it does *not preempt* undiscriminating laws of general applicability that form the legal infrastructure for conducting a banking or other business. Non-exclusive examples of laws that are not preempted are also identified in the preemption rule and include State laws on contracts, rights to collect debts, acquisition and transfer of property, taxation, zoning, crimes, and torts.

The rule *does not preempt anti-discrimination laws*. I am glad to have this opportunity to be clear on this point, since there appears to have been uncertainty on the issue, perhaps because some State predatory lending laws that actually seek to regulate loan terms have "fair lending" in their titles.

The preemption rule does not authorize any new national bank activities or powers, such as real estate brokerage. The rule does not address or affect the application of State law to activities authorized for financial subsidiaries. Nor does it impinge on the functional regulation framework for insurance and securities activities established by Congress in the Gramm-Leach-Bliley Act.

Our second action involved amendments to our existing regulation concerning the OCC's exclusive "visitorial powers" with respect to national banks. "Visitorial powers" is a term used to refer to the authority to examine, supervise, and regulate the affairs of a corporate entity. Under Federal law, the OCC has exclusive visitorial powers over national banks – except where Federal law provides otherwise. Specifically, 12 U.S.C. § 484 provides that "no national bank shall be subject to any visitorial powers except as authorized by federal law, vested in the courts of justice" or exercised by Congress or a committee of Congress. This provision dates from the earliest days of the national banking system and is integral to the overall design of the system and the ability of national banks to conduct the business of banking subject to uniform, consistent standards and supervision, wherever in the nation they operate.

Existing OCC regulations implement the statute by providing that State officials are not authorized to inspect, examine, or regulate national banks, except where another Federal law authorizes them to do so. One amendment to the visitorial powers rule clarifies that the scope of the OCC's exclusive visitorial authority applies to the content and conduct of national bank activities authorized under Federal law. In other words, the OCC is exclusive supervisor of a national bank's banking activities. The rule *does not prevent* State officials from enforcing State laws that do not pertain to a national bank's banking activities, such as public safety standards or criminal laws of general applicability.

Another amendment to the existing rule clarifies that the *preservation* of visitorial powers "vested in the courts of justice" does not *grant* State regulatory or law enforcement officials *new* authority, in addition to whatever they may otherwise have, to exercise visitorial powers over national banks. In other words, State officials may not use the courts to accomplish indirectly what the Federal statute clearly prohibits them from accomplishing directly. The visitorial powers rule *does not* preclude States from seeking a declaratory judgment from a court as to whether a particular State law applies to the Federally-authorized business of a national bank.

Neither the preemption rule nor the visitorial powers amendments change the OCC's rules governing the activities of operating subsidiaries. The OCC already has rules on the books providing that the activities of national bank operating subsidiaries are subject to State law to the same extent as their parent bank, except where Federal law or regulation otherwise provide. By virtue of these pre-existing regulations, the preemption rule and the visitorial powers amendments apply to national bank operating subsidiaries to the same extent as they apply to national banks.

So that's what we did – and didn't do.

The controversy that has followed our actions seems to fall into several basic categories: first, that our actions were legally incorrect and unsustainable; second, that codification of preemption principles for national banks in the areas of lending and deposit-taking will decimate the dual banking system; and third, that the results of preemption will be injurious to consumers, particularly in the context of preemption of State predatory lending laws. I'll take each of these in turn.

First, the legal basis for the rules. The principles for preemption used in the rule encapsulate the standards that the United States Supreme Court has applied in preemption cases for well over 130 years. It is phrased in words – "obstruct, impair, or condition" – that we took from those cases. We emphasized that we were not creating a new test for the threshold of preemption. The types of State laws specifically identified as preempted in the rule include types of laws that a Federal court has previously held, or that the OCC has previously opined, are preempted, or that are already preempted under existing OCC regulations. Additional types of laws listed as preempted are virtually the same as those specifically listed in OTS regulations that have been on the books since 1996.

Our authority to issue preemption *regulations* also is well-founded, and it is based on two statutory sources. We find it significant that this authority was specifically recognized by the D.C. Circuit in a case decided over two decades ago – *CSBS v. Conover*. In that case, the Federal Court of Appeals for the District of Columbia held that the OCC has the power under 12 U.S.C. § 371 to issue a regulation that preempts aspects of State law regarding real estate lending, and has authority under 12 U.S.C. § 93a more generally to issue regulations preempting State laws that are inconsistent with the activities permitted under Federal law for national banks.

Turning to our existing visitorial powers rule, the clarifications we added reinforce the point that the statutory prohibition on the exercise of visitorial powers by authorities other than the OCC means what the text says. No one other than the OCC is empowered to regulate or supervise the banking business of national banks unless Federal law provides that authority. The rule change clarifies that this statutory prohibition cannot be eluded by resort to a judicial process to impose regulatory standards or sanctions that the statute forbids State authorities from imposing through direct action.

The second criticism of our new regulations that I'll mention – and the one that has surprised me the most – is that the new rules will "demolish" the dual banking system. Yes, that word actually was used, and frankly I'm perplexed by the assertion that the dual banking system will be decimated by the OCC collecting together and codifying in a regulation a list of types of State laws that are preempted – a list that reflects legal conclusions contained in preexisting OCC rules and previously expressed on a case-by-case basis in legal opinions, orders, and briefs in litigation – plus several other types of laws long-recognized as preempted for federal thrifts.

This second criticism, I think, profoundly short-changes the State banking systems. More fundamentally, the argument advanced is simply backwards. National and State charters each have their own distinct advantages. Indeed, today State banking supervisors vigorously assert that the State charter is superior and some even actively market the advantages of a State bank charter!

The distinctions between State and Federal charters, powers, supervision and regulation that are reflected in our new regulations are not contrary to the dual banking system; they are the essence of it. Thus, we firmly believe that clarification of how the Federal powers of national banks interact with State laws is entirely consistent with the fundamental distinctions that make the dual banking system dual – and which have made it successful.

Finally, let me address the third area of concern, that our new rules will be injurious to consumers, particularly in the context of preemption of State predatory lending laws. As I described earlier in my remarks, national banks and their subsidiaries are highly supervised enterprises. The preemption rule puts into place additional focused standards to protect customers of national banks from unfair, deceptive, abusive or predatory lending practices. These new standards apply nationwide, to all national banks, and provide additional protections to national bank customers in every State – including the majority of States that do not have their own predatory lending standards. Our new rule does *not* leave customers of national banks or their subsidiaries vulnerable to predatory lending practices.

But some ask – why not allow State and local predatory lending laws to apply as well? Isn't more regulation and more regulators always better?

To this we would answer: Not necessarily. More regulation and more regulators can have their own consequences and are not the answer unless there has been a failure of the existing regulatory regime. That is simply not the case with national banks and their subsidiaries. Clearly, predatory lending is a problem in this country, but national banks and their subsidiaries are not where those practices are festering. Whatever our differences with the State attorneys general, they have stated in various filings that there is scant evidence that national banks, or their subsidiaries, are engaged in predatory lending practices.

National banks and their subsidiaries already are highly regulated and closely supervised. They must comply with a multitude of Federal consumer protection requirements. The largest national banks have teams of examiners on premises at all times, constantly reviewing their operations. Other banks have regular on-site exams, supplemented by targeted reviews as needed and off-site monitoring. Overall, for the approximately 2,200 national banks in the national banking system, we have nearly 1700 examiners, including compliance specialists, in addition to dozens of attorneys and consumer complaint specialists. Our approach to predatory lending is a comprehensive, ongoing, integrated, supervisory approach, focused on *preventing predatory practices,* not just punishing those that commit them. We have substantial resources available, nationwide, and a wide array of supervisory and enforcement tools, to make sure that our supervision, in this and other areas, is effective.

Adding layers of regulation brings added costs, which may lead to higher prices for customers. It may also have other undesirable collateral consequences, such as diminished product availability. State and local laws that increase a bank's costs and its potential liabilities in connection with subprime loans, which are already high risk, inevitably will cause some legitimate lenders to conclude that the cost and risks are not worth it. The result is diminished credit availability, and legitimate credit options that may otherwise be available to a segment of potentially credit-worthy sub-prime borrowers will be reduced. We believe our approach does not diminish credit access but does effectively target credit *abuses*.

Adding additional *regulators* also has implications. Just look at the typical responsibilities of a State Attorney General – prosecuting Medicaid fraud, investigating and prosecuting organized crime, enforcing the State's environmental protection laws, overseeing the integrity of charitable organizations, investigating and litigating civil rights complaints, advocating for consumers stymied by Health Maintenance Organizations (HMOs), enforcing the State's securities laws to combat fraud – the list could literally go on for pages. And look at the types of businesses supervised by State banking departments, in addition to banks – check cashers, consumer finance companies, credit unions, industrial loan companies, other licensed lenders, money transmitters, mortgage brokers, trust companies, pawnshops, payday lenders, thrifts, and title lenders. This list could go on as well.

Setting aside for the moment the issue of whether State officials have the *legal authority* to take actions against national banks and their subsidiaries, when State authorities insist on trying to put a State cop on the national bank beat, especially in today's fiscally challenged environment, that's probably one less State cop available to protect the State's consumers in connection with all the other potential sources of problems those consumers face.

This is one reason why I regret that the most conspicuous response to our new regulations by State officials has been to assert that they will still try to employ their resources to take actions directly against national banks and their subsidiaries, even with respect to core banking activities, such as lending. The net result, I think, is unfortunate because it diminishes the availability of precious resources to protect consumers in *other* areas – other areas where there *is* evidence of predatory lending – other areas that are not as highly regulated as the banking business.

Our jurisdiction over national banks and their subsidiaries should not and does not deprive State regulators of a role in protecting consumers in their States, and we would like to work cooperatively with them to further that goal. We have invited State authorities to refer consumer complaints concerning national banks to the OCC, and to bring to our attention concerns that any national bank is engaged in unfair, deceptive, abusive or predatory practices. We have set up special procedures to handle and track referrals from State authorities. The OCC and the States already cooperate extensively in many respects, referring consumer complaints to the appropriate regulator of the entity generating the complaint. Personally, I continue to hope that we can move beyond the rhetoric of the current controversy and leverage off these existing cooperative processes to put our collective resources to work to maximize their coverage.

Finally, I'll close with a different, but vital point about preemption. Preemption provides benefits to banks in the form of uniform, consistent, and predictable standards that apply wherever in the nation a bank does business. But with preemption also comes responsibility, and this is a timely opportunity for national banks as well as State banks to recommit to the highest standards of customer service, integrity, and fair play in their business. The *very best* way to counter the controversies that I have just discussed and preserve the benefits of preemption for the banking business as a whole is for bankers to be leaders in responsible corporate behavior and exemplary customer treatment. You, as their counsel, can play a vital role in helping to achieve this objective.

Thank you very much.