HEARING ON "CREDIT CARD PRACTICES: CURRENT CONSUMER AND REGULATORY ISSUES" ON APRIL 26, 2007, BEFORE THE SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT OF THE COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES

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Thank you very much for inviting me to participate in this important hearing. My testimony will address the following topics related to the credit card industry: (1) the impact of consolidation in the industry, (2) profits and fees of credit card issuers, (3) the role of credit cards in the increasing debt burdens of U.S. households, (4) the impact of federal preemption in giving the largest credit card issuers virtual immunity from state consumer protection laws, and (5) the Office of the Comptroller of the Currency's relatively poor record of protecting consumers.

1. Consolidation and Market Leaders within the Credit Card Industry

The credit card industry has experienced a rapid consolidation over the past two decades. The share of total credit card loans held by the top ten issuers has risen from 40% in 1988 to 70% in 1999 and 87% in 2005. The share held by the top five issuers has grown from 35% in 1988 to 60% in 1999 and 71% in 2005.[1] This consolidation trend has been driven by a number of factors, including advances in computer technology, increased use of mass-marketing techniques, greater reliance on credit scoring, and

[1] Arthur E. Wilmarth, Jr., "The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation and Increased Risks," 2002 *University of Illinois Law Review* 215 [hereinafter Wilmarth, "Transformation"], at 390 n.751 (providing figures for 1988 and 1999); "Top 10 U.S. General Purpose Cards," *The Nilson Report*, Jan. 2006, at 1 (providing 2005 figure for top ten issuers); "Top Credit Card Issuers," *The Nilson Report*, Feb. 2006, at 1 (providing 2005 figure for top five issuers). *See also* Julie Creswell & Eric Dash, "Bank of America to Buy MBNA, A Prime Issuer of Credit Cards," *New York Times*, July 1, 2005, at A1, C5 (describing consolidation in the credit card industry and reporting that "the 10 largest card issuers control about 87 percent of the market").

securitization. All of these developments have created economies of scale that favor large issuers.[2]

The largest federally-chartered banks dominate the credit card industry. Four of the top five credit card issuers and seven of the top ten issuers are national banks. Another of the ten largest issuers is a federally-chartered thrift (Washington Mutual). Only two of the top ten issuers are nonbanks (American Express and Discover).[3] As discussed below, federal preemption helps to explain why so many of the largest issuers are federally-chartered depository institutions.

Federally-chartered depository institutions are also dominant players in other segments of the consumer credit industry. Seven of the top ten home mortgage lenders are either national banks or federally-chartered thrifts, and they collectively control about half of the home mortgage market.[4] Seven of the top 20 subprime mortgage lenders are either national banks or federally-chartered thrifts, and together they hold about 30% of the subprime market.[5]

2. Profits and Fees Generated by Credit Card Issuers

The credit card business is highly profitable. The Federal Reserve Board (FRB) issues annual reports on the largest credit card banks. The FRB's most recent report stated that sixteen large banks specialized primarily in credit card lending as of December 31, 2005. Those banks had an average pre-tax return on assets (ROA) of 2.85% in 2005,

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[2] Timothy Clark et al., "The Role of Retail Banking in the U.S. Banking Industry: Risk, Return, and Industry Structure," *Federal Reserve Bank of N.Y. Economic Policy Review* (forthcoming), at 7-9; Wilmarth, "Transformation," *supra* note 1, at 388-90.

[3] "Largest General-Purpose Credit Card Issuers in the U.S.," *American Banker*, June 1, 2005, at 7 (listing Bank of America, JP Morgan Chase, Citigroup, American Express and Capital One as the five largest credit card issuers, following Bank of America's merger with MBNA); *id.* (listing Discover, HSBC, Washington Mutual, Wells Fargo and U.S. Bank as the credit card issuers ranked between sixth and tenth in size).

[4] "Top Residential lenders in the First Half," *National Mortgage News*, Oct. 23, 2006, at 1.

[5] "Top Subprime Lenders in 2006," *National Mortgage News*, April 23, 2007, at 1.

well-above the average pre-tax ROA of 1.94% for all U.S. banks in 2005. Credit card banks earned pre-tax ROAs of more than 2.0% in every year from 1992 through 2005, and their return has been above 2.7% in all but two of those years.[6] In contrast, the average pre-tax ROA for all U.S. banks exceeded 2.0% in only two years during 1992-2005, and never exceeded 2.05%.[7]

Credit card operations account for a significant proportion of the revenues and net income of the largest banks. For example, during 2005 credit cards accounted for about 17% of the net income of Citigroup, the largest U.S. banking organization and the third largest credit card issuer.[8] Similarly, during the third quarter of 2005, credit cards generated about a quarter of the total revenues of JP Morgan Chase, the third largest U.S. banking organization and the second largest credit card issuer.[9]

The fee income of credit card issuers has grown rapidly in recent years. U.S. cardholders paid more than $24 billion in credit-card fees in 2004, an 18% increase from 2003. Penalty fees (including late fees and over-the-limit fees) assessed by credit card issuers rose from $1.7 billion in 1996 to $12 billion in 2003, $15 billion in 2004, and

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[6] Bd. of Governors of Fed. Res. Sys., "Report to Congress on the Profitability of Credit Card Operations of Depository Institutions," June 2006 [hereinafter FRB Report], at 1-3.

[7] Elizabeth C. Klee & Gretchen C. Weinbuch, "Profits and Balance Sheet Developments at U.S. Commercial Banks in 2005," 2006 *Federal Reserve Bulletin*, at A77, A99 (tbl. A.1.A) (providing data for 1996-2005); William F Bassett & Mark Carlson, "Profits and Balance Sheet Developments at U.S. Commercial Banks in 2001," 88 *Federal Reserve Bulletin* 260, 279 (tbl. A.1.A) (providing data for 1992-95).

[8] Robin Sidel, "Loss of Balance: Credit-Card Issuers' Problem: People Are Paying Their Bills," *Wall Street Journal*, May 25, 2006, at A1.

[9] Robin Sidel, "J.P. Morgan to Expand Reach of Card Business," *Wall Street Journal*, Dec. 20, 2005, at C1.

$17.1 billion in 2005.[10] The fees collected by credit card issuers accounted for more than 10% of the total noninterest income of all U.S. banks in 2004.[11]

The growth in fee income for credit card issuers has been spurred by large increases in the penalty fees issuers impose on their customers. For example, average late payment fees rose from $13 in 1995 to $27.10 in 2000, $32.61 in 2004, and $34 in 2006. Similarly, average over-the-limit fees increased from $26 in 2000 to more than $30 in 2000.[12]

The percentage of issuers charging variable interest rates (i.e., interest rates that change with the prime rate) increased from 23% in 1991 to 53% in 2006. On average, non-penalty interest rates on credit cards exceeded 13% in every year between 1994 and 2005, except for 2003, when the average rate was 12.92%.[13] Average penalty interest rates rose from 21.9% in 2004 to 24.2% in 2005, and many issuers impose a penalty rate for a single missed payment.[14]

The very high profits, fees and interest rates of credit card issuers indicate that the credit card industry operates as an oligopoly rather than as a fully competitive industry. This conclusion is consistent with the very large market shares currently held by the top five and top ten card issuers (71% and 87%, respectively). Recently, a prominent analyst (and former senior executive) of the credit card industry challenged the view that the

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10 "US card industry challenged by lawmakers," *Electronic Payments International* (London, UK), Feb. 2007, at 8; Jane J. Kim, "Credit-Card Penalties Hit New Highs: Major Issuers Boost Costs for Late Payments Past 30% Amid Rising Interest Rates," *Wall Street Journal*, Aug. 11, 2005, at D2.

11 *See FDIC Quarterly Banking Profile*, 4th Qtr. 2005, at 5 (tbl. II-A) (reporting that U.S. banks had total noninterest income of $203 billion in 2004). As noted above, credit card issuers earned $24 billion in fees during 2004.

12 "US card industry challenged by lawmakers," *supra* note 10; Caroline E. Mayer, "Plastic's Pickup Line," *Washington Post*, July 10, 2005.

13 FRB Report, *supra* note 6, at 6, 7 (tbl.2)..

14 Kim, *supra* note 10.

industry is “competitive.” He instead described the industry’s profits, risks and pricing practices in the following terms:

> [B]ank card pricing is the inverse of a competitive industry…. In Europe they call the bank card industry what it is: a cartel.
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> ….
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> Bank cards in fact might be the safest risk among retail credit products, a view commonly acknowledged in other forums by regulators, Wall Street, and the banks themselves.
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> No other industry in the world knows consumers and their transaction behavior better than the bank card industry. It has turned the analysis of consumers into a science rivaling the studies of DNA ….
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> The mathematics of virtually everything consumers do is stored, updated, categorized, churned, scored, tested, valued, and compared from every possible angle in hundreds of the most powerful computers and by among the most creative minds anywhere. In the past 10 years alone, the transactions of 200 million Americans have been reviewed in trillions of different ways to minimize bank card risks.
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> In case nobody has noticed, bank card issuers have survived recent economic downturns far better than other credit products. Their profits and writeoffs have remained steady for two decades. Secured lending should be so lucky.[15]

3. Credit Cards and the Increasing Debt Burdens of U.S. Households

Credit card debt in the United States has exploded from $69 billion in 1980 to $675 billion in 2001 and $1.8 trillion in 2006. This rapid growth in credit card debt is consistent with the huge increase in all types of household debt during the past three decades. Total household debt (including residential mortgages, home equity lines of credit, credit card debt, and other types of consumer credit) has risen from $1.4 trillion in

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[15] Duncan A. MacDonald, “Viewpoint: Card Industry Questions Congress Needs to Ask,” *American Banker*, Mar. 23, 2007, at 10 (commentary by Mr. McDonald, former general counsel of Citigroup’s Europe and North America card businesses).

1980 to $7.2 trillion in 2001 and $11.8 trillion in 2006.[16] Household debt as a percentage of disposable household income has increased from 58% in 1984 to 101% in 2000 and 113% in 2004.[17] On an inflation-adjusted basis, the household debt burdens of families in both the top half of income brackets (those with more than $43,000 in income) and the bottom half of income brackets almost doubled during 1992-2004. The inflation-adjusted debts of families in the upper half of income brackets rose from $82,000 to $151,000, while debts of families in the lower half of income brackets increased from $21,000 to $41,000.[18] As a recent article noted, both higher-income families and working class families

> have been able to use the combination of rising home prices and easy credit to live beyond their means in recent years as wages have stagnated. That spending has helped to fuel the U.S. economy's growth. Today, [however], with the housing market in a slump and defaults mounting in the market for subprime home loans, . . . concerns grow about Americans' heavy debt load and their ability to manage it.[19]

Credit card debt has risen in response to a veritable blizzard of solicitations by card issuers. Credit card solicitations increased from 1.52 billion in 1993 to 4.29 billion in 2003 and 6.05 billion in 2005.[20] Many commentators claim that credit card issuers have aggressively solicited consumers with credit offers that far exceed the consumers' ability to repay the potential debt. These analysts maintain that the issuers' penalty fees

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[16] Michael S. Rosenwald, "Climbing out of Debt: Recovery Can Be as Tough as Breaking an Addiction," *Washington Post*, Oct. 15, 2006, at F1 (providing figures for 1980 and 2006); Wilmarth, "Transformation," *supra* note 1, at 395 (providing figures for 2001).
[17] Ben White, "Risks Multiply for Consumers Already Deep in Debt," *Washington Post*, Oct. 24, 2004, at F6 (reporting that household debt was $9.7 trillion as of June 30, 2004, equal to 113% of disposable household income of $8.6 trillion); Wilmarth, "Transformation," *supra* note 1, at 395-96 (providing figures for 1984 and 2000).
[18] Conor Dougherty et al., "Subprime Pullback May Crimp Consumer Spending," *Wall Street Journal*, April 2, 2007, at A2.
[19] *Id.*
[20] Suein Hwang, "Another Chapter: New Group Swells Bankruptcy Court: The Middle-Aged," *Wall Street Journal*, Aug. 6, 2004, at A1 (providing figures for 1993 and 2003); FRB Report, *supra* note 6, at 5 n.9 (providing figure for 2005).

and penalty interest rates make it practically impossible for overstretched borrowers to repay their debt obligations.[21]

4. The Impact of Federal Preemption

An important factor behind the rapid growth of credit card debt and other types of consumer debt is federal preemption of state usury laws and state consumer protection laws. In 1978, the Supreme Court held that a provision of the National Bank Act, 12 U.S.C. § 85, gave national banks "most favored lender" status in their home state and also allowed national banks to "export" their home state interest rates to borrowers residing in other states.[22] In 1996, the Supreme Court upheld a regulation of the Office of the Comptroller of the Currency ("OCC"), which declared that the "interest" which national banks could "export" to other states included all fees that were "material to the determination of the interest rate" – including numerical periodic rates, annual and cash advance fees, bad check fees, over-the-limit fees, and late payment fees. The OCC's

[21] *See, e.g.*, Stacey Kaper, "No Knockout in Round One: A tough grilling but no new legislative ideas," *American Banker*, Mar. 8, 2007, at 1 (reporting testimony by Wesley Wannemacher, who was charged $7,500 in fees and interest over six years based on $3,200 in card purchase); Robert Berner, "Cap One's Credit Card Trap," *Business Week*, Nov. 6, 2006, at 35; Kathleen Day & Caroline E Mayer, "Credit Card Penalties, Fees Bury Debtors," *Washington Post*, Mar. 6, 2005, at A01 (reporting that penalty fees and high interest rates caused one consumer's credit card balance to grow from $1,900 to $5,600 during 1997-2003, despite $3,500 in payments and no additional purchases); Alan Lavine & Gail Liberman, "Ask Lawmakers to Halt Abusive Credit Card Practices," *Pittsburgh Post-Gazette*, Oct. 14, 2005, at D-8; Patrick McGeehan, "The Plastic Trap – Debt That Binds," *New York Times*, Nov. 21, 2004, § 1, at 1 (reporting on adverse impact of penalty fees and penalty interest rates on consumers) ; Mitchell Pacelle, "Fine Print: Growing Profit Source for Banks: Fees from Riskiest Card Holders," *Wall Street Journal*, July 6, 2004, at A1 (same).

[22] *Marquette National Bank v. First of Omaha Service Corp.*, 438 U.S. 299 (1978). For a comprehensive analysis of the "most favored lender" and "exportation" doctrines, *see* Elizabeth R. Schiltz, "The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation," 88 *Minnesota Law Review* 518 (2004). Congress granted "most favored lender" status and "exportation" authority to FDIC-insured state banks and thrift institutions in 1980. *Id.* at 565-67 (discussing 12 U.S.C. § 1831d), which applies to all FDIC-insured state banks); *id.* at 601-03 (discussing 12 U.S.C. § 1463(g)(1), which applies to federally-chartered thrift institutions).

regulation thus exempts a wide range of fee practices, as well as numerical periodic interest rates, from any regulation under state law.[23]

In 1994, Congress adopted the Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal Act"), which authorizes national banks and state banks to establish interstate branches. The Riegle-Neal Act made possible the growth of large nationwide banking organizations. In addition, the OCC issued a ruling in 1998 that allows a national bank to "export" the "interest" allowed by the law of any state in which the bank maintains either its main office or a branch.[24] In combination, these developments have effectively barred the application of state usury laws and other state consumer credit laws to national banks as well as federally-chartered thrifts and FDIC-insured state banks. With regard to each such institution, "almost no state consumer credit law is going to pose any serious obstacle to its consumer credit operations."[25] Each such institution can locate its consumer credit operations in a state that offers the fewest regulatory restrictions on the terms that the OCC deems to be "material to the determination of the interest rate" (e.g., numerical periodic rates and all fees that are considered to be part of the "price" for credit). The institution can then "export" those terms to customers residing in all other states, regardless of any conflicting laws in those states.[26]

In 2004, the OCC issued a regulation (the "activities preemption regulation") that expands the scope of preemption for national banks far beyond matters that relate to

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[23] *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (upholding the validity of 12 C.F.R. § 7.4001(a)); *see also* Schiltz, *supra* note 22, at 560-65 (discussing *Smiley* and the OCC's expansive interpretation of "interest" under 12 U.S.C. § 85).
[24] Schiltz, *supra* note 22, at 553-56 (discussing OCC Interpretive Letter No. 822, Feb. 17, 1998).
[25] *Id.* at 618.
[26] *Id.* at 561-65, 618.

"interest." The OCC's regulation seeks to preempt all state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized powers" in four broadly-defined areas – viz., real estate lending, lending not secured by real estate, deposit-taking, and other "operations."[27] The OCC's activities preemption regulation is closely similar to preemptive rules previously issued by the Office of Thrift Supervision ("OTS") with respect to the lending, deposit-taking and other "operations" of federally-chartered thrifts.[28]

The OCC's rule with respect to non-real estate lending specifically preempts a wide range of state laws from applying to credit card loans made by national banks, including (i) state licensing and registration laws, (ii) state laws dealing with collateral and credit enhancements, (iii) state laws limiting the terms of credit, (iv) state laws affecting escrow accounts, (iv) state laws dealing with access to credit reports, (v) state laws regulating disclosure and advertising, and (vi) state laws dealing with interest rates and other payments and disbursements.[29] The OCC's rule does not preempt certain types of state laws (i.e. those governing contracts, torts, crimes, collection of debts, acquisition and transfer of property, taxation and zoning) if such laws have only an "incidental" effect on the non-real estate lending activities of national banks.[30] However, the OCC has stated that these state laws typically apply to national banks because they "establish

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[27] *See* 12 C.F.R. § 34.4(a) (real estate lending); *id.* § 7.4008 (lending not secured by real estate); *id.* § 7.4007 (deposit-taking); *id.* § 7.4009 (other "operations"). For a comprehensive analysis and critique of the OCC's rules, *see* Arthur E. Wilmarth, Jr., "The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection," 23 *Annual Review of Banking and Financial Law* 225 (2004) [hereinafter Wilmarth, "OCC's Preemption Rules"].

[28] *See* 12 C.F.R. §§ 560.2, 557.11, 545.2, discussed in Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 235, 283-84.

[29] 12 C.F.R. § 7.4008(d)(2).

[30] *Id*. § 7.4008(e).

the infrastructure that makes it practicable to exercise a permissible Federal power."[31] From this explanation, one can reasonably infer that the OCC intends to recognize the applicability of state laws only when they are *helpful* to the exercise of a national bank power.[32]

The Government Accountability Office (GAO) issued a report in April 2006, stating that the OCC's activities preemption regulation "does not fully resolve uncertainties about the applicability of state consumer protection laws to national banks and their operating subsidiaries."[33] The GAO noted that the only state consumer-oriented laws that the OCC has specifically acknowledged to apply to national banks are "fair lending laws."[34] The GAO further pointed out that "[s]ome state officials questioned the extent to which state consumer protection laws, particularly those aimed at preventing unfair and deceptive acts and practices, are preempted for national banks and their operating subsidiaries."[35] The GAO recommended that the OCC "clarify the applicability of state consumer protection laws to national banks."[36] Notwithstanding that recommendation, to date the OCC has not issued any public clarification as to the categories of state consumer protection laws that it deems *not* to be preempted by its activities preemption regulation.

In 2004, the OCC also issued a second regulation (the "visitorial powers preemption regulation") that bars state officials from initiating any administrative or

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31 *See* 69 Fed. Reg. 1904, 1912, 1913 (2004) (preamble to OCC's activities preemption regulation).
32 *See* Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 233-36, 274.
33 U.S. Gov't Accountability Off., "OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks," GAO-06-387 (April 2006), at 8; *see also id.* at 12-17, 44-45.
34 *Id.* at 8, *see also id.* at 14-15.
35 *Id.* at 8; *see also id.* at 13, 16.
36 *Id.* at 10; *see also id.* at 44-45.

judicial proceeding to enforce applicable laws (state or federal) against national banks.[37] The validity of that regulation is currently being tested in a case pending before the Second Circuit Court of Appeals.[38] A third OCC regulation declares that operating subsidiaries of national banks are entitled to the same preemptive immunity from state laws that national banks are granted under federal law (including the OCC's rules). That regulation was upheld by a recent decision of the Supreme Court.[39]

The combined effect of the OCC's preemption regulations is to make the OCC the final arbiter of the scope of national bank powers as well as the sole enforcement agency with respect to national banks and their operating subsidiaries. The OCC's regulations are designed to accomplish the agency's stated goal of creating a "national banking system" that will "enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws."[40] Former Comptroller of the Currency John D. Hawke, Jr. has called preemption "a major advantage of the national charter," and said that he wasn't "the least bit ashamed to promote it."[41]

The OCC's preemption rules have already had a very significant impact in encouraging large, multistate banks to convert from federal to state charters. For example, during 2004-05, JP Morgan Chase, HSBC and Bank of Montreal (Harris Trust) converted from state to national charters and moved more than $1 trillion of banking

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[37] *See* 12 C.F.R. § 7.4000, discussed in Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 228-29, 327-34.
[38] *OCC v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), *appeal pending sub nom. Clearing House Ass'n v. Spitzer*, No. 05-5996cv(L) (2d Cir., appeal filed Nov. 7, 2005).
[39] *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S., April 17, 2007) (upholding the validity of 12 C.F.R. § 7.4006).
[40] 69 Fed. Reg. 1904, 1908 (2004) (preamble to OCC's activities preemption regulation).
[41] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 274-75 (quoting remarks made by Mr. Hawke during a speech and newspaper interview in 2002).

assets from the state banking system into the national banking system. As a result of those charter conversions, the share of all banking assets held by national banks rose from 56% to 67%, while the share held by state banks declined from 44% to 33%. In April 2006, the Bank of New York (BONY), one of the largest remaining state banks, agreed to sell its 338 retail branches to JP Morgan Chase. BONY's branch sale provides further evidence that the OCC's preemption rules have given multistate national banks a decisive competitive advantage in retail banking.[42] In a speech given in September 2005, FDIC Chairman Don Powell described the impact of the OCC's and OTS' preemption rules as follows:

> The facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial competitive disadvantage relative to a national bank or federal thrift. . . . In my view, there is little doubt what the current competitive imbalance, if not addressed, means for the future. . . . Ultimately, Congress will have to decide this issue. . . . In the end, Congress may choose to level the playing field and preserve the dual banking system or it may, through inaction or otherwise, choose not to, and let the dual banking system fade into history. In my opinion, that would be a mistake.[43]

Thus, the preemption rules of the OCC (and to a lesser extent, those of the OTS) have fundamentally transformed our consumer credit industry. The broad scope of those rules has given large federally-chartered depository institutions a virtually unlimited immunity from state consumer protections laws and from state enforcement proceedings. Accordingly, it is necessary to evaluate whether the OCC is likely to provide effective

[42] Arthur E. Wilmarth, Jr., "The OCC's Preemption Rules Threaten to Undermine the Dual Banking System, Consumer Protection, and the Federal Reserve Board's role in Bank Supervision," *Proceedings of the 42nd Annual Conference on Bank Structure and Competition* (Fed. Res. Bank of Chi. 2006), at 102, 105-06 [hereinafter Wilmarth, "Preemption Dangers"].

[43] Wilmarth, "Preemption Dangers," *supra* note 42, at 106 (quoting Sept. 26, 2005 speech by Mr. Powell to the American Bankers Ass'n).

protection to consumers from abusive practices by the biggest national banks that dominate the credit card industry and other segments of the consumer lending market.

5. <u>The OCC's Unimpressive Record of Consumer Protection</u>

Unfortunately, the OCC has not compiled an impressive record of protecting consumers. The OCC is primarily focused on maintaining the safety and soundness of national banks. The OCC's preemption rules therefore emphasize the goal of giving national banks wide latitude to conduct their business activities in accordance with "uniform [federal] standards of operation and supervision" that will reduce their compliance costs and maximize their profits and stability.[44]

The OCC enforces national bank compliance with applicable laws and regulations primarily through its examination process and secondarily through the imposition of safety-and-soundness plans and orders.[45] However, bank examinations and safety-and-soundness enforcement measures are highly discretionary and shrouded in secrecy. Findings made during compliance examinations are strictly confidential and are not made available to the public except at the OCC's discretion.[46] Similarly, the OCC is not required to publish the results of its safety-and-soundness enforcement actions. The OCC's website lists only three safety-and-soundness orders, which the OCC issued against small national banks during 1997-99, and the website does not provide weblinks to the text of any of those orders.[47] Thus, the OCC's procedures for compliance examinations and safety-and-soundness orders do not appear to provide any public notice

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[44] 69 Fed. Reg. 1904, 1907-08 (2004) (preamble to OCC's activities preemption regulation).
[45] *See, e.g.*, 70 Fed. Reg. 6329-34 (2005) (OCC guidelines establishing standards for residential mortgage lending practices); OCC Annual Report, Fiscal Year 2005, at 13-16, 22.
[46] *See, e.g*,, 12 C.F.R. §§ 4.32(b), 4.36(b), 18.10.
[47] Wilmarth, "Preemption Dangers," *supra* note 42, at 109, 113-14 n.32. My recent search of the section of the OCC's website entitled "Enforcement Actions" (<u>www.occ.treas.gov/enforcementactions/enforcementactions_search.aspx</u>) produced the same result.

or other recourse to consumers who have been injured by violations identified by the OCC.

The OCC's record is similarly undistinguished with respect to consumer enforcement actions taken against national banks for violations of consumer protection laws. Since January 1, 1995, the OCC has taken only thirteen public enforcement actions against national banks for violations of consumer lending laws.[48] With two exceptions, all of those actions were taken against small national banks. One of the two exceptions involved an OCC enforcement order issued against Providian National Bank, a large credit card bank, in 2000. However, the OCC did not take action against Providian until the San Francisco District Attorney's office had already initiated its own prosecution of Providian for abusive and unfair practices.[49] A former senior executive in the credit card industry commented on the Providian case as follows:

> A California prosecutor . . . embarrassed the OCC into taking action against Providian [National] Bank for telemarketing and pricing practices that bordered on the criminal. For a decade Providian had been well known in the [credit] card industry as the poster child of abusive consumer practices, but apparently not to the OCC.[50]

The second OCC enforcement order involving a large bank was issued against ABN AMRO Mortgage Group, Inc., (AAMG), an operating subsidiary of LaSalle Bank Midwest, N.A., in January 2006. According to an OCC news release, the Department of

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[48] *See* Wilmarth, "Preemption Dangers," *supra* note 42, at 109, 114 n.33, which found twelve enforcement actions based on a search of the portion of the OCC's website entitled "Consumer Protection News: Unfair and Deceptive Practices" (www.occ.treas./gov/Consumer/Unfair/htm.), and a review of 69 Fed. Reg. 1904, 1913 & nn.70-71 (2004) (preamble to OCC's activities preemption regulation). My recent review of the section of the OCC's website entitled "Enforcement Actions," *supra* note 47, located a thirteenth enforcement action. That action, discussed below, was taken against ABN AMRO Mortgage Group, Inc., an operating subsidiary of LaSalle Bank Midwest, N.A., on January 4, 2006 (OCC News Release No. 2006-1; OCC Enforcement Order # 2005-162) [hereinafter AAMG Enforcement Order].

[49] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 315-16; Wilmarth, "Preemption Dangers," *supra* note 42, at 109.

[50] Duncan A. MacDonald, Letter to the Editor, "Comptroller Has Duty to Clean Up Card Pricing Mess," *American Banker*, Nov. 21, 2003, at 17.

Housing and Urban Development (HUD) notified AAMG as to suspected improprieties involving AAMG's underwriting of Federal Housing Administration (FHA) loans. Following an internal investigation, AAMG informed HUD and the OCC that it had found violations of HUD regulations in its underwriting practices for FHA loans. After AAMG disclosed those violations, the OCC and HUD conducted a formal investigation and issued an enforcement order against AAMG. However, it is unclear whether the OCC would have found those violations absent HUD's notice to AAMG and AAMG's internal investigation and disclosure of the violations.[51] Thus, neither of the OCC's two public enforcement orders against large banks for consumer lending violations was actually initiated by the OCC.

Since January 1, 1995, the OCC has not issued a public enforcement order against any of the eight largest national banks for violating consumer lending laws.[52] In contrast to this absence of public enforcement action by the OCC against major national banks, state officials and other federal agencies have issued numerous enforcement orders against leading national banks or their affiliates – including Bank of America, Bank One, Citigroup, Fleet, JP Morgan Chase, and US Bancorp – for a wide variety of abusive practices over the past decade, such as predatory lending, privacy violations, telemarketing scams, biased investment analysis, manipulative initial public offerings, and allowing hedge funds to engage in late trading and market timing in bank-sponsored mutual funds. In many of those cases, state officials such as New York Attorney General

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[51] *See* OCC News Release 2006-1, with regard to AAMG Enforcement Order, *supra* note 48.

[52] The only OCC consumer protection order issued against any of the top eight national banks during this period was a "me too" order issued by the OCC against Bank of America for allowing hedge funds to engage in late trading and market timing in its mutual funds. That order was issued after other federal and state agencies had already taken enforcement measures against Bank of America. Wilmarth, "Preemption Dangers," *supra* note 42, at 109. My recent search of the OCC's website for "Enforcement Actions," *supra* note 47, confirmed the foregoing results.

Eliot Spitzer, Minnesota Attorney General Mike Hatch, and Massachusetts Secretary of State William Galvin spearheaded the investigations and spurred federal regulators to take action.[53]

During 2003 alone, state officials initiated more than 20,000 investigations and took more than 4,000 enforcement actions in response to consumer complaints about abusive lending practices. During the past several years, state officials have obtained large settlements with Providian, First Alliance, Household International and Ameriquest that required those lenders to pay approximately $1 billion in penalties and restitution. Several studies have concluded that state anti-predatory lending laws provide significant benefits to consumers, particularly in light of the inadequate protections offered by current federal laws in the area of subprime lending.[54]

Unfortunately, the OCC's self-interest provides a plausible explanation for its failure to take public enforcement actions against any of the largest national banks for violating consumer lending laws. More than 95% of the OCC's budget is financed by assessments paid by national banks, and the twenty biggest national banks account for nearly three-fifths of those assessments. Large, multistate banks were among the most outspoken supporters of the OCC's preemption regulations and were widely viewed as the primary beneficiaries of those rules. In addition to its preemption regulations, the OCC has frequently field amicus briefs in federal court cases to support the efforts of national banks to obtain court decisions preempting state laws. The OCC's efforts to attract large, multistate banks to the national banking system have already paid handsome

[53] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 314-16, 348-56; Wilmarth, "Preemption Dangers," *supra* note 42, at 109.

[54] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 315-16; Wilmarth, "Preemption Dangers," *supra* note 42, at 111, 114 n.40 (citing studies).

dividends to the agency. During 2004-05, the OCC's assessment revenues rose by 15%, primarily due to the transfer of $1 trillion of banking assets into the OCC's jurisdiction by virtue of the charter conversions of JP Morgan Chase, HSBC and Bank of Montreal. Thus, the OCC has a powerful financial interest in pleasing its largest regulated constituents, and the OCC therefore faces a clear conflict of interest whenever it considers the possibility of taking an enforcement action against a major national bank.[55]

The OCC's Consumer Assistance Group (CAG) provides additional evidence that the OCC is not committed to a vigorous enforcement strategy in the area of consumer protection. The CAG handles all consumer complaints filed against national banks through a single call center located in Houston, Texas. In 2005, the CAG employed fifty full-time employees, representing less than two percent of the OCC's total workforce of more than 2,800 employees (including 1,900 bank examiners). Similarly, the CAG accounted for just over one percent of the OCC's operating budget for fiscal year 2005 ($5.4 million out of a total operating budget of $500 million). The CAG does not have any enforcement functions. It describes itself as a "neutral arbiter" and says that it cannot act as an "advocate" for either the consumer or the bank. The CAG tells consumers that it "cannot give legal advice or personal opinions about consumer complaints and/or the bank's position." The CAG also warns consumers that "only a court of law" can resolve "factual or contract disputes between the bank and the customer." Therefore, the CAG advises consumers that "[i]f your case involves such a dispute, we will suggest that you consult an attorney for assistance."[56]

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[55] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 232, 274-77, 356; Wilmarth, "Preemption Dangers," *supra* note 42, at 104-05, 109-10, 112 n.16.

[56] Wilmarth, "Preemption Dangers," *supra* note 42, at 110; U.S. Gov't Accountability Off., "OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced

Based on the foregoing statements, the CAG certainly does *not* view itself as a vigorous defender of consumer rights. The CAG holds annual meetings with the ten national banks that provoked the largest number of consumer complaints during the previous year. In addition, the CAG alerts the OCC's compliance examiners if there are significant patterns of consumer complaints at particular national banks.[57] However, as previously noted, the OCC's supervisory and examination process is highly discretionary, is not visible to the public, and does not establish any formal procedures for granting relief to injured customers.

Four additional facts indicate that the CAG and the OCC's compliance examinations are *not* effective in discouraging abusive practices by large national banks. First, as noted above, almost all of the OCC's public consumer enforcement actions have targeted *small* national banks. However, most consumer complaints are filed against *large* national banks. During 2004, ten large banks accounted for four-fifths of all complaints received by the CAG. Second, compared to other federal bank regulators, the CAG received a much higher rate of consumer complaints per billion dollars of supervised banking assets during 2000-04. Third, compared to other federal bank regulators, a much higher percentage of complaints filed with the CAG during 2000-04 were closed because consumers either withdrew their complaints or commenced litigation. During the same period, the percentage of withdrawn or litigated complaints *rose* steadily at the CAG, while the percentage of complaints in which the CAG found bank errors *declined* steadily. It seems clear that many consumers did not find the CAG

Outreach," GAO-06-293 (Feb. 2006) [hereinafter GAO-CAG Report], at 8-9, 23-25; OCC Annual Report, Fiscal Year, 2005, at 1, 3, 7, 13, 23-24; *see also* the portion of the OCC's website entitled "Consumer Complaints and Assistance" (www.occ.treas/gov/customer,htm)..

[57] Wilmarth, "Preemption Dangers," *supra* note 42, at 110; GAO-CAG Report, *supra* note 56, at 21-23.

to be helpful, an outcome that is not surprising in view of the CAG's explicit statements that it will not act as an "advocate" for consumers and will not attempt to resolve "factual or contract disputes." Fourth, until it was criticized by the GAO, the CAG did not provide any mechanism for feedback by consumers, in sharp contrast to the OCC's long-established complaint process for bankers who are dissatisfied with OCC examinations.[58] All of these facts suggest that the OCC gives a relatively low priority to consumer protection. The CAG, like the OCC's public enforcement actions against small national banks, appears primarily to be a public relations gesture designed to deflect criticism from state regulators and consumer groups.

In one well-publicized case, the OCC refused to help hundreds of consumers who complained after Fleet Bank raised the interest rates on their credit cards despite promises of a "fixed" rate. In a representative letter, the OCC told Fleet's complaining customers that "we can only suggest that you contact private legal counsel regarding any additional remedies."[59] When one of the aggrieved customers filed a federal class action in December 2000, alleging deceptive lending practices by Fleet, the OCC responded by filing amicus briefs *on behalf of Fleet* in both the district court and the Third Circuit Court of Appeals. The Third Circuit determined, however, that the plaintiff presented a genuine issue for trial based on her claim that Fleet's disclosures were misleading and violated the Truth in Lending Act (TILA). Based on the Third Circuit's opinion, one can

[58] Wilmarth, "Preemption Dangers," *supra* note 42, at 110-11; GAO-CAG Report, *supra* note 56, at 9-25.
[59] Wilmarth, "OCC's Preemption Rules," *supra* note 27, at 353; Jess Bravin & Paul Beckett, "Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers," *Wall Street Journal*, Jan. 28, 2002, at A1 (quoting OCC letter).

certainly question whether the OCC acted properly when it concluded that federal law did not give customers any reasonable grounds for obtaining recourse from Fleet.[60]

For the foregoing reasons, Congress cannot expect the OCC to act vigorously in adopting substantive protections for credit card customers or in taking public enforcement actions against the largest credit card issuers. Congress should promptly move forward with legislation to establish uniform fair lending and consumer protection standards for all credit card issuers and other consumer lenders, whether federally-chartered or state-chartered. In view of the aggressive preemption rules adopted by the OCC and the OTS, uniform legislation is needed to restore a "level playing field" between federally-chartered and state-chartered consumer lenders. In addition, Congress should amend the Federal Trade Commission Act (FTC Act) to allow the Federal Trade Commission to bring enforcement proceedings against national banks for unfair and deceptive acts and practices. Currently, the FTC is barred from bringing such actions under 15 U.S.C. § 45(2), and only the OCC may prosecute such actions. In view of the OCC's obvious conflict of interest in supervising the same institutions that fund its budget, the OCC should not be given sole enforcement power over national banks with respect to consumer protection matters. The FTC should be given concurrent and independent enforcement authority over national banks with regard to all matters arising under the FTC Act, in the same way that state attorneys general have independent authority to enforce applicable state laws against state banks.

Arthur E. Wilmarth, Jr. (04/25/07)

[60] Wilmarth, "OCC's Preemption Rules, *supra* note 27, at 353-54; *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260, 266 (3d Cir. 2003) ("Construing the TILA strictly against the creditor and liberally in favor of the consumer, as we must, we believe that the TILA disclosures [made by Fleet] in this case, read in conjunction with the solicitation materials, present a material issue of fact as to whether Fleet clearly and conspicuously disclosed its right to change the [credit card's annual percentage rate]").