Statement Of The National Association Of REALTORS®
Before The House Financial Services Subcommittee On Oversight And Investigations
Submitted By Walter T. Mcdonald, President
January 28, 2004

On behalf of almost 1 million members of the NATIONAL ASSOCIATION of REALTORS® I am submitting this statement in opposition to the Office of the Comptroller of the Currency (OCC) regulation that preempts state laws regarding real estate lending and other state consumer protection laws. This rule is another example of federal regulators run amok. It is clearly an effort to grant preferable treatment to national banks and their operating subsidiaries by misinterpreting existing law and mischaracterizing legal precedent. REALTORS® are greatly troubled by this turn of events. This action is bad for consumers, bad for homeowners, bad for small businesses, and bad for our members.

Many REALTORS® who operate mortgage, title, appraisal and other businesses are unfairly impacted by this unbridled grant of preemption for national banks and their subsidiaries. The OCC stated in its rule release that requiring state licenses could "create higher costs and operational burdens that banks either must shoulder, or pass onto consumers, or that may have the practical effect of driving them out of certain businesses." While it may require higher costs, those costs are shared by **all businesses** that operate within that state. Is it fair for national banks to be exempt? Has there been any indication that their profits have suffered due to previous compliance with these laws?

We fear this would only become worse if our efforts to prohibit the proposed real estate brokerage, leasing and management rule fail. If OCC logic prevails, it is not too much of a reach to conclude that the OCC would preempt state real estate licensing and continuing education requirements for national bank real estate operations. Is this what Congress intends?

The effort to concentrate banking regulation in the federal government should only be considered by *Congress* after a careful and complete examination determines that our nation's dual banking system has failed in some way. We believe our dual banking system continues to be the best in the world. It is a decentralized market that provides a stable supply of credit to every sector of our economy. As incubators of new and innovative products state banks help REALTORS® put American consumers in homes. The dual banking system requires state regulators who are closer to consumers to provide remedies to those who are injured by the acts of financial institutions. Even if the OCC has the desire, does it have the resources to effectively protect consumers in every state, city and neighborhood where national banks do business?

The OCC has consistently relied on the broadest misinterpretation of the law to determine that national banks may avoid state consumer protection, insurance and lending laws due to their federal charter. Congressional intent is unclear, and the OCC currently is taking advantage of this lack of clarity. Nevertheless, Congress has repeatedly upheld the dual banking system and limited the authority of the OCC to preempt state laws. In our legal analysis attached to this statement we detail Congressional actions and the court cases applicable to this issue.

Are we to believe that Civil War necessities should apply to our modern banking system, as the OCC implies in its citing of preemptive authority? Surely, none of these existing consumer protection and licensing statutes threaten to destroy any national bank today.

This rule follows a predictable pattern of national banks working with their regulator, the OCC, to gain greater market share and an expanded portfolio. Their efforts in the early 1990's to obtain broad insurance powers are illustrative. These efforts led to the *Barnett* case.

The applicable language granting authority to the OCC to preempt state laws found in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) holds that states cannot "forbid, or (to) impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." The Court continued by citing three supporting cases where the Court held certain state laws did not "unlawfully encroach" (1), would not "destro[y] or hampe[r]"(2) and do not "interfere with, or impair"(3)national banks' functions, rights or privileges.

It was only after the conclusion of this case that national banks redoubled their efforts to obtain legislative authority to broadly operate securities and insurance businesses. They were finally successful with the Gramm/Leach/Bliley Act that spelled out how they could enter these businesses.

After Congress carefully crafted language that codified the *Barnett* decision, the OCC and its partner banks continued to push the envelope. Congress relied on the language that states could not "prevent or significantly interfere with the national bank's exercise of its powers" in Section 104(d)2 of the Gramm/Leach/Bliley Act. Although Congress never indicated any other standard would be appropriate for determining preemption of state laws, the OCC relied on different language from Barnett to support its preemption of state consumer protection, insurance and lending laws.

The OCC continues to twist the law to meet its ends. NAR believes those ends are to increase the value of the federal charter at the expense of state licensing and consumer protection measures. As an agency whose very existence depends on the assessments that its member banks render, it is in the OCC's best interest to promote the healthiest and most profitable institutions it can. That is an admirable goal that produces safe and sound national banks. But that promotion should not become so relentless that it crosses the line to unfairly prejudice other institutions not under the auspices of the OCC.

NAR has consistently argued that Congress must not allow unelected regulators to unfettered interpretation and enforcement of all laws as they see fit. There is just not enough attention paid by these agencies to public comment or Congressional opposition. Although some leeway must be granted to regulators to fashion the most effective regulation, recent actions prove that some Congressional contraction of authority is necessary.

Even Chairman Oxley questioned the OCC's preemption efforts to overrule the Massachusetts Consumer Protection Act. (Oxley letter to Treasury Secretary O'Neill, April 22, 2002) In that letter, Chairman Oxley quotes the GLBA conference report "explicitly states that it was 'recognizing the primacy and legal authority of the States to regulate insurance activities of all persons.' " The OCC seems to have no trouble ignoring specific legislative language or intent in the area of insurance activities.

The OCC should not have the ability to determine the winners and losers in a marketplace through broad preemption of state laws for national banks. All other national and local businesses continue to meet the regulatory burden of complying with the laws that protect this country's consumers against all but national banks and their subsidiaries. There is no valid public policy to create such a special class of financial services company.

No other federal regulator has been as callous in its disregard for consumer protections, and no other regulator has so fiercely fought against a dual regulatory system in this country. The Securities and Exchange Commission and the states both enforce consumer protections and securities laws over this industry. The Food and Drug Administration's whole purpose is to protect Americans. It does so in cooperation with state health authorities. The Federal Trade

Commission operates closely with state officials and does not attempt to circumvent state unfair and deceptive trade practices laws.

The OCC has historically argued that consumers and businesses can "take their business elsewhere" if they don't like how national banks operate. This "free market rhetoric" loses quite a bit of strength when one considers how only a few huge banks are coming to dominate that market. The opportunities to utilize other businesses are shrinking due to the constant grant of special privileges to national banks. This latest salvo could destroy the dual banking system, leading to an oligopoly of huge multinational banks that can disregard state licensing and consumer protection laws. This situation would certainly lead to eventual problems that Congress would need to rectify. They should address the situation now before the problems occur.

The consolidation of so many financial institutions into only a few huge banking conglomerates has troubled REALTORS® for some time now. Our concern is only heightened when an out of control regulator can finalize rules like this over the objection of businesses, consumers, states, and many Members of Congress.

Congress should not let this situation continue. Congress needs to rein in the regulators before these actions lead to untenable consequences.

Maybe it is time for Congress to amend the Civil War era National Bank Act to make it abundantly clear that state consumer protection and licensing laws apply to national banks and their operating subsidiaries, and to prohibit the OCC from unilaterally preempting these laws unless they truly discriminate against them.

REALTORS® stand ready to support such efforts and we appreciate your attention to this issue.

NAR Challenges OCC's Power to Preempt State Real Estate Lending and Licensing Laws

- The language of the National Bank Act does not express Congress' intent that the OCC has the authority to preempt state real estate lending or licensing laws.
- Courts have not interpreted the National Bank Act as granting the OCC broad authority to preempt state real estate lending or licensing laws.

The NATIONAL ASSOCIATION OF REALTORS® (NAR) is America's largest trade association, representing almost 1 million members who are very concerned about the negative impact that preempting state real estate lending and licensing laws will have on consumers, homeownership and the real estate industry. REALTORS® are engaged in all aspects of the real estate industry – commercial and residential brokerage, property management, investment, development – in the United States and internationally.

NAR is troubled by the Office of the Comptroller's (OCC) final rule amending amend parts 7 – Bank Activities and Operations –and 34 – Real Estate Lending and Appraisals (particularly § 34.4 (1), "licensing, registration, filings, or reports by creditors") of its regulations to expand the types of state laws that are preempted. As discussed more fully below, NAR disagrees with the OCC's interpretation that federal law enables the agency to issue broad preemption regulations for national banks' real estate lending activities and opposes the agency's final rule.

I. Supremacy Clause and General Principles of Preemption

It is well recognized that the foundation of federal preemption is rooted in paragraph 2, Article VI of the U.S. Constitution, Supremacy Clause, "[the] Constitution and the laws of the United States . . . shall be the supreme law of the land . . . anything in the constitutions or laws of any State to the contrary notwithstanding." In the absence of express preemption (where

Congress has expressly stated that it intends to preempt state law), courts look for implied preemption in two forms:

- That the federal government so occupies the field in a given area that there is no room for the state to participate in regulation; and
- That state law actually conflicts with federal law.(4)

NAR strongly maintains that the OCC has not met either standard of federal preemption in the area of real estate lending license laws and thus, should articulate in the final rule that such laws are not preempted.

II. The OCC Does Not Have Congressional Authority to Preempt All State Laws Related to Real Estate Lending.

A. The OCC's power to make a broad preemption assertion is belied by its prior recognition of its limited pre-emptive authority.

Congress enacted the National Currency Act in 1863 (NCA) and amended it one-year later with the National Bank Act (NBA) in order to help bring stability to the economy during the Civil War. It was the intent of Congress at the time to replace the existing system of state banks with one national banking system. Representative Hooper, speaking in support of the measure, indicated the need for amending the National Currency Act after only one year was, "to render the law so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charter."**(5)**

Congress' action to give national banks paramount powers was solely for the purpose of putting state banks out of business. Much to the dismay of the proponents of the 1864 NBA, state banks were not "induced" to convert their charter. Today our dual banking system is habitually reviewed and ultimately preserved by congressional action. It is also important to note that the NBA did not give national banks authority to lend on the security of real estate.

It was not until 1913 when Congress enacted the Federal Reserve Act that national banks were allowed to conduct real estate lending activities. However the legislative provisions governing real estate lending were very limiting, i.e., aggregate lending limits, geographic limits, and limits on loan terms and conditions.**(6)** In 1982, Congress overhauled banks' real estate lending activities by removing what was referred to as "rigid statutory limitations"(7) in favor of allowing national banks to "make, arrange, purchase, or sell loans or extensions of credit secured by liens on interest in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation." (8)

Congress stated that the purpose for the 1982 action was "to provide national banks with the ability to engage in more creative, flexible financing, and to become stronger participants in the home financing markets."(9) Congress could have easily stated their intent with the Garn-St. Germain Depository Institutions Act of 1982 was that federal law preempts state real estate lending laws, but it did not. Instead, use of "stronger participant" directly implies Congress' recognition that national banks are players among many in real estate lending – there is no single regulator. Shortly after enactment of the Garn-St. Germain Depository Institutions Act, the OCC promulgated the implementing real estate lending regulations (part 34) and detailed certain standards for such activities. The OCC's standardizing regulations indicate that national banks may make real estate secured loans without regard to state laws that limit:

- The amount of the loan in relation to the appraised value;
- The schedule for repayment of principle and interest;
- The term to maturity of the loan;
- The aggregate amount of funds which may be loaned; and
- The restrictions that must be contained in a lease to qualify the leasehold as acceptable security.

When the OCC promulgated these regulations it stated its intent in preempting state laws where the Garn-St. Germain Depository Institutions Act removed such limitations, was "to preclude any conflict of state law with Congressional intent . . ."(10) Furthermore, the OCC noted:

The final rule clarifies the limited scope of the preemption. Aside from the specific preemption of state law as to the restrictions discussed, the relationship between state and federal law in regard to real estate loans as it existed prior to the [Garn-St. Germain Depository Institutions Act] amendment is expected to remain unchanged.(11)

The OCC's last review of part 34 prior to the rule proposal currently at issue occurred in 1996. The OCC removed a provision from its real estate lending standards that stated "national banks must comply with all applicable federal laws and regulations, including those pertaining to disclosures." (12) In its place, the OCC added the following language: "The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks."(13)

In 1999, the Government Accounting Office (GAO) examined the role of OTS and OCC in the preemption of state law. Their report articulated that from the authority in Home Owners Loan Act, the OTS 1996 preemption rules are based on a finding that Congress intended the agency to occupy the field of regulation.(14) The GAO also reported that the OCC relies on conflict preemption – not field preemption – when issuing interpretations of whether federal law preempts state law. (15) More importantly, the report stated:

While the statutory authorities OTS and OCC use to formulate the preemption opinions are different, their approaches share a common feature. Both agencies rely on past court decisions to guide their analysis of whether a federal law or regulation preempts state law.(16) To reiterate, the OCC has not relied on field preemption in the area of real estate lending, and instead has relied on court decisions to guide their formulation of preemption decisions. Interestingly enough, the majority of court cases reviewing federal preemption of state law have not had to address field preemption because they usually find actual conflict. To date, there have been no Supreme Court opinions that ruled on whether OTS or OCC reliance on field preemption in the area of real estate lending is appropriate.

B. Congress and the statutory legislative scheme reveal no intention or authority for the OCC to issue broad preemption regulations.

It is well established that, in absence of express legislation conveying congressional intent to supercede state law, that the following tests are used to detect field preemption: 1) "[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;" 2) "[the] Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;" or 3) "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."(17)

Pervasiveness

In gathering evidence as to whether or not pervasiveness exists to imply broad preemption authority, courts consider language of the legislation, regulations promulgated pursuant to the legislation and the legislative history. Since *Rice v. Santa Fe Elevator Corp.* was decided in 1947, the Supreme Court has only on a few occasions found a scheme of regulation so pervasive as to determine field occupation. (18) "In contrast, the Supreme Court has rejected field preemption claims in areas of obvious federal interests such as . . . due-on-sale clauses in mortgages and the entire field of federal savings and loan regulation . . . and standards for officers and directors of federally insured banking institutions."(19)

Dominant Federal Interest

As stated above, the second test that courts have accepted as evidencing intent to supercede state law is dominance of federal interest. In making a dominance determination, courts have weighed whether the legislation or regulation is "so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress (sic) . . . is supreme."(20) Traditionally, dominant federal interest has been reserved for areas of national security, defense and treaties. The courts, however, have eagerly pointed out their apprehension in making such a determination of dominant federal interest by noting "[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law."(21)

In 1985, the Supreme Court was asked to consider whether two local ordinances that required blood donors be tested for hepatitis and alcohol content were preempted by federal regulation. The Court recognized the validity of the Food and Drug Administration's broad regulations establishing standards for the collection of blood, however, it opined,

To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.(22)

The OCC maintains that Congress has "expressly and exclusively" referred to the Comptroller as "the entity possessing authority to set restrictions and requirements that apply to national banks' real estate lending activities." (23) Furthermore, the OCC contends that "national bank real estate authority has been extensively regulated at the [f]ederal level since the power first was codified." The NAR believes the OCC is mischaracterizing the congressional intent as it relates to real estate lending; in fact, there is little evidence of pervasiveness or dominance to imply exclusive authority to regulate real estate lending activities.

To be sure, certain aspects of real estate lending are, to a limited extent, addressed by federal law in a manner that infers a design to occupy a narrow field.(24) These primarily include the standards for real estate lending that the OCC promulgated in 1982, which went virtually unchanged when the OCC opened up part 34 to review in 1995-96 (loan to volume limits, repayment schedule, loan term, total amount of funds which can be loaned and qualifying leasehold as security). But even these were implemented pursuant to 1982 standardizing regulations that were as a direct result of congressional action easing real estate lending restrictions. The OCC could not act in such a way on its own. In contrast, there is presently no recently enacted federal legislation relating to real estate lending that requires implementing regulations that would suggest a similar intent that the OCC preempt even a narrow field.

In short, preemption of state licensing requirements related to real estate lending is wholly inappropriate on the basis of lack of congressional intent.

Congress has not exercised federal authority in the area of real estate lending licenses, nor has it directed any banking agency to regulate licensing with such a complete scheme that leaves no room for states to supplement. This is further evidenced by the fact that on a number of occasions, Congress carved out certain real estate lending related licenses from federal legislation and specifically recognized state regulation. (25)

· Factors indicating dominant federal interest in real estate lending licenses are conspicuously absent. The federal government has not exerted power in the real estate licensing arena; and
· The object sought to be obtained by the National Bank Act and the character of obligations imposed do not reveal a purpose to preclude enforcement of state real estate lending license laws.

Finally, a further dramatic illustration of the absence of any intent by Congress to empower the OCC with exclusive preemption authority is the open criticism of the agency's preemption activities during consideration of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal). The House conferees recognized that:

States have a strong interest in the activities and operations of depository institutions doing business within their jurisdiction, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. (26)

The Riegle-Neal conferees further stated:

Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result. (27)

And finally, the only banking regulator that the Riegle-Neal conferees singled out as "inappropriately aggressive" was the OCC. (28)

I. Conflict Preemption is Inapplicable Because State Real Estate Lending License Laws Do Not Conflict with Federal Law

The OCC generally relies on conflict preemption when issuing interpretations of whether federal laws preempt specific state law. Their analysis in making such a determination is usually guided by past court decisions. (29) The NAR asserts that real estate lending license laws do not conflict with federal law on the simplest grounds –there can be no conflict where there is no governing federal law.

In determining whether conflict is present in a state law that ultimately warrants federal preemption, the Courts consider two factors: that compliance with both the federal law and the state law is a "physical impossibility;" (30) or when "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."(31)

"Physical Impossibility"

First and foremost, it is essential that the OCC recognize that real estate lending licenses go far beyond mortgage banker and mortgage lender licenses; the term "license" in the context of real estate lending covers in various jurisdictions almost every real estate lending related service that touches on the transaction including, but not limited to: mortgage brokerage, insurance, title service, appraiser, home inspector, legal services, termite/insect inspector, surveyor and escrow agent.

All of these real estate related services are licensed at the state level and in most cases, are essential to the completion of the real estate loan transaction. Currently, there is no federal statute codifying national standards for real estate lending service professionals. In fact, on more than one occasion, Congress has specifically directed regulatory agencies to recognize state licensing laws.(32)

The Supreme Court has on a number of occasions found conflict when presented with a federal preemption question. However, the Court has emphasized that under conflict preemption principles, a state law is not preempted if the regulated party can comply with both the state and federal regulation. (33)

In 2002, the Federal Trade Commission (FTC) was asked to consider whether or not Connecticut's financial privacy law is preempted where compliance with both the state privacy law and provisions of Gramm-Leach-Bliley Act appear physically impossible. The FTC determined:

[W]here Connecticut law prohibits disclosure and federal law permits disclosure, a Connecticut financial institution can comply with both laws by not disclosing the consumer's nonpublic personal information. Likewise, where federal law prohibits disclosure and state law permits disclosure, the financial institution can comply with both laws by not disclosing the information. Here, compliance by Connecticut financial institutions with both the federal and state requirements is not physically impossible.(34)

The FTC bases its Connecticut rationale on standards set in *Pacific Gas & Elect. Co. v. State Energy Resources Conservation & Dev. Comm'n* stating, "if a state law prohibits what federal law merely permits but does not require, compliance with both statutes is possible."(35) Hence, where a state law prohibits engaging in real estate lending activities without a license and federal law is silent, one simply cannot maintain that simultaneous compliance is physically impossible. The notion of conflict requires a determination that there is an "inevitable collision between the [state and federal] schemes of regulation."(36) Simply put, it takes two laws – state and federal – for a collision. State real estate lending license laws have nothing to collide with at the federal level and should not be preempted.

"Stands as an Obstacle"

The *Hines* Court established the second standard of conflict preemption – that "the state law stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (37) The OCC on a number of occasions has used the *Barnett* decision in its rational for preemption determinations, including two such decisions involving state occupation/ professional license laws.(38) Specifically, the OCC holds the following *Barnett* excerpt as the agency's effigy for "stands as obstacle" –

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases [i.e. national bank preemption cases] take the view that *normally* Congress would not want States to forbid, or to impair significantly, the exercise of a *power that Congress explicitly granted*. To say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers. (39)

The *Barnett* Court drew attention to the latter part of the above statement (i.e., [t]o say this is not to deprive States . . .) by citing three supporting cases where the Court held certain state laws did not "unlawfully encroach," (40)would not "destroy or hamper" (41) and do not "interfere with, or impair"(42) national banks' functions, rights or privileges.

In the same preemption decisions involving state occupation/professional license laws, the OCC further maintains that the *Barnett* Court finds preemption of state laws that condition the exercise of national bank powers. Specifically, the OCC states:

> Where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done by express language (sic) in several other instances."(43)

What the OCC has neglected to refer to when citing the above *Barnett* passage is the *Franklin* Court's note that "[e]ven in the absence of such express language, national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law." (44)

Objectives of Congress – Real Estate Lending

Congressional intent, it can be argued, is in the eye of the beholder. This is especially true for

statutes codified in the early history of our nation and that have been subsequently amended to accommodate evolving public interests. When presented with a preemption question as to whether a state law "stands as an obstacle," courts "[e]xamine the explicit statutory language and the structure and purpose of the statute."(45)

In the case of national banks' real estate lending activities, it is erroneous for the OCC to rely on the original congressional purpose of the National Bank Act when the Act did not even address such lending powers. Instead, it is more relevant to closely examine Congress' objectives when real estate lending powers were first authorized for national banks in 1913, together with Congress' objectives when the banking system was overhauled in 1982. (46) The Federal Reserve Act was enacted to bring stability and integrity to the nation's financial system and to establish a more effective supervision of banking.(47) The objective of Garn-St. Germain was to revitalize the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans. (48)

Congress attempted to achieve the objective of Garn-St. Germain by easing "rigid statutory limitations."(49) However, Congress was not referring to state imposed "rigid statutory limitations," instead Congress was referring to its self-imposed federal limitations on real estate lending activities.

Thus, when considering whether or not state real estate lending license laws "stand as an obstacle" to Congress' objectives in legislating national banks' real estate lending activities, one must ask,

- Do state real estate lending license laws impede the stability, integrity or supervision of national banks?
- Do state real estate lending license laws interfere with or weaken the mortgage lending market?

NAR maintains that the answer to both of these questions is a resounding "No" – there is no impediment and there is no interference with the intent of federal law governing real estate lending.

I. State Real Estate Lending License Laws May Not be Preempted Because They Do Not Discriminate Against National Banks

Traditionally, courts will find that a state law is not preempted as long as it does not discriminate by imposing disproportionate restrictions. One of the earliest cases on this point is *Davis v. Elmira Savings Bank* where the Court stated:

Nothing of course . . . is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of Congressional legislation.(50)

Recently, a California court was asked to consider a federal preemption claim by a savings and loan association (regulated by the OTS and governed by Home Owners' Loan Act). The court, when analyzing the applicability of implied preemption held:

> The duties [of California's unfair competition law] govern, not simply the lending business, but anyone engaged in any business and anyone contracting with anyone else. On their face, [the state law] do[es] not purport to regulate federal savings associations and are not specifically directed toward them. Nor is there any evidence that they were designed to regulate federal savings associations more than any other type of business, or that in practice they have a disproportionate impact on lending institutions.(51)

It is notable that there are license requirements for a number of the services involved in the real estate lending context that are imposed primarily for consumer and public interest protection

purposes. Most state statutes regarding occupational licenses fall within the "business and professional" section of the governing code. Except for mortgage lender/broker, licenses for real estate related service professionals (insurance, title service, appraiser, home inspector, legal service, termite/insect inspector, surveyor, escrow agent, etc.) are not considered "lending regulations," and apply equally and in some cases predominantly in other transactions.

Thus, there is no discrimination against national banks, and thus no implied preemption under the *Gibson* rationale, because:

- Real estate lending license laws are not solely applicable to the banking business, but to anyone who is engaged in the real estate services industry;
- Real estate lending license laws are not specifically directed toward national banks;
- There is no evidence that real estate lending license laws were designed to regulate national banks more than any other type of business; and
- There is no evidence that real estate lending license laws have a disproportionate impact on national banks.

I. Conclusion

In the OCC's material accompanying its Final Rule, the agency asserted,

> Preemption of state laws governing national banks' real estate lending certainly *does not* [sic] mean that such lending would be unregulated. On the contrary, national banks' real estate lending is highly regulated under federal standards and subject to comprehensive supervision. (52)

While NAR agrees with the OCC that their regulatory enforcement in certain areas of real estate lending has helped to protect consumers, we maintain that these are congressionally prescribed supervisory standards. The OCC has taken positive steps in the areas of combating predatory lending, reining in banks that partner with payday lenders and working with community organizations to promote consumer education.

However, NAR believes the current standards for applicability of state law detailed in the OCC regulations (12 C.F.R. § 34.4) are as far as the agency can go without an act of Congress clarifying their explicit intent to preempt state real estate lending laws.

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(1) *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks.").

(2) *McClellan* v. *Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions).

(3) *National Bank v. Commonwealth*, 76 U.S. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government.").

(4) *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982).

(5) Cong. Globe, 38th Cong., 1st Sess. 1256 (March 24, 1864).

(6) Federal Reserve Act, ch. 6, § 24, 38 Stat. 251 (1913).

(7)S. Rep. No. 97-536, at 27 (1982).

(8)Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, Stat. 1469 (1982).

(9) S. Rep. No. 97-536, at 27 (1982).

(10) 48 Fed. Reg. 40698-40701 (September 9, 1983).

(11) Id. at 40699 (emphasis added).

(12) 12 C.F.R. § 34.2(b).

(13) 12 C.F.R. § 34.4(b). The OCC's 1996 rulemaking also revised the numbering of part 34 – § 34.2
became § 34.4.

(14) GAO Report, *Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law*, B-284372 at 2,4 (February 7, 2000).

(15) Id. at 2.

(16) GAO Report at 7 (emphasis added).

(17) *Fidelity Fed. Sav., supra*, at 153, quoting *Rice, supra*, at 230.

(18) John Duncan, *The Course of Federal Preemption of State Banking Law*, 18 Ann. Rev. Banking L. 221, 232 (March 1999). Example of findings of pervasiveness include interstate sale of natural gas, American Indian affairs, airport noise pollution, etc. Id. at 233.

(19) Id. 233. The Court in *Fidelity Fed. Sav.* noted "[b]ecause we find an actual conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation." *Fidelity Fed. Sav., supra*, at 158 n. 14.

(20)*Hines v. Davidowitz,* 312 U.S. 52, 66 (1941), quoting in part *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824).

(21) *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985).

(22) Id. at 717.

(23)68 Fed. Reg. 46124 (August 5, 2003).

(24) Duncan, 312.

(25) The Gramm-Leach-Bliley Act expressly provides for compliance with state insurance licensing laws, "no person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law." 15 U.S.C. 6701 (2000). The Financial Institutions Reform, Recovery and Enforcement Act recognizes state appraisal licenses and requires use of certified and licensed appraisers in federally related transactions. 12 U.S.C. 3336 (2000).

(26) H.R. Conf. Rep. No. 103-651, at 53 (1994).

(27) Id. (emphasis added).

(28) Id. The Conference Report specifically cited the OCC's preemption of the New Jersey

Consumer Checking Account Act and the OCC's interpretive rule at 12 C.F.R. 7.8000, preempting any State law that attempts to prohibit, limit, or restrict deposit account service charges. The conferees urged the OCC to reconsider both these preemption interpretations.

(29) GAO Report, 6.

(30) *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996), quoting *Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

(31)Id., quoting *Hines, supra,* at 67.

(32) *See, e.g.* footnote 23.

(33)*See, Hillsborough, supra* at 722.

(34) Letter of June 7, 2000 from FTC to Connecticut Banking Commissioner.

(35) Id. quoting *Pacific Gas & Elect. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 218-219 (1983).

(36) *Florida Lime & Avocado Growers, supr,* at 143.

(37) *Hines, supra,* at 67.

(38) 65 Fed. Reg. 15037-15041 (March 20, 2000) and 66 Fed. Reg. 23977-23979 (May 10, 2001). In addition to these two Preemption Determinations, the OCC frequently cites *Barnett* in other publications such
as congressional testimony, amicus briefs, advisories and public speeches.

(39) Id. at 33 (emphasis added).

(40)*Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not "unlawfully encroach on the rights and privileges of national banks.").

(41)*McClellan* v. *Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions).

(42) *National Bank v. Commonwealth*, 76 U.S. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government.").

(43) *Barnett, supra* at 34. 65 Fed. Reg. 15037-15041 (March 20, 2000) and 66 Fed. Reg. 23977-23979 (May 10, 2001).

(44) *Franklin National Bank v. New York*, 347 U.S. 373, 378 n. 7(1954) citing *Anderson, supra* and *McClellan, supra.* (emphasis added).

(45) *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

(46) *Federal Reserve Act*, ch. 6, § 24, 38 Stat. 251 (1913) and *Garn-St. Germain Depository Institutions Act of 1982*, Pub. L. 97-320, § 403, Stat. 1469 (1982).

(47) Testimony of the Vice Chairman of the Board of Governors of the US Federal Reserve System, Ms. Alice M. Rivlin, before the Committee on Banking and Financial Services of the

US House of Representatives on July 29, 1997.

(48) S. Conf. Rep. No. 97-536, at 27 (1982).

(49) Id.

(50) *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896), see also *First Nat'l Bank of San Jose v. California*, 262 U.S. 368, 369 (1923).

(51) *Gibson v. World Sav. & Loan Ass'n*, Cal. App. 4th 1291, 1302 (2002).

(52) OCC *Question and Answers* for Final Rule 12 CFR Parts 7 ans 34 Bank Activities and Operations; Real Estate Lending Activities, http://www.occ.treas.gov/2004-3dPreemptionQNAs.pdf.

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