

February 4, 2009

By overnight mail and facsimile transmission

The Honorable Timothy F. Geithner
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220-0002

re: Obama Administration's Position on Whether States May Protect Consumers
Against National Banks' Predatory Lending Is Due on February 25, 2009, in
United States Supreme Court

Dear Secretary Geithner,

On behalf of Consumers Union, the nonprofit, independent publisher of *Consumer Reports* magazine,¹ I convey our congratulations on your appointment as Secretary of the Treasury. As you tackle the financial crisis and challenges confronting our nation, we look forward to working closely with you and your staff on initiatives that can improve the financial well-being of America's consumers and, in the words of President Obama, remedy a massive "failure of oversight and accountability [that] has the potential to devastate our entire economy."²

I write concerning one significant decision you face now, with both short-term and long-term consequences. On February 25, 2009, the United States will file a brief in the United States Supreme Court in a case that will decide the ability of states to monitor and enforce mortgage-lending protections, anti-discrimination laws, and other important consumer protections in the financial sector. We respectfully urge you to consider immediately and carefully what is at stake, to reverse the position of the United States, and to direct that the Office of the Comptroller of the Currency, a bureau within the Department of the Treasury, rescind the regulations at issue in the case.

¹ For more than 70 years, Consumers Union has worked for a fair and safe marketplace for all consumers. Consumers Union's publications, including *Consumer Reports* and ConsumerReports.org, have a combined paid circulation of approximately 8.5 million, and we have a dedicated team of consumer advocates and grassroots organizers who work with our more than 650,000 online activists to strengthen government policies and the marketplace in favor of consumers.

² Transcript, Dec. 18, 2008.

In Cuomo v. The Clearing House Association, L.L.C. and Office of the Comptroller of the Currency, No. 08-453, New York's Attorney General sought to investigate whether the residential mortgage-lending practices of several nationally chartered banks and their operating subsidiaries doing business in New York were racially discriminatory because they were issuing high-interest home mortgage loans in significantly higher percentages to African-American and Latino borrowers than to White borrowers. The Office of the Comptroller of the Currency (OCC) and a consortium of national banks sued to prevent New York's Attorney General from enforcing those anti-discrimination laws against national banks. The OCC and banks cited a recent OCC regulation that purports to prevent states from enforcing state laws against national banks and their operating subsidiaries, even when the state laws are not substantively preempted. Unfortunately, the Second Circuit deferred to the OCC's regulation and interpretation of the National Bank Act.³ New York's Attorney General filed a petition for writ of certiorari, and the remaining 49 states' attorneys general filed an amicus brief urging the United States Supreme Court to reverse this egregious result. The Court granted review on January 16, and the government's brief is due February 25, 2009.

For the past four years and more, the Office of the Comptroller of the Currency has been siding with banks against consumers and against states, championing deregulatory and minimal standards against states that have been trying to enforce higher standards for banks and their operating subsidiaries.

When states tried to monitor mortgage lending and to protect consumers, the OCC instructed the banks that they "should contact the OCC in situations where a State official seeks to assert supervisory authority or enforcement jurisdiction over the bank."⁴ Banks could not refuse such an invitation, and complained to the OCC about state efforts to investigate or enforce state laws against the bank or its operating subsidiaries. The OCC responded with letters to banks and state banking agencies asserting that the states had no authority to investigate or enforce state laws against national banks and their operating subsidiaries, that only the OCC could enforce such laws against the banks, and that the banks need not comply with the state laws.⁵

³ 510 F.3d 105 (2d Cir., 2007).

⁴ Office of the Comptroller of the Currency, Interpretive Letter No. 957 (Jan. 27, 2003) (citing OCC Advisory Letter 2002-9 (Nov. 25, 2002)).

⁵ E.g., Office of the Comptroller of the Currency, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003) (stating that "the provisions of the GFLA [Georgia Fair Lending Act] affecting national banks' real estate lending are preempted by Federal law" and "issuing an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia"); Office of the Comptroller of the Currency, Interpretive Letter No. 958 (Jan. 27, 2003) (National City Bank of Indiana, and its operating subsidiaries, National City Mortgage Company, First Franklin Financial Corporation, and Altegra Credit Company,

The OCC also sided with national banks in the courts, writing amicus briefs arguing that state monitoring and enforcement in a variety of areas were preempted, and that only the OCC could investigate and enforce laws against the banks. This included the case decided by the United States Supreme Court in 2007 against Michigan,⁶ in which the OCC sided with Wachovia Bank and argued that state mortgage lending laws and oversight could not apply to a national bank's operating subsidiary.

Michigan and most of the other states covered by OCC's letters cited above--Georgia, Ohio, and California--have something else in common: they are now among the very states at the center of the mortgage crisis, with the highest foreclosure rates, according to the Mortgage Bankers Association.⁷ Wachovia, which the OCC defended in the Supreme Court, subsequently found itself on the brink of collapse because of risky mortgages and was forced to sell itself to Wells Fargo.

The stakes and long-term consequences are enormous. The national banks that the OCC regulates comprise almost *three quarters* (73.76% as of September 30, 2008) of the consolidated assets of the nation's large commercial banks. The current financial crisis originated in the mortgage crisis, and the nine largest national banks and their mortgage subsidiaries--regulated by the OCC--alone comprise 40 percent of all outstanding mortgages.⁸ By reversing the position of the United States before the Supreme Court and directing that the OCC rescind its pro-preemption regulations⁹ and interpretation of the National Bank Act, you

regarding Ohio's authority to monitor their mortgage banking and servicing businesses) (found at 2003 OCC Ltr. LEXIS 10); Office of the Comptroller of the Currency, Interpretive Letter No. 957 (Jan. 27, 2003) (Bank of America, N.A., and its operating subsidiary, BA Mortgage LLC, regarding California's authority to examine the operating subsidiary's mortgage banking and servicing businesses and whether the operating subsidiary was required to maintain a license under the California Residential Mortgage Lending Act) (found at 2003 OCC Ltr. LEXIS 11); Office of the Comptroller of the Currency, Interpretive Letter No. 971 (Jan. 16, 2003) (letter to Pennsylvania Department of Banking, that it does not have the authority to supervise a unnamed national bank's operating subsidiary which engages in subprime mortgage lending (unnamed because the letter is unpublished)) (found at 2003 OCC QJ LEXIS 107).

⁶ Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (OCC filed an amicus brief supporting Wachovia and arguing that Michigan's banking laws, including licensing, reporting, investigative, and enforcement powers were preempted by the OCC's regulations and the National Bank Act).

⁷ Mortgage Bankers Association, National Delinquency Survey, First Quarter 2008.

⁸ Office of the Comptroller of the Currency, OCC Mortgage Metrics Report: Analysis and Disclosure of National Bank Mortgage Loan Data, October 2007-March 2008, at p. 1.

⁹ 12 C.F.R. §§ 7.4000(a)(3), 7.4006, 7.4007(b), 7.4008(d), 7.4009(b), (c)(1), 34.4(a).

can increase substantially the efforts to monitor and enforce higher standards against the banks at the heart of the current financial crisis.

In short, the United States' position in this case should not be left, unreviewed, solely to those in the Office of the Comptroller of the Currency. A matter so important in the midst of the current fiscal crisis warrants your own review to incorporate the broader issues and interests at stake, and to ensure that states may lend a hand and help to ensure that consumers are protected from financial discrimination and unfair or deceptive practices.

I welcome the opportunity to discuss this with you and your staff at your earliest opportunity. Time is short, for the government's brief setting forth its position in the case is due on February 25. You may reach me or my colleague Mark Savage at (415) 431-6747.

Respectfully yours,



Gail Hillebrand
Financial Services Campaign Manager
Consumers Union of United States, Inc.

attachment

cc: The Honorable Eric Holder
Attorney General of the United States

08-453 CUOMO V. THE CLEARING HOUSE ASSOCIATION, L.L.C.

DECISION BELOW:510 F.3d 105

LOWER COURT CASE NUMBER: 05-5996, 05-6001

QUESTIONS PRESENTED:

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" as to national banks, except where those powers are authorized by federal law, vested in the courts of justice, or exercised by Congress or a House or committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting § 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
2. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

CERT. GRANTED 1/16/2009

EXPEDITED BRIEFING SCHEDULE.