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# Prepaid and Stored Value Cards: Navigating the CARD Act and New FinCEN Regulations

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Gizelle Barany, Senior Corporate Counsel, **Blackhawk Network**, Pleasanton, Calif.

Marilyn D. Barker, Counsel, **Bryan Cave**, Washington, D.C.

Chris Daniel, Partner, **Paul Hastings Janofsky & Walker**, Atlanta

**Thursday, January 28, 2010**

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**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

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# **CARD Act Prepaid and Store Value Card Provisions (and Federal Reserve Board Proposed Card Act Rules)**

Gizelle Barany



- ❖ Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) (Amends EFTA)
- ❖ Signed into law May 22, 2009
- ❖ Federal Reserve Board (Board) and FINCEN Final Rules due February 22, 2010
- ❖ CARD Act Becomes Effective August 22, 2010



## **Rulemaking:**

- ❖ Board charged with prescribing regulations and determining extent to which individual definitions and provisions of EFTA should apply to covered products.
- ❖ Board to consult with FTC.
- ❖ Secretary of Treasury (Treasury) charged with issuing regulations implementing the Bank Secrecy Act regarding the sale, issuance, redemption, or international transport of covered products.
- ❖ Treasury to consult with Secretary of Homeland Security.



## **Products Subject to CARD Act:**

- ❖ **Gift Certificates** (Per proposed rules includes non-reloadable, closed loop gift cards)
- ❖ **Store Gift Cards** (Per proposed rules includes reloadable, closed loop gift cards & mall cards)
- ❖ **General Use-Prepaid Cards** (Per proposed rules includes non-reloadable open loop gift cards and reloadable open loop cards marketed as gift cards)

**(for purposes of presentation, all covered products called gift cards)**

# Products Excluded From CARD Act

- ❖ Usable solely for telephone services
- ❖ Reloadable and **not** marketed or labeled as a gift card or certificate
- ❖ Loyalty, award and promotional gift cards
- ❖ Not marketed to the general public
- ❖ Issued in paper form only
- ❖ Redeemable solely for admission to events or venues



## **CARD Act Provisions:**

- ❖ Fee Restrictions
- ❖ Expiration Date Restrictions
- ❖ Disclosure Requirements
- ❖ Limit on Federal Preemption (States May Enact More Protective Provisions)





### **Types of Fees Restricted by CARD Act:**

- ❖ Dormancy Fees
- ❖ Inactivity Fees
- ❖ Service Fees

### **Fee Restrictions:**

- ❖ Fees cannot be imposed until 13 months after inactivity
- ❖ Only one fee may be assessed in a calendar month
- ❖ Per proposed Board Rules, if more than one dormancy, inactivity or service fee may be assessed, issuer can choose which one to impose
- ❖ Clear & conspicuous fee disclosure on gift card prior to purchase

# Expiration Date Restrictions

It is unlawful to sell or issue a gift card subject to an expiration date unless:

- The expiration date is not earlier than 5 years after the gift card issuance date or date of last load, and
- Clear and conspicuous disclosure of terms of expiration



## **Key Provisions/Issues Presented by Proposed Board CARD Act Rules**

## Service Fee/Activity (Per Proposed Board Rules):

- ❖ **Service Fee:** Periodic fee imposed for holding or using gift card
  - INCLUDES (whether or not waived):
    - monthly maintenance fee
    - transaction fee
    - reload fee
    - balance inquiry
  - EXCLUDES: One time initial issuance fee
  
- ❖ **Activity:** Any action by a consumer to increase, decrease or otherwise make use of fund underlying a gift card.
  - INCLUDES:
    - purchase & activation of a gift card
    - reloading funds onto a gift card
  - EXCLUDES:
    - imposition of a fee
    - replacement of expired, lost or stolen gift card
    - balance inquiry

## Cards/Products Excluded From CARD Act: *loyalty, award and promotional gift cards (LAP Cards)*

### **LAP Cards are:**

- ❖ Issued in connection with a loyalty, award or promotional program
- ❖ Redeemable at one or more merchants for goods/services or usable at ATM
- ❖ Disclosure:
  - clear and conspicuous disclosures of any fees, including dormancy, inactivity, or service fees, or expiration dates, & toll-free number and Web site for additional information must be on card when cards is received.
  - disclosures of other fees may accompany card

**Note:** Does not require providing payment or other value

**Issue:** Failure to meet disclosure requirements could cause LAP Cards to lose exemptions (not intent of Congress)

## Cards/Products Excluded From CARD Act: *Reloadable and not marketed or labeled as a gift card or certificate*

### **Impacts how general purpose reloadable cards (GPR cards) may be marketed, while maintaining CARD Act exemption**

- ❖ “Not marketing or labeling as a gift card or certificate” means not directly or indirectly offering, advertising, or otherwise suggesting the potential use of a card...as a gift for another person
- ❖ Exclusion for reloadable card will be lost if any party, such as the issuer, program manager, distributor, seller, etc. makes the promotional message

## Cards/Products Excluded From CARD Act : Reloadable *and not marketed or labeled as a gift card Con't*

### **Examples of not marketing or labeling a GPR card as a gift card (GRP card maintains CARD Act exemption):**

- ❖ Simply because a purchaser gives the card to another as a “gift”
- ❖ Card is represented as substitute for checking, savings, or budgetary tool, or use for emergency expenses
- ❖ Card is promoted as substitute for travelers’ checks or cash for personal use or health care expense use

### **Examples of marketing or labeling a GPR card as a gift card even if above examples apply (GPR card loses CARD Act exemption) :**

- ❖ If card is promoted as a gift card or gift cert.
- ❖ Card is advertised as “perfect gift” for holiday.
- ❖ Displaying the word “gift” or “present”, congratulatory message & incorporate gift-giving or celebratory message or motifs on the card or accompanying material, like documents, package & promotional displays.
- ❖ Representing or suggesting that a card can be given to another person, such as “token of appreciation,” or “stocking stuffer.”

## Cards/Products Excluded From CARD Act : *Reloadable and not marketed or labeled as a gift card Con't*

If issuers & program managers have **policies & procedures** reasonably designed to avoid marketing GPR cards as gift cards, then GPR cards keep their exemption even with marketing mistakes like a retail clerk inadvertently placing a GPR cards on gift card displays.

### **Examples of such policies & procedures:**

#### **INCLUDES (GRP card maintains CARD Act exemption): :**

- ❖ Contract with retailer prohibits GPR cards from being sold/ marketed as gift cards & provides for regular monitoring or verifying compliance. Also, issuer/program manager sets up separate displays for gift cards and GPR Cars.

#### **EXCLUDES (GPR card loses CARD Act exemption):**

- ❖ Same as above but issuer/program manager sets one display for gift cards and GPR cards, and a sign stating "Gift Cards" appears prominently at the top.



# Expiration Date Restrictions

- ❖ Funds cannot expire less than 5 years after date of issuance (defined as activation in proposed Board rules) or last load
- ❖ Gift card plastic cannot expire less than 5 years after purchase
- ❖ Can't impose replacement gift card fee for expired card (ok to impose fee for lost/stolen card)
- ❖ Clear & conspicuous disclosure on gift card prior to purchase

## Alternate Rules:

### Alternate A:

- ❖ "Plastic" exp. date must be at least 5 years after date of purchase (this would require retailers to know at POS minimum time left on a card plastic).

### Alternate B:

- ❖ Issuers, distributors and sellers of gift cards must adopt **policies and procedures** to ensure that a consumer will have a **reasonable opportunity** to purchase a gift card that has at least 5 years remaining after purchase until "plastic" expires. (i.e. display a gift card no later than 6 months after produced if "plastic" expires 6 years after card was produced)
- ❖ No requirement for seller to confirm before sale that gift card "plastic" is valid for at least 5 years after purchase

# Disclosures

Disclosures that must be on the gift cards (not enough room on card):

- ❖ The amount of any dormancy, inactivity or service fees (which includes any balance inquiry, reload fee, ATM fee or other transaction fee);
- ❖ How often such fees may be assessed;
- ❖ The fact that such fees may be assessed for inactivity;
- ❖ The card “plastic” expiration date, if any;
- ❖ The underlying funds expiration date, or if the underlying funds do not expire, that fact;
- ❖ A statement in equal prominence and close proximity to the gift card “plastic” expiration date noting that the gift card expires, but that either the underlying funds do not expire or expire at a later date, and that the cardholder may contact the issuer for a replacement card;
- ❖ A toll-free telephone number and, if maintained, a website that the consumer may use to obtain a replacement card after the card expires if the underlying funds do not expire; and
- ❖ A toll-free telephone number and, if maintained, a website that the consumer may use to obtain information about all card fees.

## Grandfathering Cards In Market

Industry will only have 6 months to respond to new rules:

- ❖ Design and obtain approvals for new gift card art, packaging and terms and conditions.
- ❖ Manufacture and package new gift cards (in the multi millions) and collateral material (i.e. cards, packaging, terms and conditions, signage).
- ❖ Possibly produce new displays and signage for marketing of GPR cards.
- ❖ Remove all non-complying gift cards from displays and merchandise with new complying gift cards.
- ❖ Possibly remove all GPR cards from current displays and merchandise onto new.

**Proposal:** Grandfather in existing product in market (including product in manufacturing, distributor and seller warehouses (and stores)) as long as issuers comply with CARD Act fee and expiration date restrictions and inform consumers via signage, IVR, websites (including downloadable disclosures)



Gizelle Barany, Senior Corporate Counsel of Blackhawk Network, Inc.

Her practice area includes financial services matters, with a focus on network branded prepaid products and related federal regulations. Her practice areas also include closed loop prepaid products, antitrust and unfair competition and general commercial contracting. Blackhawk is a prepaid and payments network, a market leader in card-based financial solutions and the largest provider of third-party prepaid cards. Blackhawk develops unique products in easy-to-use formats and delivers them to consumers through an exclusive retail network of leading grocery, mass, drug, convenience, and specialty retailers in the United States and abroad. Headquartered in Pleasanton, California, Blackhawk Network has offices worldwide including the United States, Canada, Mexico, Australia, Japan, France and the United Kingdom.



**FinCEN Regulation of Prepaid and Stored Value Cards:  
An Imminent New Paradigm in AML Compliance Risk**

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**Marilyn Barker  
Counsel  
January 28, 2010**



*A Broader Perspective<sup>SM</sup>*

# Section 503 of the CARD Act Specific Directive

- Section 503 of the CARD Act directs that the Secretary of the Treasury [through FinCEN], in consultation with the Secretary of the Homeland Security, shall issue regulations in *final form* implementing the Bank Secrecy Act, regarding the sale, issuance, redemption or international transport of stored value including stored value cards ... [taking] into consideration current and future needs and methodologies for transmitting and storing value in electronic form.” [Emphasis added]

# Section 503 of the CARD Act Specific Directive

- FinCEN has been directed to issues its final rules with 270 days, which would fall on February 24<sup>th</sup>.
- How does this square with FinCEN's obligations under the Administrative Procedures Act?

# FinCEN's May 2009 Proposal Responding to the CARD Act's Directive

- FinCEN issued a rulemaking proposal designed to:
  - Revise the MSB definitions by describing with greater clarity the type of financial activity that would subject a business to the Bank Secrecy Act's implementing rules;
  - Incorporate past FinCEN administrative rulings, interpretative guidance and policy determinations into the regulatory text to make it easier for companies to know their MSB status and related responsibilities; and
  - Solicit comments on stored value issues in an effort to better inform future rulemaking addressing providers of stored value.



# FinCEN's May 2009 Proposal Responding to the CARD Act's Directive

- What will FinCEN do in relation to stored value regulation based on a reading of the May 2009 proposal?!
  - Option 1: Closed Loop Products  
FinCEN stated in its proposal that it did “not want a department store that sells gift cards that only may be used at the department store, or a mall operator who sells gift cards that may only be used within the confines of the mall operator’s locations, to be subject to the MSB rules as a money transmitter.” [Emphasis added]

## FinCEN's May 2009 Proposal Responding to the CARD Act's Directive

- Translation: This means that FinCEN contemplates now recognizing closed loop products as within its Bank Secrecy Act regulatory regime as a covered MSB contrary to its 2003 administrative ruling: Definition of Money Transmitter Stored Value (Gift Certificate/Gift Cards) (August 15, 2003). In that ruling FinCEN, recognizing that closed loop products present lower AML risk than open loop, announced that it “does not currently interpret the definition of stored value to include closed system products such as a mall-wide gift card program.”

# FinCEN's May 2009 Proposal Responding to the CARD Act's Directive

- Consequence: The inclusion of closed loop issuers, sellers and redeemers meeting the \$1,000 dollar threshold means that they will have to (i) establish and implement an AML program and (ii) file CTRs (instead of IRS Form 8300) but they would not be subject to registration, direct examination or mandatory SAR filings.

# FinCEN's May 2009 Proposal Responding to the CARD Act's Directive

- Option 2: Regulate Open Loop as Money Transmission

This interpretation is simplistic since open loop products are mere payment instruments used as one form of payment method in settling transactions.

# FinCEN's Money Transmitter Redefinition Proposal

The proposal would revise the current definitional framework --- which provides a facts and circumstances limitation excluding from the definition persons that are engaged in the business of money transmission as an integral part of the execution and settlement of a transaction other than a funds transmission itself.

# FinCEN's Money Transmitter Redefinition Proposal

- The revised framework would use concise exceptions to the definition and illustrations based on guidance and administrative relief FinCEN has rendered over the past years.
- These exceptions would include entities that are used “solely for the purpose of providing a medium of communication or transportation on information between money services businesses and their agents, financial institutions, or service providers,” as well as entities that “solely provide a clearance and settlement system or act as intermediaries between Bank Secrecy Act regulated institutions and do not provide other types of money transmission services as mere instrumentalities that the financial institutions use to process their transfers.”

# FinCEN's Money Transmitter Redefinition Proposal

- Current Money Transmitter Definition: Any person whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds denominated in currency, or the value of the currency or funds, by any means through a financial agency ... or an electronic funds transfer network, or any other person engaged as a business in the transfer of funds.

# FinCEN's Money Transmitter Redefinition Proposal

- Proposed Definition: A person who provides money transmission services which includes “the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of such currency, fund, or value to another location or person by any means.
- Translation: The proposed definition would apply to open loop stored value and exempt closed loop stored value. As a consequence, FinCEN's proposed definition would go beyond established guidance wherein FinCEN has definitively stated previously that



# FinCEN's Money Transmitter Redefinition Proposal

- Further Translation: The proposed definition would apply to open loop stored value and exempt closed loop stored value. As a consequence, FinCEN's proposed definition would go beyond established guidance wherein FinCEN has definitively stated previously that:

# FinCEN's Money Transmitter Redefinition Proposal

- In an administrative ruling released last week, FinCEN concluded that a company that transmits funds in connection with the sale of sale and reload of stored value as a service provider in with a distributor agreement is not deemed a money transmitter. Under the distributor agreement, the company would engage in marketing and sales promotion with retailers, capture card purchases and reload funds accepted by retailers and then transfer those funds to a bank for crediting to the appropriate stored value accounts. The company, essentially, is providing data processing hardware and software and product networking services to merchants and financial institutions. FinCEN concluded based on these facts and circumstances, that the company was deemed not to be a money transmitter.

# FinCEN's Money Transmitter Redefinition Proposal

- Certain retailers who receive funds for initial purchase or reloads of stored value cards are not money transmitters;
- Transactions involving the acceptance of currency from one person at one location and the return of that currency to the same person at the same location would not be considered as money transmission;

# FinCEN's Money Transmitter Redefinition Proposal

- Merchant payment processor acting exclusively on behalf merchants receiving payments for goods and services, rather than on behalf of consumers making payments to merchants is not a money transmitter; and
- Merchant payment processor who processes payments from consumers as an agent of the merchant to whom the consumers owe money --- rather than on behalf of the consumer themselves --- is not a money transmitter by virtue of such activities.

# FinCEN's Money Transmitter Redefinition Proposal

- Best Approach: Consider the risk profile of stored value products generally. FinCEN should consider that there have been few reported instances of law enforcement actions that entail the domestic abuse and misuse of stored value cards by money launderers or terrorist financiers.

# FinCEN's Money Transmitter Redefinition Proposal

- In the rulemaking proposal, FinCEN stated that it “is deferring the proposal of a new rulemaking regarding issuers, sellers, and redeemers of stored value at the present time.” FinCEN further stated that it would “continue to study the nature and the risks of this emerging industry before proposing a separate future rulemaking. At this point, FinCEN is not proposing to revise the definition of stored value found at 31 CFR 103.11(vv).”

# FinCEN's MSB Redefinition Proposal

FinCEN, in its final rules, hopefully will provide clarity for the industry on certain hybrid products that incorporate aspects of technology affecting their overall risk posture and MSB status classification.

# Other CARD Act Mandates

- The CARD Act also mandated that FinCEN issue regulations on the international transport of stored value including stored value cards; however, FinCEN has not proposed any rulemaking addressing this requirement.



# Other CARD Act Mandates

- Homeland Security has long wanted the inclusion of stored value products to FinCEN Form 105 --- the Report of International Transportation of Currency or Monetary Instruments (or CMIR). This approach does not consider that funds are not stored or held on the card and that the card is just a mere access device.

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*Paul Hastings*

**The Current Status of Preemption  
and an overview of the  
Proposed CFPAA**

*Chris Daniel*

# *Current Status of Preemption* PaulHastings

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1. Constitutional Basis
2. What is Preemption?
3. Codification of Preemption Principles in the National Bank Act of 1864 and the Home Owner's Loan Act of 1933
4. Holding of Cuomo
5. Holding of Walters v. Wachovia and Simon line of cases

# *Current Status of Preemption*

## *(cont'd)*

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### **1. Constitutional Basis**

Federal preemption of state laws is rooted in the Supremacy Clause of the U.S. Constitution, which states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

# *Current Status of Preemption*

## *(cont'd)*

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Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”[\[1\]](#);  
[\[1\]](#) *U. S. Constitution*, Art. VI, para. 2.

# *Current Status of Preemption* *(cont'd)*

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## **2. What is Preemption?**

A recent case that outlined the grounds for declaring a federal law preemptive of a state law is Barnett Bank of Marion County, N.A. v. Nelson. These grounds are characterized by the OCC as follows:

*First, congress can adopt express language setting forth the existence and*

# *Current Status of Preemption (cont'd)*

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*scope of preemption. Second, Congress can adopt a framework for regulation that “occupies the field” and leaves no room for states to adopt supplemental laws. Third, preemption may be found when state law actually conflicts with Federal law. Conflict will be found when either: (1) compliance with both laws is a “physical impossibility,”*



# *Current Status of Preemption (cont'd)*

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*or (ii) when the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” (citations omitted).*

# *Current Status of Preemption*

## *(cont'd)*

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### **3. Codification of Preemption Principles in the National Bank Act of 1864 and the Home Owner's Loan Act of 1933.**

#### **A. National Bank Act of 1864**

- i. Section 24 of the National Bank Act grants national banks broad powers to exercise “all such incidental powers as shall be necessary to carry on the business of banking.”

# *Current Status of Preemption*

## *(cont'd)*

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- ii. Section 484(a) of Title 12, U.S.C., a provision of the National Bank Act, reads as follows:

*“No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by an committee of Congress or of either House duly authorized.”*

# *Current Status of Preemption*

## *(cont'd)*

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- iii. OCC's regulation implementing Section 24 of the NBA:
  - § 7.4009 – Applicability of state law to national bank operations.
    - a) Authority of national banks. A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

# *Current Status of Preemption*

## *(cont'd)*

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- b) Applicability of State Law. Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.
- c) Applicability of state law to particular bank activities.
  - 1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

# *Current Status of Preemption*

## *(cont'd)*

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- 2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:
  - (i) Contracts;
  - (ii) Torts;
  - (iii) Criminal law 8 8 8 Id.;
  - (iv) Rights to collect debts;
  - (v) Acquisition and transfer of property;
  - (vi) Taxation;
  - (vii) Zoning; and
  - (viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

# *Current Status of Preemption*

## *(cont'd)*

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- iv. OCC's Regulation implementing Section 484(a) of the NBA:

*§7.4000 Visitorial Powers.*

*(a) General rule. (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State Officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or*

# *Current Status of Preemption (cont'd)*

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*or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.*

*(2) For purposes of this action, visitorial powers include:*

*(i) Examination of a bank;*



# *Current Status of Preemption (cont'd)*

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*(2) For purposes of this action, visitorial powers include:*

- (i) Examination of a bank;*
  - (ii) Inspection of a bank's books and records;*
  - (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and*
  - (iv) Enforcing compliance with any applicable federal or state laws concerning those activities.*
- 12 CFR §7.4000 (2009).*

# *Current Status of Preemption*

## *(cont'd)*

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### B. Home Owner's Loan Act of 1933

- i. Pursuant to the Home Owner's Loan Act, federal savings associations possess broad authority to conduct all activities that are consistent with safe and sound banking practices. 12 U.S.C. §§ 1463 and 1464.
- ii. The Board, an independent federal regulatory agency, as formed in 1932 and thereafter was vested with plenary authority to administer the

# *Current Status of Preemption*

## *(cont'd)*

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*Paul Hastings*

Home Owners' Loan Act of 1933....Section 5(a) of the HOLA, 12 U.S.C. 1464(a) (1976 ed., Supp. IV), empowers the Board, [458 U.S. 141, 145] “under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as “Federal Savings and Loan Associations.”

# Current Status of Preemption (cont'd)

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- iii. OTS's Regulation Implementing Section 5(a) of the HOLA:

*“The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office [of Thrift Supervision] to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the [Home Owners Loan] Act. This exercise of the Office’s authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.” 12 CFR §545.2*

# *Current Status of Preemption* *(cont'd)*

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## 4. Holding of Cuomo

### A. Facts:

- i. In 2005 NY AG Eliot Spitzer sent letters to several national banks making a request “in lieu of subpoena” that the banks provide certain non-public information about their lending practices.
  - ▶ Outside of the court system
- ii. He sought this information to determine whether the banks had violated the state’s fair-lending laws.

# *Current Status of Preemption*

## *(cont'd)*

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- B. Question: “The question presented is whether the Comptroller’s regulation purporting to preempt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act.

# *Current Status of Preemption* *(cont'd)*

PaulHastings

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## C. Holding of Cuomo

- i. When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of “visitorial powers” and thus the Comptroller erred by extending the definition of “visitorial powers” to include “prosecuting enforcement actions” in state courts, §7.4000.

# *Current Status of Preemption*

## *(cont'd)*

Paul Hastings

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### ii. In Plain English:

- ▶ Cuomo allows states to enforce valid, non-preempted state laws against a national bank, but only through the court system
- ▶ The state law sought to be enforced must not be in conflict with federal law
  - ▶ Easy – zoning laws
  - ▶ Harder = state fair-lending laws
  - ▶ Current Open Question: Gift Card Act vs. State Unclaimed Property Statutes



# *Current Status of Preemption (cont'd)*

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*Paul Hastings*

- ▶ What this means is that National Banks are now subject to lawsuits in all 50 states, the District of Columbia, Puerto Rico and all U.S. territories by state law enforcement officials to enforce any consumer protection law that would apply to their business practices within the jurisdiction so long as there is not applicable federal law on the same subject

# *Current Status of Preemption*

## *(cont'd)*

Paul Hastings

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### 5. Holding of Watters v. Wachovia and Simon line of Cases

- A. Cuomo addressed the question of whether states may enforce their own non-preempted laws against a national bank
- B. In Waters the question was:
  - i. Question: Whether operating subsidiaries of national banks enjoyed the same immunity from state visitation.
  - ii. Holding: Watters held that a state may not exercise general supervision and control (i.e. visitation powers) over a subsidiary of a national bank.

# *Current Status of Preemption*

## *(cont'd)*

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### C. Simon line of Cases:

- i. The question was whether the card product in question was a national bank's product and thus entitled to preemption or whether it was the non-bank's product and not entitled to preemption.

## Consumer Financial Protection Commission Act

### A. Status

1. Passed by the House on December 11, 2009.
2. Part of Senator Dodd's "Restoring American Financial Stability Act".
  - a) Still in Committee (Dodd/Shelby).
  - b) Senate floor consideration is not expected until later this year.

## B. Purpose

1. Pull the consumer protection functions from each of the banking agencies, and some consumer financial protection functions from the Federal Trade Commission and give those functions to a new Consumer Financial Protection Agency.

2. The legislation further calls for the CFPA to ensure that:
  - a) consumers have, understand, and can use the information they need to make responsible decisions about consumer financial products or services;
  - b) consumers are protected from abuse, unfairness, deception, and discrimination;
  - c) markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation; and
  - d) traditionally underserved consumers and communities have access to financial services.

## C. Structure

1. Operative definitions:
  - a) Covered Person – the term “covered person” means any person who engages directly or indirectly in a financial activity, in connection with the provision of a consumer financial product or service.
  - b) Consumer Financial Product or Service – The term “consumer financial product or service” means any financial product, other than a Federal tax return, or service to be used by a consumer primarily for personal, family, or household purposes.

- c) Financial Activity – the term “financial activity” means any of the following activities:
  - i. (A) - (P) but specifically includes:
    - Deposit-taking activities
    - Extending credit and servicing loans
    - Check cashing
    - Financial data processing
    - Money Transmitting
    - Sale, provision or issuance of stored value
    - Acting as a money services business
    - Acting as a custodian of money or any financial instrument
    - Any other activity the CFPA defines as a financial activity



- ii. Separate section for “Treatment of Remittance Transfers”
- iii. Separate section for “Service Providers”
  - Not “covered persons” but obligations set forth in various sections applicable to covered persons.

## D. Issues

1. Separation of consumer product regulations from prudential regulation of Banks
2. Preemption:
  - a) Eliminates federal preemption of state consumer protection laws. States may adopt stricter consumer protections. Federally-chartered financial institutions would be subject to state consumer protection laws. Increases compliance costs and burdens for federally-chartered financial institutions.

- b) Codifies the standard in the 1996 Supreme Court case of Barnett Bank of Marion County, N.A. v. Nelson. Any state consumer financial law would apply to national banks unless the state law “would have a discriminatory effect on national banks” or if the OCC determines that there is “substantial evidence” that the state law “prevents or significantly interferes with the ability of [a national bank] to engage in the business of banking.” **The bill would amend the National Bank Act and Home Owners Loan Act accordingly.**

- c) The bill overturns *Watters v. Wachovia* – state-chartered operating subsidiaries of national banks and federal thrifts would have to comply with state law.

## E. Likelihood of Passage

1. Senator Dodd's impending retirement
2. House approach versus Senate approach

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