

State Regulators' Powers Over National Banks Reaffirmed by U.S. Supreme Court

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Recently, the United States Supreme Court, in its [decision](#) styled *Andrew M. Cuomo v. The Clearing House Association, L.L.C.*, No. 08-453, reaffirmed that federal banking regulations do not pre-empt states from enforcing their own fair-lending laws against national banks.

This dispute arose following the New York State Attorney General's attempt to investigate several banks' residential real-estate lending practices in 2005. The Attorney General's office had suspected discriminatory lending practices after reviewing reports that showed minority borrowers received a larger percentage of high-interest home loans than white borrowers. As part of that probe, the Attorney General sent letters to several national banks, in lieu of a subpoena, requesting that they provide certain non-public information regarding their mortgage lending practices. In response, the federal Office of the Comptroller of the Currency ("OCC," the chartering authority and federal regulator of national banks) and the Clearing House Association (a banking trade group) sued to block the Attorney General's investigation, claiming that an OCC regulation promulgated under the National Bank Act pre-empted any state regulation or enforcement against national banks.

The U.S. District Court for the Southern District of New York enjoined the Attorney General from enforcing state fair-lending laws through demands for records or judicial proceedings, and the Second Circuit affirmed. The United States Supreme Court granted certiorari to determine whether the OCC's regulations could be upheld as a reasonable interpretation of the National Bank Act, which provides that national banks are not subject to any "visitorial powers," except as provided by federal law.

The Supreme Court concluded, in a 5-4 decision, turning on statutory construction, that the OCC's regulation – and its reading that the exclusive grant of "visitorial powers" can preclude state enforcement of state law – was not a reasonable interpretation of the Act. Indeed, the Court noted, the OCC's regulation was in conflict with Supreme Court precedent that clearly upheld state enforcement of banking laws. Accordingly, state attorneys general are permitted to prosecute judicial enforcement actions against all banks, regardless of charter, for violations of state consumer protection laws. States, however, are pre-empted from "overseeing" national banks, which the Supreme Court viewed as separate and apart from "enforcing" the laws.

This decision comes at an important time, when the Obama administration is looking to [overhaul](#) federal regulation of the financial services industry in response to the nation's economic crisis. The decision is already being lauded as a way for state attorneys general to play a larger role in protecting local consumers from discriminatory bank practices. The banks, on the other hand, now face the challenge of complying with a patchwork of conflicting federal and state laws. Banks should consult with counsel to discuss potentially conflicting fair-lending laws, as well as ways to avoid being the subject of a state enforcement action.