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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

June 8, 2007

Catherine O'Hagan Wolfe  
Clerk of Court  
United States Court of Appeals  
for the Second Circuit  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street  
New York, New York 10007

Subject: *SPGGC, Inc. v. Blumenthal, No. 05-4711-CV*  
*Office of the Comptroller of the Currency Letter-Brief as Amicus*  
*Curiae in Response to the Invitation of the Court*

Dear Ms. Wolfe:

In response to the invitation of the Court, the Office of the Comptroller of the Currency ("OCC") files this letter-brief as *amicus curiae* in *SPGCC, Inc. v. Blumenthal, No. 05-4711 CV* ("*Blumenthal*"). This case presents issues of conflict preemption under the National Bank Act, a federal statute administered by the OCC. The Supreme Court recently confirmed in *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1567 (2007), its prior guidance concerning implied conflict preemption arising under laws providing for national banking, and clarified that preemption is not determined by the structures and mechanisms through which

national banks exercise their powers, but by analyzing whether a state law impermissibly burdens the exercise of national bank powers.

After this Court issued its invitation, the First Circuit Court of Appeals issued its decision in *SPGCC, LLC v. Ayotte*, No. 06-2326 (1<sup>st</sup> Cir. May 30, 2007) (“*Ayotte*”), 2007 WL 1545840, *affirming* 443 F. Supp. 197 (D. N.H. 2006). *Ayotte* involved the new gift card program that appellant SPGGC (“Simon”) entered into with U.S. Bank, N.A., (“U.S. Bank gift card program”) upon termination of the gift card program at issue in this case, which involves gift cards issued by Bank of America, N.A. (“Bank of America gift card program”).<sup>1</sup> Unlike the Bank of America program, U.S. Bank not only issues the gift card, but it also establishes and retains the fees associated with the gift card, paying Simon a fee to market the gift card to potential customers and to perform ministerial duties in delivering the gift cards to purchasers. In *Ayotte*, the First Circuit addressed national banks’ power to offer gift cards that have expiration dates and various fees and held that “it is within a national bank’s powers to issue and sell” gift cards with these features. *Id.*, 2007 WL1545840 at \*5. The Bank of America gift card program at issue in this case differs from the one reviewed in *Ayotte* in that the fees here were established and retained by Simon and the bank was compensated for its role in

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<sup>1</sup> Gift cards are a form of stored-value system authorized for national banks. *See* 12 C.F.R. ¶ 7.5002(a)(3).

issuing the gift card through interchange fees paid by retailers when the card was used.

The OCC appreciates the opportunity to address the preemption issues in *Blumenthal* and make clear our position in light of this new authority.<sup>2</sup> First, we believe that the complaint filed by Simon challenging the application of Connecticut law should not have been dismissed solely on the basis that Simon is not a national bank or national bank operating subsidiary—provided that Simon satisfied constitutional and prudential standing requirements. Second, based on the allegations of the Second Amended Complaint (“SAC”), we believe that dismissal would be appropriate with respect to Simon’s claim that the National Bank Act preempts Connecticut law that prohibits *Simon* from charging a monthly maintenance fee in connection with the sale of gift cards issued by national banks. Third, we believe that because the expiration date for the gift card is imposed as part of the national bank’s power to issue stored-value cards, the National Bank Act would preempt state laws prohibiting the sale of national bank issued gift cards with an expiration date feature.

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<sup>2</sup> This letter-brief does not address the Commerce Clause question also presented by the case, which falls outside the scope of the Court’s invitation.

## Background

Plaintiff-appellant Simon filed this suit claiming that the National Bank Act preempted application of the Connecticut Gift Card Law, 2003 Conn. Pub. Acts 03-1, §§ 83, 84, and Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. 42-110 *et seq.*, to the sale of prepaid gift cards issued by Bank of America and marketed and sold by Simon. In its suit, Simon challenged the application of Connecticut law that prohibited charging a monthly service fee in connection with the gift card, and that prohibited sale in Connecticut of gift cards that have an expiration date. As alleged in the complaint,<sup>3</sup> the Bank of America gift card program involved the bank issuing gift cards for which Simon set and received all relevant fees and charges paid by gift card purchasers, including a monthly maintenance fee prohibited by Connecticut law. SAC at ¶¶ 12, 19 and 20. The bank provided the gift cards as the vehicle through which card holders accessed funds in a Simon account at the bank to pay retailers for purchases made with the gift cards. SAC ¶¶ 7, 8, 9, 10 and 14. As the trial court observed, Simon, not the bank, earned a profit from the monthly maintenance fees. *SPGGC v. Blumenthal*, 408 F.Supp.2d 87, 94 (D. Conn. 2006). The gift card itself was owned by the bank, however, and the expiration date was imposed by the bank as a fraud

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<sup>3</sup> Because this case was resolved on a motion to dismiss, the facts are limited to the allegations contained in the complaint, including attachments to the complaint.

prevention feature in connection with its issuance of this type of payment vehicle.  
SAC at ¶¶ 14, 21.

Writing before the Supreme Court's clarification in *Watters*, the district court dismissed Simon's complaint, holding that Simon had failed to state a claim because a non-bank corporation could not claim any protection from state law flowing from the preemptive effect of the National Bank Act. *SPGGC v. Blumenthal*, 408 F.Supp.2d at 96 (Connecticut law does not frustrate the purpose of Congress in enacting the National Bank Act "because preemption by the [National Bank Act] does not apply to a non-bank entity, even if it has an agency or business relationship with a national bank."). However, as the Supreme Court made clear in *Watters*, conflict preemption issues under the National Bank Act are not determined by the corporate structure of the entities involved in the national bank's activities, but rather are resolved by assessing the effect of state restrictions upon the exercise of national bank powers. National bank powers preempt conflicting state law irrespective of the structure or corporate status of the entities through which the national bank powers are exercised. Therefore, provided Simon demonstrated a sufficient interest in the litigation to satisfy constitutional and prudential standing requirements, in our view, this case should not have been dismissed on the basis that only a national bank or its subsidiary could claim that

the National Bank Act preempts application of state law to activities conducted by national banks.

However, to say that dismissal for failure to state a claim is not warranted *solely* because the plaintiff asserting preemption by the National Bank Act is not a national bank does not answer the question of whether the state law restrictions are, in fact, preempted. That question must be resolved by application of the Supreme Court's guidance for determining when the National Bank Act preempts state law.

#### **I. Implied Conflict Preemption Under the National Bank Act.**

Under the Constitution's Supremacy Clause, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). When it created the national banking system during the Civil War, Congress built upon that principle to protect national bank operations from obstruction by state regulation. At the same time, Congress established national banks as commercial enterprises reliant in their day-to-day transactions upon a legal infrastructure formed largely by certain categories of state laws, particularly

tort and contract law.<sup>4</sup> *See Watters* 127 S.Ct. at 1567 (usury rates, contract, and property laws).

A. National Bank Powers Ordinarily Preempt State Laws That Would Burden or Interfere With the Exercise of Those Powers.

In *Watters*, the Supreme Court applied the conflict preemption analysis that it had refined in 1996 in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996). *Barnett* involved the conflict between federal statutory authority permitting national banks to sell insurance from agencies in “small towns,” and a Florida statute that purported to prohibit insurance sales by some of those banks. In concluding that the Florida statute was preempted, the *Barnett* Court determined the case involved a form of *implied* preemption caused where state restrictions frustrate the purposes of a federal scheme, resulting in a conflict between federal and state law. 517 U.S. at 31.

Implied conflict preemption arises even in the absence of “impossibly” conflicting obligations imposed by federal and state law: for example, if federal law required national banks to provide a service and state law prohibited banks

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<sup>4</sup>The OCC’s regulations reflect this role for state law by specifying categories of state laws that generally are not preempted, including contract, tort, criminal, tax, and zoning law. *See, e.g.*, 12 C.F.R. § 34.4(b). *See also Bank of America v. City and County of San Francisco*, 309 F.3d 551, 559 (9<sup>th</sup> Cir. 2002), *cert. denied*, 538 U.S. 1069 (2003). Cases that simply apply this principle are therefore consistent with the OCC’s regulations. *See, e.g., Atherton v. FDIC*, 519 U.S. 213 (1997) (federal standard of duty could not be grafted onto a state tort claim).

from providing that service. *Id.* Instead, the Supreme Court has made clear that the requisite conflict with federal law arises as a result of national banks' authority to exercise *powers* under the federal banking laws on the one hand and state restrictions on the exercise of those powers on other, explaining: "In using the word 'powers,' [the authorizing statute] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." 517 U.S. at 32; *see also Watters*, 127 S.Ct. at 1567 (same).<sup>5</sup>

In applying the Supreme Court's *Barnett* conflict analysis, there is no presumption against preemption. The Supreme Court has explained that an "assumption" of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 569 U.S. 89, 108 (2000)(admiralty law). This Court has expressly applied that principle to preemption of state laws that interfere with the operations of national banks and federal thrifts. "The presumption against federal preemption

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<sup>5</sup> The OCC is given *Chevron* deference in identifying the nature and scope of national bank powers. *NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Company*, 513 U.S. 251, 256-257 (1995). In assessing the degree to which state laws interfere with the exercise of national bank powers, the views of the OCC as an expert administrative agency are entitled, at a minimum, to "weight." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000).

disappears \* \* \* in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.” *Wachovia Bank v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *cert denied*, 127 S.Ct. 2093 (2007), *quoting Flagg v. Yonkers Sav. & Loan Ass’n*, 396 F.3d 178, 183 (2d Cir. 2005), *cert. denied* 126 S.Ct. 343 (2005) (federal thrifts), and *citing Locke*, 529 U.S. 89, 108 (2000). The Supreme Court’s long recognition that “federal law [is] supreme over state law with respect to national banking,” *Watters*, 127 S.Ct. at 1566 (*citing McCulloch v. Maryland*), and its conclusion that national bank powers “ordinarily pre-empt[] contrary state law” *Barnett*, 517 U.S. at 32, confirm that preemption of state law that would impact the powers of national banks is a fundamental feature of the operations of nationally-chartered banks, not an extraordinary or unexpected result. These principles apply regardless of whether the state law at issue has consumer protection or business regulation objectives.

**B. State Laws Are Preempted When They Interfere With a National Bank’s Exercise of Authorized Powers Involving Third Parties.**

National banks’ power to conduct the banking business includes the authority to use business tools, structures and arrangements to do so. Where state laws impair the exercise of that authority, they repeatedly have been found to be preempted. For example, in *Franklin Nat’l Bank v. New York*, 347 U.S. 373

(1974), the Court held that the national bank power to receive savings deposits preempted a state statute that prohibited national banks from using the word “savings” in their advertising. The Court noted that: “Modern competition for business finds advertising one of the most usual and useful of weapons. \* \* \* It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.” *Franklin*, 347 U.S. at 377-78. The Supreme Court in *Watters* echoed the *Franklin* Court’s analysis in concluding that state laws are preempted if they burden national banks’ use of operating subsidiaries as a means of exercising their authorized powers. *Watters*, 127 S. Ct. at 1570-1571; *see also Bank One v. Guttau*, 190 F.3d 844 (8<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1087 (2000) (burden on exercise of powers through ATMs); *American Bankers Ass’n v. Lockyer*, 239 F. Supp. 2d 1000 (E.D.Cal. 2002) (burden upon national banks’ use of credit card statements).

National banks exercise their powers through their officers, employees, agents and other third parties. *See* 12 U.S.C. § 24(Seventh) (Each national banks is authorized “to exercise by its board of directors or duly authorized officers or agents \* \* \* all such incidental powers as shall be necessary to carry on the business of banking \* \* \*.”) The OCC has specifically recognized this power in regulations addressing national banks’ authority to use third parties in originating

loans, 12 C.F.R. § 7.1004(a), and in selling money orders, 12 C.F.R. § 7.1014. Just as the National Bank Act preempts state laws that impair a national bank's use of operating subsidiaries to conduct its authorized banking activities, *Watters, supra*, state laws that impede the ability of national banks to make their authorized products available to third parties to market such products to consumers would impermissibly interfere with national banks' power to offer those products.

Here, Bank of America issued a gift card that was to be used by consumers. *See* SAC at ¶¶ 8, 10, 11 and 14. Pursuant to its powers under the National Bank Act, the bank entered into an agreement to provide its gift cards to Simon for ultimate sale to consumers. *Id.* The bank was compensated for its part in the gift card program through fees received from retailers as a result of customers' use of the gift cards the bank had made available for sale by Simon. SAC at ¶ 18. A state law that prohibits Simon from selling national bank issued gift cards to consumers because of card features imposed by the national bank would interfere with the bank's exercise of its powers, and would be preempted.

National bank's authority to offer gift cards is clearly established and is subject to regulation by the OCC. As part of its regulation of national banks' stored-value systems, the OCC has provided specific guidance to national banks concerning disclosure and marketing related to their gift card programs. *See* OCC Bulletin 2006-34 (August 14, 2006). This guidance is intended to assure that each

national bank takes the necessary steps to fully inform purchasers and recipients of the terms and conditions of the bank's gift card. Pursuant to this guidance, national banks will disclose on the gift card itself the expiration date for the card, the amount or existence of any maintenance, dormancy, usage or similar fee, and how consumers can obtain additional information about the gift card and the terms governing its use. The guidance specifies disclosures to be given to the purchaser of the card at the time of purchase. And it identifies for national banks types of practices that have the potential to mislead consumers and, therefore, must be avoided. National banks also are subject to OCC guidance regarding use of technology to provide products and services. *See, e.g.*, Stored Value Card Systems, OCC Bulletin 96-48 (Sept. 10, 1996); Guidance on Electronic Financial Services & Consumer Compliance (FFIEC), OCC Bulletin 98-31 (July 30, 1998). And OCC has provided more general guidance regarding risk management, including avoiding reputation risk associated with unfair dealings with consumers. *See, e.g.*, Risk Management of New, Expanded, or Modified Bank Products and Services, OCC Bulletin 2004-20 (May 10, 2004); Third Party Relationships: Risk Management Principles, OCC Bulletin 2001-47 (Nov. 1, 2001); and Third-Party Risk, Advisory Letter 2000-9 (August 29, 2000).

II. State Laws Governing Gift Cards Are Preempted **Only** To the Extent They Burden **National Banks'** Exercise of Their Power to Offer That Product as Authorized Under Federal Law.

Under the analysis prescribed in *Barnett* and *Watters*, to determine whether the National Bank Act preempts the state laws at issue in this case, it is necessary to first identify the national bank powers involved and then the degree to which the state law interferes with the exercise of those national bank powers. If the state law conditions, impairs, or interferes with the exercise of a *national bank's* powers, then it is preempted.<sup>6</sup>

The OCC has applied this test in reviewing two different gift card programs involving Simon and national banks, and reached different conclusions concerning the effect of state law on the exercise of national bank powers based on the features of each program. The OCC evaluated a gift card program involving Bank of America and Simon in which Simon set, collected and retained the fees charged in connection with offering the gift card to the public. Although Bank of America issued the gift card and retained ownership of the card itself, the OCC advised

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<sup>6</sup> In this brief, the OCC does not address in detail national banks' authority to issue gift cards that have expiration dates and various fees attached to them because these issues are already addressed in OCC regulations. *See* 12 C.F.R. § 7.5002(a)(3) (national banks may offer electronic stored-value systems); and 12 C.F.R. § 7.4002 (national banks may charge non-interest fees in connection with their authorized activities). It is not disputed in this case that national banks have the power to issue gift cards with these features. *See also Ayotte, 2007 WL1545840 at \*5.*

Massachusetts Attorney General Thomas F. Reilly and Simon counsel Margaret M. Pinkham that OCC staff did “not believe that the state restrictions on **Simon’s** fees would be preempted by [OCC regulations] or the National Bank Act generally.” January 5, 2005 Letter from Daniel P. Stipano, Acting Chief Counsel. The OCC concluded that Simon’s collection and retention of fees associated with those gift cards did not involve the exercise of national bank powers. Consequently, the state restrictions applicable to Simon’s fees did not conflict with federal banking law and were not preempted. The OCC did not address in that letter the application of any state law prohibition on expiration dates for gift cards.

More recently, in connection with filing an *amicus* brief in *Ayotte*, the OCC evaluated the U.S. Bank gift card program in which the bank not only issued the gift cards, but set and retained for its use all of the fees associated with the gift cards. Simon collected funds from gift card purchasers and then transmitted them to U.S. Bank, and the bank paid Simon a fee for promoting and marketing the gift cards and performing ministerial duties necessary to deliver the bank’s gift cards to customers. In *Ayotte*, the state contended that the state law restrictions on sales of gift cards that contain expiration dates and charged certain fees did not conflict with the National Bank Act because those restrictions were only applied to Simon acting as the bank’s agent, not to the bank itself. In analyzing the U.S. Bank program, however, the OCC concluded that the National Bank Act preempted the

state restrictions on fees and gift card expiration because these features were part of the national bank's exercise of its powers in providing these stored-value cards to the public. The OCC also concluded that the National Bank Act preempted the application of the state prohibitions to the bank's agent because the national bank was authorized to use agents in conducting its business, and the state restrictions would impair the national bank's exercise of its powers through agents.

Based on Simon's Second Amended Complaint, it appears that the gift card program involved here is virtually identical in all relevant respects to the Bank of America gift card program that the OCC discussed in the January 5, 2005 letter from Acting Chief Counsel Daniel P. Stipano. According to the Second Amended Complaint, Simon collects and retains the fees charged in connection with the gift card, SAC at ¶¶ 12-13, and the bank is compensated through per transaction interchange fees, SAC at ¶ 18. Under these circumstances, we do not believe that the state restrictions on *Simon* charging a monthly service fee in connection with the gift cards would burden or interfere with *national bank* powers to issue stored-value cards as a payment mechanism. Therefore, based solely on the facts alleged in the complaint, dismissal for failure to state a claim for relief appears appropriate for Simon's claim that the National Bank Act preempts Connecticut law prohibiting Simon from charging monthly maintenance fees in connection with the sale of gift cards issued by national banks.

Simon also challenged the Connecticut statute that prohibits imposition of an expiration date for gift cards. SAC at ¶¶ 21, 23, 28, 30, 35. This feature of the Bank of America gift card program was not addressed in Acting Chief Counsel Stipano's January 5, 2005 letter. And unlike the fees in the Bank of America gift card program, the gift card expiration date is a requirement imposed by the *national bank* in connection with its issuance of the gift card.<sup>7</sup> In its *amicus* brief in *Ayotte*, the OCC concluded that national banks have the power to impose expiration dates for their gift cards and that state laws prohibiting this feature would be preempted. The First Circuit, in affirming the district court's decision in that case, reached the same conclusion. *Ayotte*, 2007 WL 1545840 at \*5 ("a national bank has the power to issue [gift cards] that carry expiration dates"). Because the expiration date is imposed as an exercise of the national bank's power to issue stored-value cards as an authorized electronic payment mechanism, state laws that prohibit the sale of national bank issued gift cards with that feature interfere with the exercise of the national bank's power. Those state laws are preempted by the National Bank Act.

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<sup>7</sup> Expiration of the card does not terminate the card holder's right to the funds that could be accessed with the card, but it does require that the gift card holder request that a new gift card be issued to access those funds. SAC at Exhibit C.

As a seller of national bank issued gift cards that have an expiration date, Simon is a third party through which the national bank exercises its power to provide gift cards to consumers. Under these circumstances, Simon states a claim for relief based on its claim that the state's prohibition of expiration dates for national bank issued gift cards is preempted by the National Bank Act.

### **III. Conclusion**

For the foregoing reasons, the decision of the district court should be affirmed insofar as it dismissed Simon's claim that the National Bank Act and regulations issued by the OCC preempt Connecticut law prohibiting Simon from charging certain fees in connection with the gift cards issued by a national bank, and it should be reversed insofar as the district court dismissed Simon's claim that the National Bank Act preempts Connecticut law prohibiting Simon from selling gift cards issued by a national bank because the gift card contains an expiration date.

Respectfully submitted,

Julie L Williams  
First Senior Deputy Comptroller  
and Chief Counsel

## ANTI-VIRUS CERTIFICATION FORM

SPGGC, LLC v. Blumenthal

No. 05-4711-CV

I, Horace G. Sneed, certify that I have scanned for viruses the PDF version of the Office of the Comptroller of the Currency Letter Brief as *Amicus Curiae* in Response to the Invitation of the Court that was submitted in this case as an email attachment to [briefs@ca2.uscourts.gov](mailto:briefs@ca2.uscourts.gov) and that no viruses were detected. The virus scan was accomplished using Symantec AntiVirus version 10.1.5.5000 scan engine 71.2.0.12, virus definition date 6/7/2007 Rev. 24.

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Date: June 8, 2007

## CERTIFICATE OF SERVICE

I certify that on June 8, 2007, I served copies of the foregoing, Office of the Comptroller of the Currency Letter Brief as *Amicus Curiae* in Response to the Invitation of the Court, upon the following:

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