



Highlights of [GAO-06-8](#), a report to the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives

## Why GAO Did This Study

On January 13, 2004, the Office of the Comptroller of the Currency (OCC) issued two sets of rules (the preemption rules) on the extent to which the National Bank Act preempts the application of state and local laws to national banks and their operating subsidiaries. The rules and the manner in which OCC promulgated them generated considerable controversy. Some state officials, consumer groups, and congressional members questioned whether OCC adhered to the statutes and executive orders pertaining to rulemaking and whether the process was as inclusive as it could have been. GAO (1) assessed OCC's rulemaking process within the framework of applicable laws and executive orders, (2) described the issues raised in comment letters and OCC's responses, and (3) identified and discussed stakeholder concerns about how OCC promulgated its preemption rules.

## What GAO Recommends

GAO is not making recommendations because OCC generally followed laws and executive orders. GAO makes observations on how OCC could enhance consultation and better document its rulemaking process. In its comments, OCC agreed to develop detailed written procedures, disagreed with GAO's observations about the sufficiency of documentation and consultation relative to the executive orders, but intends to enhance its consultation.

[www.gao.gov/cgi-bin/getrpt?GAO-06-8](http://www.gao.gov/cgi-bin/getrpt?GAO-06-8).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Richard J. Hillman at (202) 512-8678 or [hillmanr@gao.gov](mailto:hillmanr@gao.gov).

# OCC PREEMPTION RULEMAKING

## Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process

### What GAO Found

Federal preemption of state law affecting national banks always has been controversial and seems to have become more so with consolidation in the financial services industry, which has resulted in the presence of large national banks in nearly every state. OCC followed the statutory framework for rulemaking and appears to have followed applicable executive orders, but it was difficult to fully determine the basis for some agency actions or assess the extent of its consultation with stakeholders because OCC did not always document its actions. The agency also lacked its own guidance or procedures for its rulemaking process and instead used a rulemaking checklist as a guide for completing reviews and routing documents. Federal internal control standards call for documenting actions to verify that an agency has complied with its policies and applicable law. The standards also call for agencies to follow written procedures in making important decisions, to provide a framework for ensuring compliance with management directives and applicable law and regulations. Without such documentation and procedures, evidence to substantiate OCC's actions was limited.

OCC considered all of the approximately 2,700 comment letters it received on its banking activities proposal, but strongly disagreed with comments questioning its preemptive authority and the rules' adverse effect on consumers. GAO's analysis of the letters revealed that commenters were concerned that the rule could diminish enforcement of state consumer protection laws, questioned the bases for OCC's legal analysis and conclusions, and posited adverse effects on state-chartered banks. In response, OCC contended that it has a comprehensive consumer protection effort for national banks, reiterated its preemptive authority, and asserted the rule would preserve the "dual banking" system. However, OCC agreed with some issues raised in the public comments and made some changes to the final rules. For instance, OCC included an explicit reference to a provision of the Federal Trade Commission Act that prohibits national banks from engaging in practices considered unfair and deceptive.

Most criticism about how OCC promulgated the rules focused on what some believed was a lack of opportunity to discuss and comment on the proposed rules. Although OCC briefed several congressional members about the proposals before they were published, some criticized OCC for issuing the rules while Congress was in recess and not allowing time for hearings on the rules. OCC officials told GAO that a lengthy delay would have harmed banks' ability to securitize their loans, left consumers with fewer choices, or imposed burdensome costs on banks seeking to comply with a multitude of state laws. According to consumer groups, OCC could and should have offered additional mechanisms for soliciting public input—such as public meetings. Some financial institution regulators have used other means besides the comment period to solicit input for rulemakings they deemed controversial. GAO observed that such efforts, while not required, might have contributed to a better understanding about the rules.