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Letting the Banks Off the Hook

By JOE NOCERA

Judging by last week's performance, it sure looks as though the country's top bank regulator is back to its old tricks.

Though, to be honest, calling the Office of the Comptroller of the Currency a "regulator" is almost laughable.

The Environmental Protection Agency is a regulator. The O.C.C. is a coddler, a protector, an outright enabler of the institutions it oversees.

Back during the subprime bubble, for instance, it was so eager to please its "clients" — yes, that's how O.C.C. executives used to describe the banks — that it steamrolled anyone who tried to stop lending abuses. States and cities around the country would pass laws requiring consumer-friendly measures such as mandatory counseling for subprime borrowers, or the listing of the fees the banks were going to charge for the loan. The O.C.C. would then use its power to either block or roll back the legislation.

It relied on the doctrine of pre-emption, which holds, in essence, that federal rules pre-empt state laws. More than 20 times, states and municipalities passed laws aimed at making subprime loans less predatory; every time, the O.C.C. ruled that national banks were exempt. Which, of course, rendered the new laws moot.

You'd think the financial crisis would have knocked some sense into the agency, exposing the awful consequences of its regulatory negligence. But you would be wrong. Like the banks themselves, the O.C.C. seems to have forgotten that the financial crisis ever took place.

It has consistently defended the Too Big to Fail banks. It opposes lowering hidden interchange fees for debit cards, even though such a move is mandated by law, because the banks don't want to take the financial hit. Its foot-dragging in implementing the new Dodd-Frank laws stands in sharp contrast to, say, the Commodity Futures Trading Commission, which is working diligently to create a regulatory framework for derivatives, despite Republican opposition. Like the banks, it views the new Consumer Financial Protection Bureau as

the enemy.

And, as we learned last week, it is doing its darndest to make sure the banks escape the foreclosure crisis — a crisis they created with their sloppy, callous and often illegal practices — with no serious consequences. There is really no other way to explain the “settlement” it announced last week with 14 of the biggest mortgage servicers (which includes all the big banks).

The proposed terms call on servicers to have a single point of contact for homeowners with troubled mortgages. They would have to stop the odious practice of secretly beginning foreclosure proceedings while supposedly working on a mortgage modification. They would have to hire consultants to do spot-checks to see if people were foreclosed on improperly. (Gee, I wonder how that’s going to turn out?)

If you’re thinking: that’s what they should have done in the first place, you’re right. If you’re wondering what the consequences will be if the banks don’t abide by the terms, the answer is: there aren’t any. And although the O.C.C. says that it might add a financial penalty, I’ll believe it when I see it. While John Walsh, the acting comptroller, called the terms “tough,” they’re anything but.

No, the real reason the O.C.C. raced to come up with its weak settlement proposal is that last month, a document surfaced that contained a rather different set of terms with the banks. These were settlement ideas being batted around by the states’ attorneys general, who have been investigating the foreclosure crisis since late October. The document suggested that the attorneys general were not only trying to fix the foreclosure process but also wanted to penalize the banks for their illegal actions.

Their ideas included all the terms (and then some) included in the O.C.C. proposal, though with more specificity. Unlike the O.C.C., the attorneys general had devised a way to actually enforce their settlement, by deputizing the new consumer bureau, which opens in July. And they wanted to impose a stiff fine — possibly \$20 billion — which would be used to modify mortgages. In other words, the attorneys general were trying to help homeowners rather than banks.

By jumping out in front of the attorneys general, the O.C.C. has made the likelihood of a 50-state master settlement much less likely. Any such settlement needs bipartisan support; now, thanks to the O.C.C., there’s a good chance that Republican attorneys general will walk away. The banks will be able to say that they’ve already settled with the federal government, so why should they have to settle a second time? If they wind up being sued by the states, the federal settlement will help them in court.

“It’s a vintage O.C.C. move,” said Prentiss Cox, a law professor at the University of Minnesota who was formerly an assistant attorney general. “It is clearly an attempt to undercut the A.G.’s”

Old habits die hard in Washington. The O.C.C.’s historical reliance on pre-emption should have died after the financial crisis. Instead, it’s merely been disguised to look like a settlement.



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