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December 13, 2005

FDIC
DEC 16 2005
OFFICE OF LEGISLATIVE AFFAIRS

The Honorable Martin J. Gruenberg
Acting Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Dear Acting Chairman Gruenberg:

We oppose the FDIC's proposed rule[1] purporting to implement the parity provisions of the Riegle-Neal Amendments Act of 1997 ("Riegle-Neal II")[2] and ask that the FDIC not finalize the proposed rule because it actually makes matters *worse* for state-chartered banks; and does nothing to solve the underlying problems.

We appreciate the FDIC's willingness to hold public hearings and look into this important issue. Clearly something needs to be done. Unfortunately because the OCC created this problem, only it, the courts and the Congress are in any position to solve it. We hope the FDIC will use its expertise in this area to shed light on this issue and facilitate appropriate OCC or Congressional action.

The Proposed Rule Actually Makes Matters Worse For State-Chartered Banks

Under the proposal, state-chartered banks actually have significantly less parity with national banks than they have now. To illustrate:

Without the Proposed Rule. Under the statute alone (without the proposed rule), the interstate branches of state-chartered banks are subject to host state laws *to the same extent* those laws apply to interstate branches of national banks.[3] Under the current law,[4] and except where made applicable by federal law, both the interstate branches of national banks and the interstate branches of state-chartered banks need not comply with a particular state law if it:

[1] 70 Fed. Reg. 60019 (Oct. 14, 2005).
[2] 12 U.S.C. 1831a(j).
[3] "The laws of the host state … shall apply to any branch … of an out-of-State State bank to the same extent as such laws apply to a branch of an out-of-State National bank. To the extent host state laws is inapplicable to a branch of an out-of-State State bank in such host state … home State law shall apply to such branch." Id.
[4] Although, given the potential that a court will overturn the OCC's overbroad preemption rule, by no means "settled law."

(1) has been the subject of a formal OCC preemption determination[5] or court decision;[6]

(2) is substantially similar to another state law that has been the subject of a preemption determination or court decision;[7]

(3) is one of the "types" of laws listed in the OCC's preemption regulation[8] (largely codifying previous preemption determinations and substantially similar laws); or

(4) "obstructs, impairs or conditions" the bank's "ability to fully exercise its Federally authorized deposit-taking [or lending] functions."[9]

While we believe this incredibly broad preemption is bad public policy that leaves consumers without the consumer protections they deserve – it is the policy that results directly from (and illustrates perfectly) the enormous breadth of the OCC's irresponsible preemption rule.

With the Proposed Rule. Under the proposed rule, national banks will continue to benefit from all the OCC's preemption standards set forth above, but state-chartered banks operating interstate would only benefit from (1). Under the proposal the interstate branches of state-chartered banks would *only* get parity with national banks when "*a Federal court or the [OCC] has determined in writing that the particular host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, national bank....*"[10]

This leaves state-chartered banks operating interstate in a far worse position vis-à-vis national banks than they would be without the rule. In other words national banks can continue to benefit from the OCC's broad rule to self-select themselves out from under other various state laws, while state-chartered banks would need to wait for the OCC (or courts) to make formal preemption decisions.

Moreover, given national banks' ability to operate largely free from state laws *without* the OCC making formal preemption determinations, it seems highly unlikely that the OCC would be inclined to make these determinations knowing that they will extend broadly to their state bank competitors. To be sure, had the OCC had any intention to continue issuing preemption determinations for every questionable law, there would have

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[5] See, e.g., OCC Determination and Order Relating to Georgia Fair Lending Act, 68 Fed. Reg. 46264 (Aug. 3, 2003).
[6] See, e.g, Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996).
[7] For example, while the OCC's Georgia Fair Lending Act determination analyzed the applicability of that Georgia law to national banks, the OCC order provides the basis for national banks to ignore similar laws in other states.
[8] See, 12 C.F.R. 7.4007(b)(2), 7.4008(d)(2) (e.g., relating to abandoned or dormant accounts; checking accounts; disclosure requirements; funds availability; state licensing, etc...).
[9] 12 C.F.R. 7.4007(b)(1), 7.4008(d)(1).
[10] Proposed 12 C.F.R. 362.19(c). 70 Fed. Reg. 60019, 60031 (Oct. 14, 2005).

been no need for it to issue its broad forward-looking ("obstruct, impair or condition") preemption regulation.

The Proposed Rule Does Not Address The Underlying Problem

The underlying problem at issue is that the interstate branches of state-chartered banks are entitled by statute to parity with the interstate branches of national banks ***and*** interested parties (including banks, consumers, regulators and Congress) need to know what laws apply to these institutions. Because the OCC's preemption rule is so broad, no one knows what state laws apply to the interstate operations of national banks – and through the statute – no one knows what laws apply to the interstate operations of state-chartered banks.

In many respects the FDIC regulation puts the FDIC in a "lose/lose" position. Because the FDIC cannot revise the OCC's rule, it can only provide state banks one of the two: parity or clarity. If it finalizes the proposal as-is – its rule would give the interstate operations of state chartered banks clarity[11] but, as noted above, the FDIC would violate Riegle-Neal II by undermining the statutory parity provided by Congress. Moreover, this would further exacerbate the competitive disadvantages faced by the state banking system and increase conversions to the national bank charter.

If the FDIC revises the rule to provide "full-parity" (i.e. by simply codifying the statute as originally proposed to the FDIC Board) it would do nothing to solve the parity problem (i.e. as parity is already automatically granted by statute) *and* would further complicate the legal uncertainties faced by state-chartered banks by inserting another regulator (now the FDIC) – and another set of regulations – into the preemption mix. For example, would state-chartered banks ask the FDIC where/when state laws apply under *its* regulation? How would the FDIC opine on the Riegle-Neal parity provision without opining on the National Bank Act that triggers it? While it may seem beneficial to many to have the FDIC offer an alternative regulation implementing the National Bank Act, it is not the appropriate way to regulate our banking system.

Because the FDIC lacks the authority to amend the OCC's regulation, its regulatory efforts can only make matters worse. As an alternative, we hope the FDIC will use its expertise and perspective to encourage action where it is needed: Congress.

Sincerely,

REP. BARNEY FRANK
Ranking Member
Committee on Financial Services

REP. LUIS V. GUTIERREZ
Ranking Member
Subcommittee on Oversight
And Investigations

[11] State banks operating interstate could easily see where the OCC and courts have issued written preemption decisions and know "what state laws apply."