MEMORANDUM

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

To. Don Powell
John Reich
Tom Curry

From: Julie Williams

Date July 27, 2005

Subject: Financial Services Roundtable Petition for FDIC Rulemaking

Introduction

At the FDIC Board meeting on July 19th, we discussed the petition (Petition) submitted by the Financial Services Roundtable urging the FDIC to adopt a series of rules, generally designed to preempt state laws in five areas relating to the interstate activities of insured state banks.[1] At the Board meeting, I expressed grave reservations about the FDIC's legal authority to adopt rules to do much of what the Petition was seeking, and in the course of the discussion at the Board, I indicated that I would be pleased to provide my views in a more complete fashion, in writing. That is the purpose of this memo.[2]

The Petition urges the FDIC to adopt new rules to do the following:

1) Provide that the governing law applicable to activities conducted in a host state (at a branch or by other means) by a state bank that has an interstate branch in that state is its home state law to the same extent that host state law is preempted by the National Bank Act;

2) Provide that the governing law applicable to activities conducted by a state bank in a state in which the state bank does **not** have a branch is its home state law to the same extent that host state law is preempted by the National Bank Act;

[1] Letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable to Robert E. Feldman, Executive Secretary, FDIC, "Petition for FDIC Rulemaking Providing Interstate Banking Parity for Insured State Banks" (March 4, 2005) (Petition).

[2] Of course, in addition to issues of legal authority, the Petition also presents very considerable policy issues concerning the effects of the regulatory actions the Petition seeks. This memo addresses only questions of legal authority

3) Provide that the law applicable to activities conducted by an operating subsidiary of a state bank is the same law that applies to the parent state bank;

4) Construe the scope and application of section 104(d) of the Gramm-Leach-Bliley Act (GLBA), which pertains to the applicability of state law in certain circumstances, to make clear that a state law or action is expressly preempted under section 104(d) when it imposes a requirement, limitation, or burden on a state bank, or its affiliate, that does not also apply to an out-of-state national bank or an in-state bank; and

5) Implement section 27 of the Federal Deposit Insurance Act (FDI Act), which governs permissible rates of interest for insured state banks, to parallel the rules of the OCC and the Office of Thrift Supervision (OTS) on the same subject for national banks and Federal thrifts.

In support of these requests, (other than # 5) the Petition generally relies on the policies and legislative history of the Riegle-Neal Amendments Act of 1997 (Riegle-Neal II), which addresses the law that governs the activities of interstate branches of state banks in a host state, and on the provisions of section 104(d) of the Gramm-Leach-Bliley Act (GLBA) that address the applicability of certain state laws to depository institutions and affiliated or associated entities.

The fundamental flaws of the Petition are twofold: First, by its plain language, Riegle-Neal II unambiguously applies only to **activities of branches of out-of-state banks.** Nothing in that statute addresses the governing law for any other activity conducted by a state bank directly, through an operating subsidiary, or through any means other than a branch. This is understandable since the Riegle-Neal Interstate Banking and Branching Act of 1994 (Riegle-Neal I) dealt with interstate branching and interstate acquisitions, and not with all the other ways in which banks could do business with customers through non-branch means or facilities. Riegle-Neal I addressed the application of state laws to national banks in the context of activities conducted at national bank **branches**. The argument that Riegle-Neal II, which was designed to equalize the application of state laws to interstate state bank branches, went beyond that purpose and accomplished broader preemption of state law, defies both the plain language of the statute and the logic behind it.

Second, the Petition also fundamentally misreads section 104(d) of the GLBA, particularly section 104(d)(4), as a broad preemption of state law. Section 104(d)(1) provides that states may not "prevent or restrict" certain depository institution activities, but the activities covered by this proscription are only the set of activities that are "authorized or permitted" under the GLBA. The scope of the "prevent or restrict" standard of preemption of state law is limited to that class of activities

The Petition attempts to rely on section 104(d)(4) as a source of preemption of state law, but that subsection is a "savings clause," i.e., it **saves from preemption** under the "prevent or restrict" standard of section 104(d)(1) certain state laws if they satisfy a list of conditions set forth in section 104(d)(4). In other words, section 104(d)(4) only describes the class of state statutes that are **not subject to preemption** under the "prevent or restrict" standard. It does not itself

preempt any state statutes. Moreover, section 104(d) confers no rulemaking authority on the FDIC, makes no mention of the FDIC, and is not even part of Title 12 of the U S. Code.

In my view, rules incorporating any of the first four proposals, as presented in the Petition, would be vulnerable to successful challenge on the grounds that the FDIC had exceeded its authority in promulgating them. Moreover, it is likely that Federal courts would construe the FDI Act narrowly to avoid or limit the preemption of state law. For example, in *Bankwest, Inc. v. Baker*, the U.S. Court of Appeals for the Eleventh Circuit recently concluded that section 27(a) of the FDI Act, governing the permissible rate of interest for state banks, did not preempt a state statute prohibiting certain non-bank, in-state payday lenders from charging interest at a rate otherwise permissible for the out-of-state state banks for whom they acted as agents.[3] The court found that, although section 27(a) expressly preempted state law, its scope was "quite narrow and restricted to one element of any loan by out-of-state banks: the interest rate."[4]

The Petition does request that the FDIC issue a rule codifying its prior interpretations implementing section 27 of the FDI Act. This statute is one that the FDIC administers and enforces, and on this point I do agree that the FDIC could issue a rule codifying these prior interpretations.

The remainder of this memorandum examines in greater detail the substantive legal bases that the Petition asserts in support of each of the rules it requests.

Discussion

1. *FDIC Regulation Concerning the Law Governing the Interstate Activities of an Insured State Bank in a Host State Where the State Bank Has a Branch*

The Petition first asks the FDIC to promulgate a rule providing that the home state law of an insured state bank applies to **all** of the activities conducted by that bank in a host state where it has a branch, regardless of whether those activities are conducted by the branch, by the bank directly, or by the bank through some other means (*e.g.*, a loan production office).

The Petition bases this request on the provisions of Riegle-Neal I, as amended by Riegle-Neal II, that address the law that governs certain activities of interstate branches in a host state.

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[3] *Bankwest, Inc. v. Baker*, No. 04-12420, 2005 U.S App. LEXIS 10832 (11th Cir. June 10, 2005). The state statute under review was a Georgia law that operated to prohibit an in-state payday lending company from acting as an agent for an out-of-state bank where the in-state payday company held a "predominant economic interest" in the revenues generated by the payday loans made to Georgia residents.

[4] *Id.* at * 19.

The key Riegle-Neal II provisions relied upon read as follows:

> **(j) Activities of branches of out-of-state banks**
>
> **(1) Application of host state law**
> The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to *any branch* in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable *to a branch* of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply *to such branch*
>
> **(2) Activities of branches**
> An insured State bank *that establishes a branch* in a host State may conduct any activity *at such branch* that is permissible under the laws of the home State of such bank, to the extent such activity is permissible either for a bank chartered by the host State (subject to the restrictions in this section) or for a branch in the host State of an out-of-State national bank.[5]

It is very obvious that this section pertains to activities conducted at an interstate **branch** of a state bank The effect of these provisions is to sort out which state's law applies to the activities of the interstate branch. The first provision says that the laws of the host state apply to the branch, but only if those laws would apply to the interstate branch of a national bank. If the national banking laws preempt a host state law, then the state bank's home state law (if any) on that subject, will apply to the branch. The second provision addresses what activities an interstate state bank may conduct at its branch in a host state. It says that the branch may carry on the activities that the bank's home state permits, but only if the activity also is permissible either under host state law or under Federal law for the branch of an interstate national bank.

Although the text is dense, it is not ambiguous. The plain language of the section addresses the law that applies to an interstate bank's **branches** in a host state. It neither addresses nor implies any result concerning the law that applies to that bank's activities conducted through any means other than an interstate branch. The provisions do not even provide for the unqualified application of home state law to interstate branches. Home state law applies to interstate branches only under the conditions described.

The Petition characterizes the history of this provision to assert that there is a "statutory gap" that the FDIC should fill with respect to the law applicable to the interstate bank. Resort to the legislative history – even if it were helpful – is unnecessary because the statute is not ambiguous. The legislative history, however, confirms, that, at most, Congress wanted to eliminate a disparity between the treatment of the branches of a national bank and the branches of an

[5] 12 U.S.C. § 1831a(j) (emphasis added).

interstate state bank that existed as a result of Riegle-Neal I. There simply is no Riegle-Neal statutory "gap" to fill.

Section 1831a(j) as originally enacted in Riegle-Neal I differed from the statute today in that it provided that host state law[6] applied to an interstate state bank's **branches** in the host state. National bank **branches**, on the other hand, were made subject to host state law except when it was preempted by Federal law or when the Comptroller determined that the application of state law would have a discriminatory effect on the national bank branch's activities.[7] After the enactment of Riegle-Neal I, state banks perceived a competitive inequality in the application of multiple states' laws to their interstate **branches**, for which they sought, and obtained, a legislative remedy.

The legislative history of Riegle-Neal II shows that, while Congress believed that parity for state banks with respect to the law governing interstate branches was important to equalize Riegle-Neal's treatment of national and state banks' interstate branches, Congress also was well aware that the scope of the relief it provided was limited to branches. For example, remarks by both Rep. LaFalce and Rep. Roukema, both quoted in the Petition, show their clear understanding that Riegle-Neal II applied to state bank interstate branches.[8] The Petition cites no specific

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[6] Prior to its amendment in 1997, the statute provided:

> **(j) Activities of branches of out-of-state banks**
> **(1) In general**
> The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch of a bank chartered by that State.
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> **(2) Activities of branches**
> An insured State bank that establishes a branch in a host State may not conduct any activity at such branch that is not permissible for a bank chartered by the host State.

[7] 12 U.S.C. § 36(f)(1)(A) (law applicable to national bank interstate branches)

[8] The remarks of Rep. La Falce quoted in the Petition reinforce this conclusion:

> "Now, when Congress passed the Interstate Banking and Branching bill of 1994, it did not, in my judgment, adequately anticipate the negative impact that it might have on State-chartered banks interested in branching outside their home States. However, in the 2 1/2 years since that legislation passed it has become clear that State-chartered banks *wanting to branch outside their home States* are at a significant disadvantage relative to national banks branching outside their home State. Why so? Well, it is due to the fact that the national bank regulator has the authority to permit national banks to conduct operations in all the States with some level of consistency. In contrast, under the existing interstate legislation *State banks branching outside their home State* must comply with a multitude of different State banking laws in each and every State in which they operate So the complications of complying with so many different State laws *in order to branch interstate* has led many State banks to conclude, and might lead even more to conclude, that it would be much easier to switch to a national Federal charter. It could get so bad that it could bring about the demise of the dual banking system. The legislation we are considering today attempts to prevent this from occurring."

statements to the contrary, but relies on general statements of members supporting competitive parity and the dual banking system.

Despite this history, the Petition asserts that the FDIC's general rulemaking authority is sufficiently broad to enable it to adopt a preemptive regulation for state banks that exceeds the scope of preemption provided under the plain language of Riegle-Neal II. I must disagree.

The FDI Act gives the FDIC the general authority:

> To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency).[9]

Nothing in this grant of authority to "carry out the provisions" of laws for which it has responsibility empowers the FDIC to substantively expand the scope of an underlying statute that it administers – in this case to expand the scope of preemption of state law afforded by Riegle-Neal II. Thus, I believe such an FDIC rulemaking based on Riegle-Neal II would be subject to challenge as beyond the agency's authority.[10]

But, I do agree that the FDIC clearly would be authorized to adopt a rule that replicates the statute, (which was discussed at the July 19th Board meeting), including presenting the operative provisions in a format that could be easier to follow than the precise statutory text. Such a restatement of the statutory provisions could not be used as a springboard, however, for interpretive positions causing preemption beyond the scope of the underlying statute, as discussed above, nor, of course, would the existence of such a regulation give the FDIC any authority to determine the extent to which state laws apply to a branch in a host state of an out-of-state **national bank.**

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143 Cong Rec. H 3094, H3095 (May 21, 1997) (Statement of Rep. La Falce) (emphasis added).

Similarly, Rep Roukema noted that the Riegle-Neal II legislation:

> had strong bipartisan support and clarifies the ambiguities of the Riegle-Neal interstate bill and preserves the dual banking system by allowing an out-of-State *branch* of a State bank to offer the same products allowed in its home State as long as the host State banks or national bank branches in the State may exercise those same powers

143 Cong Rec. H 4230, 4231 (June 24, 1997) (Statement of Rep. Roukema) (emphasis added).

[9] 12 U.S.C § 1819(a)(Tenth).

[10] *Cf. Bankwest* at *17 - *19 (narrowly construing section 27 of FDI Act, which expressly preempts state law)

2. *FDIC Regulation Concerning the Law Governing the Interstate Activities of an Insured State Bank in a State Where the State Bank Has No Branch*

The Petition next asks that the FDIC issue a rule providing that the home state law of a state bank applies to its activities in other states to the same extent as the National Bank Act governs the activities of national banks, **even if the bank has no branch in the other state.** The Petition asserts that such a rule would "implement the terms and policies of [s]ection 104(d) [of the GLBA] and the policies of Riegle-Neal II and address gaps in existing law."[11] The Petition also asserts that the FDIC has the authority to issue such a rule by virtue of the general grant of rulemaking authority given to it by section 9 of the FDI Act.

FDIC's rulemaking authority, as discussed above, is premised on "carry[ing] out the provisions" of the FDIA or of any other law that the FDIC has the responsibility of administering or enforcing. Since the scope of the rule sought here disconnects entirely from any branching nexus of Riegle-Neal I and Riegle-Neal II, those laws cannot be the legal authority for the rule.

Probably recognizing this, the Petition attempts an argument that provisions of sections 104(d)(1) and (d)(4) of the GLBA authorize such a rule. This argument is untenable.

First, any preemption of state law for depository institutions (not just state banks) that is effected by the provisions of section 104(d) of the GLBA is much more limited than the Petition asserts. Section 104(d)(1) excludes most insurance activities, which are governed by separate sections, and then provides that the scope of preemption under that section is limited to state laws preventing or restricting activities that were "authorized or permitted" under the GLBA itself. In relevant part, the section states:

> no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in an activity *authorized or permitted under this Act or the amendments made by this Act.*[12]

The key here is that whatever preemption of state law occurs by virtue of section 104(d)(1), it does not apply to state laws, regulations, etc. concerning activities authorized or permitted under Federal laws *other than* the GLBA or amendments made by the GLBA. For example, the lending or depositing-taking activities of depository institutions, which are not "authorized or permitted" by the GLBA or amendments made by the GLBA, simply are not within the scope of the "prevents or restricts" preemption standard of section 104(d)(1) in the first place.

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[11] Petition at p. 16.

[12] 15 U.S.C. § 6701(d)(1) (emphasis added). Section 104(d) also contains provisions pertaining to insurance activities that are not relevant to the Petition.

The preemptive effect of this section is further limited by a savings provision in section 104(d)(4), which **saves from preemption** some state laws [13] Under the first component of section 104(d)(4), a state law pertaining to activities authorized or permitted by the GLBA is **not preempted** under the "prevent or restrict" standard if it:

- does not regulate insurance sales, solicitations, or cross-marketing activities to the extent permitted under other provisions of section 104(d),
- does not regulate the business of insurance except for the regulation of insurance activities to the extent permitted under other provisions of section 104(d); and
- does not relate to securities investigations or enforcement actions described in section 104(f).

Thus, a state law *could* come within the savings provision – and thus *not be preempted* under the "prevent or restrict" standard of section 104(d)(1) – if it pertains to activities other than certain insurance and securities matters that are covered by other, specific provisions of section 104.

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[13] Section 104(d)(4) reads as follows:

(4) Financial activities other than insurance No State statute, regulation, order, interpretation, or other action shall be preempted under [section 104(d)(1)] to the extent that –

(A) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, insurance sales, solicitations, or cross marketing activities covered under [section 104(d)(2)];
(B) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, the business of insurance activities other than sales, solicitations, or cross marketing activities, covered under [section 104(d)(3)];
(C) it does not relate to securities investigations or enforcement actions referred to in [section 104(f)]; and
(D) it –
(i) does not distinguish by its terms between depository institutions, and affiliates thereof, engaged in the activity at issue and other persons engaged in the same activity in a manner that is in any way adverse with respect to the conduct of the activity by any such depository institution or affiliate engaged in the activity at issue,
(ii) as interpreted or applied, does not have, and will not have, an impact on depository institutions, or affiliates thereof, engaged in the activity at issue, or any person who has an association with any such depository institution or affiliate, that is substantially more adverse than its impact on other persons engaged in the same activity that are not depository institutions or affiliates thereof, or persons who do not have an association with any such depository institution or affiliate,
(iii) does not effectively prevent a depository institution or affiliate thereof from engaging in activities authorized or permitted by the Act or any other provision of Federal law, and
(iv) does not conflict with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law

15 U.S.C. § 6701(d)(4) (emphasis added)

However, in order to be saved from preemption under the "prevent or restrict" standard, the state law *also* must satisfy additional conditions. The law is saved from preemption only if it:

- does not "distinguish by its terms" between depository institutions and their affiliates and other persons engaged in the same activity in any way that is adverse to the depository institution or its affiliate;

- as interpreted or applied, does not impact depository institutions or their affiliates in a way that is "substantially more adverse" than its impact on other persons engaged in the same activity that are not depository institutions or their affiliates;

- does not "effectively prevent" a depository institution or its affiliate from engaging in activities authorized or permitted by the GLBA or any other Federal law; and

- does not "conflict with the intent" of the GLBA to permit affiliations authorized or permitted by Federal law.

The net result of all these provisions is consistent with the overall purpose and effect of the statute. The principal purpose of the GLBA was to "eliminate many Federal and State law barriers to affiliations among banks and securities firms, insurance companies, and other financial service providers."[14] The "prevent or restrict" standard for preemption of state law in section 104(d)(1) – directed to activities "authorized or permitted" under the GLBA – makes sense as a statement that states may not undo what Congress intended to accomplish in the GLBA when it allowed financial services providers to engage in certain new financial activities or enter into affiliations that had previously been prohibited by Federal law.[15]

The savings provision in section 104(d)(4) describes a limited class of state statutes – applicable to the class of GLBA-authorized activities – that would not be subject to preemption under the "prevent or restrict" test, that is, state statutes, other than the insurance or securities laws addressed elsewhere in section 104, that are both non-discriminatory and consistent with the text and intent of the GLBA provisions that grant new activities authority or permit new affiliations.

The Petition does not even attempt to analyze the text of the savings provision. Rather, the Petition sweepingly asserts that "[u]nder [s]ection 104(d), when state law provides for a different result for out-of-state state banks compared to national and in-state state banks, that law is preempted."[16] As described above, the law says no such thing, and the arguments in the Petition fail for several reasons:

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[14] H.R. Conf. Rep. No. 106-434, at 151 (1999).

[15] The general purpose of section 104 was to establish "the parameters for the appropriate balance between Federal and State regulation of the activities and affiliations allowed under [the GLBA]." *Id.* at 156

[16] Petition at p. 17.

First, the Petition reads the non-discrimination clauses of section 104(d)(4) as an affirmative grant of preemption authority. It asserts that a state law is preempted by virtue of section 104(d)(4) if it satisfies any one of the non-discrimination conditions in section 104(d)(4); that is, if the state law "distinguishes by its terms," has a "substantially more adverse" impact, "effectively prevents," or "conflicts with the intent." This reading turns the section on its head. Section 104(d)(4) is not about what state laws are preempted. It is a **savings clause** that **saves a limited class of state laws from preemption** under the "prevent or restrict" preemption standard in section 104(d)(1), which itself applies only to a limited class of state laws.

Second, the Petition's reliance on section 104(d)(1) to support preemption parity between state and national banks does not square with the text of the statute. The type of differential treatment addressed in the law is between a depository institution and its affiliates, on the one hand, and "other persons" engaged in the same activity that are not depository institutions or affiliates, on the other. The text simply does not address disparities between different types of depository institutions.

As already noted, the FDIC's rulemaking authority in section 9 of the FDI Act, as described, authorizes the FDIC Board to issue regulations to "carry out" the FDI Act and other laws that it has "the responsibility of administering or enforcing."

But, section 104 of the GLBA is not part of the FDI Act. The FDIC does not administer section 104. The FDIC is not even mentioned in section 104. Section 104 is not even codified among any banking laws that might otherwise confer authority on the FDIC, but at title 15 of the U.S. Code. Moreover, the FDIC does not enforce section 104(d). The "prevent or restrict" prohibition at section 104 (d)(1) is a restriction on state laws, rules and other state actions, not on the non-member banks that the FDIC supervises. To "enforce" section 104(d) therefore would be to take action against states – an undertaking not within the FDIC's enforcement authority under section 1818. For these reasons, if the FDIC were to proceed on the basis of section 104(d), I believe its action could be successfully challenged.[17]

3. *FDIC Regulation Prescribing the Law Applicable to State Bank Operating Subsidiaries*

The Petition also asks the FDIC to issue a rule providing that a state bank's home state law governs the activities of its operating subsidiary – apparently wherever that operating subsidiary does business – to the same extent as home state law governs the activities of the parent state bank. The basis for this request is not well developed in the Petition. The Petition refers to the OCC's "comprehensive rules concerning the establishment and operation of operating subsidiaries,"[18] including the regulation providing that state law applies to a national bank operating subsidiary to the same extent as that law applies to the parent national bank.[19]

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[17] Even if the FDIC were to proceed by interpretive rule or interpretive legal opinion, its interpretive action would not be entitled to deference by a reviewing court because the underlying statute is not one that the FDIC administers *See, e.g., Citicorp v Board of Governors of the Federal Reserve System*, 936 F.2d 66, 75 (2nd Cir. 1991)

[18] Petition at p 17.

To be clear, the essence of the OCC's position concerning the application of state laws to national bank operating subsidiaries is that operating subsidiaries are a federally authorized means **through which national banks exercise federally authorized powers**. The OCC does not purport to define an operating subsidiary as a part of its national bank parent, nor to transform an operating subsidiary into an entity with an independent federal character. It is a means, authorized under the long-recognized incidental powers of national banks, through which national banks may operate.[20] Thus, unless Federal law further provides, the application of state laws to a national bank operating subsidiary is no more and no less than to the parent bank itself.

I would agree that the FDIC could have authority to construe certain Federal laws that it administers to apply in the same way to an operating subsidiary of a state bank as they do to the state bank itself. But because an operating subsidiary is simply a means through which the bank operates, the bank cannot gain powers, or broaden the scope of preemption available to it, by conducting an activity in an operating subsidiary. To the extent that this aspect of the Petition seeks to extend that scope of preemption of state laws beyond activities conducted by a host state branch of a state bank, it presents the same fundamental issues, and fails for the same reasons, as discussed in sections 2. and 3., above with respect to a state bank's direct activities.

4. ***FDIC Regulation Expressly Preempting State Laws Providing for Disparate Treatment between State and National Banks***

The Petition requests that the FDIC issue a rule (or a statement of policy) that would expressly and affirmatively preempt state laws that it asserts fall within the scope of laws preempted by sections 104(d)(1) and (d)(4). The Petition asserts

> The breadth of the [s]ection 104(d) preemption and its purpose to reach state law or actions that would provide disparate treatment for any type of depository institution, including the distinct class of out-of-state banks, vis-à-vis its competitors are evident in the language of the statute. Section 104(d)(4)(D) provides four distinct nondiscrimination tests for any state law or action that 'restricts' any depository institution or affiliate.[21]

This request is based on the same fundamental misconstruction of section 104, which, as I discussed above, misreads the statutory text, first by ignoring the scope of the "prevent or restrict" test of preemption, second by misconstruing a savings provision as an affirmative grant of authority, and third by ignoring that the plain language of the section pertains not to different types of banks, but to disparities in treatment of depository institutions and their affiliates, on the

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[19] 12 C.F.R. § 7.4006.

[20] *See Wachovia Bank N A v Burke*, 2005 WL 1607740, *7.

[21] Petition at p. 19.

one hand, and "other persons" engaged in the same activity that are not depository institutions or affiliates, on the other

5. ***FDIC Regulation Implementing Section 27 of the FDI Act***

Lastly, the Petition requests that the FDIC issue a rule implementing section 27 of the FDI Act, which governs the rates of interest permissible for state banks.[22] This statute is one that the FDIC administers and enforces, and its implementation is therefore within the authority of the FDIC. As the Petition notes, the FDIC has already issued legal opinions interpreting section 27.[23] Thus, I agree the FDIC could issue a rule that codifies its prior interpretations in this area.

I hope the foregoing has been useful in understanding my views on the issues presented by the Petition, and why I could not, in good faith, vote in favor of the Advance Notice of Proposed Rulemaking that was before the Board.

[22] 12 U.S.C. § 1831d.

[23] *See* FDIC General Counsel Opinions Nos 10 (construing the term "interest" in section 27 to include those charges that a national bank is authorized to charge under section 85 of the National Bank Act) and 11 (addressing where a state bank is "located" for purposes of section 27)