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Robert E. Feldman, Executive Secretary
Attn: Comments/Legal ESS, Room 3060
Federal Deposit Insurance Corporation
550 17th Street, NW.
Washington, DC 20429
VIA e-mail: comments@FDIC.gov

Re: Petition for Rulemaking to Preempt Certain State Laws, 70 FR 13413 (March 21, 2005)

Dear Mr. Feldman:

I am writing on behalf of New York and the Attorneys General of the States of Connecticut, Illinois, Iowa, New Mexico, North Carolina and Vermont to urge the FDIC to deny in its entirety the petition filed by the Financial Services Roundtable with respect to the preemption of certain state laws relating to the interstate operations and activities of state banks. In the name of parity with national banks, the Roundtable is asking the FDIC to adopt rules providing that the laws of a state bank's home state govern the bank's operations in other states in which it does business whenever those other states' laws are preempted with respect to national banks by the National Bank Act, as interpreted by the Office of the Comptroller of the Currency (OCC). Because the OCC has in recent years aggressively promoted an overly broad preemption agenda that interprets nearly all state laws affecting national banks as preempted, the Roundtable's proposal would effectively immunize state banks from compliance with the laws of the states in which they do business, including most consumer protection laws.

The petition follows on the heels of the controversial and widely criticized efforts of the OCC, through its own overreaching rulemaking, to craft a new regulatory structure for national banks that disregards the nation's long history of cooperative federalism in the area of banking and that shields national banks and their subsidiaries from state law and state law enforcement.

Not only does the FDIC lack authority to adopt the rules requested by the Roundtable, any such rules would undermine the states' sovereign authority to police their borders and protect their citizens.

A. <u>The FDIC Does Not Have the Authority to Adopt the Proposed Rules</u>

It is a basic principle of our federalist system that businesses are subject to the laws of the states in which they do business. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987). Even national banks, which derive their powers from and are governed by federal law, are subject to the laws of the states in which they operate, provided such laws do not conflict with federal law or "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25, 33 (1996). In fact, it has been often said that national banks "are governed in their daily course of business far more by the laws of the State than of the nation." *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 222 (1997), citing *Nat'l Bank v. Commonwealth,* 76 U.S. 353 (1870). State banks, on the other hand, derive their powers primarily from state law and have always been subject first and foremost to the laws of the states in which they operate. *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 177 (1985); *Lewis v. B.T. Investment Managers, Inc.,* 447 U.S. 27, 38 (1980); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 679 n.12 (5th Cir. 1979). State laws have been supplanted with respect to the operation of state banks only in a few limited circumstances and only where Congress has expressly so provided.[1]

1. The FDIC Does Not Have Authority under the Federal Deposit Insurance Act to Adopt Rules of the Scope Proposed by Petitioner

Underlying the Roundtable's petition is the faulty premise that the FDIC has the same rulemaking authority as the OCC and that such authority should be exercised to adopt rules similar to those recently adopted by the OCC with respect to preemption of state laws. Even apart from the discussion in Sections B and C below exposing the infirmity of the OCC's recent rules, we believe that the FDIC does not possess equivalent rulemaking authority to that of the OCC. There are fundamental differences between the two agencies' functions, purposes and statutory frameworks. Based on these differences, the FDIC's rulemaking authority is significantly more limited than that of the OCC.

The OCC is the primary regulator of national banks. In contrast, the FDIC is not the primary regulator of state banks and its authority over state banks is limited accordingly.

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[1] For example, in 1980 Congress preempted state usury laws applicable to state banks by allowing them to take advantage of the same federal usury standards that apply to national banks under the Depository Institutions Deregulation and Monetary Control Act ("DIDA"). 12 U.S.C. § 1831(d)(a). Congress also preempted state laws with respect to adjustable rate mortgage loans by permitting state banks to make such loans in accordance with federal regulations, regardless of any applicable state law restrictions. 12 U.S.C. § 3803. And, pursuant to the Gramm-Leach-Bliley Act, 15 U.S.C. 6701, Congress authorized banks to engage in certain activities that had been previously been prohibited, such as the sale or cross-marketing of insurance, while generally preempting state regulation of such activities.

Federally chartered banks are "instrumentalities of the Federal government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States." *Davis v. Elmira Svgs. Bank*, 161 U.S. 275, 283 (1896). The National Bank Act establishes a national bank system subject to primary federal regulatory oversight by the OCC. The National Bank Act also vests national banks with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C.A. § 24.

In contrast to national banks, state banks are, with few exceptions, authorized primarily under state law to engage in banking. The FDIC was created in 1933 in response to the thousands of bank failures that occurred in the 1920s and early 1930s, for the purpose of providing deposit insurance available to qualified state and federal lending institutions. *See, e.g., FDIC. v. Godshall*, 558 F.2d 220, 221 (4th Cir. 1977) (primary purpose of the FDIC is "stabilizing or promoting the stability of banks by providing deposit insurance"). The Federal Deposit Insurance Act ("FDIA"), unlike the National Bank Act, does not enumerate all the powers of state banks. Those powers derive primarily from state law. In addition, section 24 of the FDIA specifically states that "[t]his section shall not be construed as limiting the authority of any appropriate Federal banking agency or any State supervisory authority to impose more stringent restrictions." 12 U.S.C.A. § 1831a(i). The FDIA further makes clear that state banking supervisors remain the "primary regulatory authority" over state banks participating in the FDIC's deposit insurance program. 12 U.S.C. § 1813(r)(1).

2. The Reigle-Neal and Gramm-Leach-Bliley Acts Do Not Provide the FDIC with Authority to Adopt the Preemptive Rules Proposed in the Petition

The petition also asserts that the rules it requests are necessary to fill in statutory gaps left by Congress when it enacted the Reigle-Neal and Gramm-Leach Bliley Acts. However, except as to interstate branch banks, Reigle-Neal and Gramm-Leach-Bliley have nothing to do with the general applicability of state laws to interstate banking, and their silence on the subject cannot be interpreted as a "statutory gap" that can be filled by administrative rule making. If there is a gap – and we do not think there is – it is a legislative gap that can only be filled by an act of Congress. Neither Riegle-Neal nor Gramm-Leach-Bliley vests the FDIC with the broad authority to supplant state law that petitioner asserts.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal I"), adopted by Congress in 1994, simply permitted national and state banks to operate branches interstate. Riegle-Neal I was intended to reverse longstanding prohibitions on interstate branch banking, not to preempt the application of state laws to branch banks. Indeed, in passing Riegle-Neal I, Congress affirmed that states retain "a legitimate interest in protecting the rights of their consumers, businesses and communities" and "a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, *regardless of the type of charter an institution holds*." H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added). In fact, the express intent of Riegle-Neal I was to reign in what Congress saw as the "inappropriately aggressive" preemption of state law by the OCC "in situations where the federal interest did not warrant that result." *See* H.R. Conf. Rep. No. 103-651, at 53-54 (1994). To this end, the Act specifically provided that "the laws of the host State 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 national bank to the same extent as such

State laws apply to a branch of a bank chartered by that State, except . . . when Federal law preempts the application of such State laws to a national bank." 12 U.S.C.A. § 36(f).

The Riegle-Neal Amendment Act of 1997 ("Riegle-Neal II"), enacted in 1997, was intended to provide parity between state and national banks in the area of branch banking. Pub. L. No. 105-24, 111 Stat. 238 (1997). By its express terms, Riegle-Neal II applies only to interstate branches of state banks and permits state banks operating interstate branches to do so on terms equivalent to those that apply to national banks. *See* section 24(j), 12 U.S.C.A. § 1831a(j). Nothing in the statute indicates a Congressional intent to reach beyond the activities of interstate branches to the business of state banks generally.

Section 104 of the Gramm-Leach-Bliley Act, 15 U.S.C. 6701, also fails to provide authority for the rules sought by the petition. The primary purpose of Gramm-Leach-Bliley was to remove barriers that had previously existed between banking and the securities and insurance industries. Gramm-Leach-Bliley thus repealed Glass-Steagall Act restrictions on commercial bank affiliates' investment banking activities and permitted banks to engage in the sale and solicitation of certain insurance products. Section 104 of Gramm-Leach-Bliley, the section on which petitioners specifically rely, addresses primarily state regulation of insurance sales and underwriting. Section 104 explicitly "recognizes the primacy and legal authority of the States to regulate the insurance activities of all persons." H.R. Rep. No. 106-434, at 156 (1999). Section 104 thus affirms the continued force of the McCarran-Ferguson Act, which provides for state regulation of insurance, 15 U.S.C. § 6701(a), and also requires persons engaged in the business of insurance to be licensed by the state, 15 U.S.C. § 6701(b). The only provisions in section 104 that expressly preempt state law are: i) section 104(d)(1), which prevents states from restricting banks and their affiliates from engaging in any activity authorized or permitted under Gramm-Leach-Bliley, and ii) section 104(d)(2), which, with certain specified exceptions, prohibits states from preventing or significantly interfering with the ability of banks or their affiliates to engage in any insurance sales, solicitation, or crossmarketing activity. 15 U.S.C.A. §§ 6701(d)(1) and (2).

Section 104(d)(4), relating to "Financial activities other than insurance" expressly provides that state laws other than those relating to certain areas of insurance and securities investigations are not preempted provided such laws do not discriminate against banks. 15 U.S.C.A. §§ 6701(d)(4)(1) and (2). Contrary to petitioner's assertion, these anti-discrimination provisions have nothing to do with establishing parity between national and state banks. They apply equally to all depository institutions, including state and national banks, and ensure that states do not treat such depository institutions, regardless of whether they are federally or state-chartered, more harshly than non-depository institutions. Thus, this section provides no support whatsoever for the rules requested by the Roundtable.

In sum, given the absence of any Congressional mandate, the FDIC plainly lacks authority to conduct the extraordinary rulemaking sought here.

B. **The Proposed Rules Would Impermissibly Expand the Preemption of State Laws in Violation of Longstanding Judicial Precedent and the Intent of Congress**

The petition rests on the proposition that the FDIC should follow the lead of the OCC, which recently promulgated sweeping and controversial new rules purporting to preempt nearly all state regulation of national banks and their operating subsidiaries. *See, e.g.,* OCC Preemption Rule, 69 Fed. Reg. 1904 (Jan. 13, 2004). Specifically, the petition seeks rules that would apply the laws of a state bank's home state to the bank's business activities in other states whenever the laws of those other states are preempted with respect to national banks and their operating subsidiaries by the National Bank Act, as interpreted by the OCC. If not overturned by the courts, the requested rules would leave states powerless to regulate activities transacted within their borders by out-of-state state banks and their subsidiaries.

No sound basis exists for such a radical departure from the time-honored model of state bank regulation. The OCC rules, which the Roundtable proposes as a means to bootstrap the ill-advised preemption it seeks, purport to effect a dramatic change in the standard for preemption as historically interpreted by the courts and intended by Congress. Accordingly, the new OCC rules have been widely criticized by members of Congress, state legislators, banking supervisors, attorneys general, consumer groups and others as overreaching and unwise.[2] Indeed, the House Subcommittee on Oversight and Investigations has convened hearings to determine whether the OCC overstepped its authority in issuing its preemptive rules and has also asked the General Accounting Office to undertake a complete review of the process by which the OCC adopted its new rules and the impact of the rules on consumers.[3]

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[2] *See, e.g.*, Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225 (2004); Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004); *see also Congressional Review of OCC Preemption: Hearings Before Subcommittee on Oversight and Investigations*, 108th Congress, H.R. 108-65 (Jan. 28, 2004) [hearinafter *OCC Preemption Hearings*] available at http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=273 (last visited May 13, 2005) (opening statement of Subcommittee Chairwoman Sue Kelly; testimony of the Hon. Thomas, J. Miller, Attorney General of Iowa on behalf of the National Association of Attorneys General; testimony of Diana L. Taylor, New York Superintendent of Banking on behalf of the Conference of State Bank Supervisors; testimony of John Taylor, President and CEO, National Community Reinvestment Coalition; testimony of W. Lee Hammon, Board Member, AARP; testimony of Hilary Shelton, Director, Washington Bureau of the National Association for the Advancement of Colored People) and *OCC Preemption Hearings,* H.R. 108-78 (April 1, 2004) available at http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=290 (last visited May 13, 2005) (Opening statements of Representatives Luis Gutierrez and Rahm Emanuel).

[3] *OCC Preemption* Hearings, fn. 2 above (opening statement of Chairwoman Sue Kelly, Jan. 28, 2004 and statement of Representative Luis Gutierrez, Apr. 1, 2004).

In its new "preemption rule," the OCC essentially re-wrote and weakened the applicable test for determining whether state laws are preempted. Over 100 years ago, the Supreme Court acknowledged that national banks are subject to state regulation, stating explicitly that: "It is only when the State law *incapacitates* the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank v. Commonwealth,* 76 U.S. (9 Wall.) 353, 362 (1870) (emphasis added). As recently as 1996, the Supreme Court in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996), reaffirmed that state laws with respect to national banks are not preempted unless they either "prevent or significantly interfere with" the exercise of a power of a national bank "that Congress explicitly granted."

Disregarding these well-established precedents, the OCC's new rules provide that state laws are preempted if they "obstruct, impair, or *condition* a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law." 12 C.F.R. 7.0009 (emphasis added). By substituting "condition" for "incapacitates" or "significantly interfere," the OCC effected a sweeping and unjustifiable preemption of state laws. The OCC adopted these regulations over the strong objections of Conference of State Banks Supervisors (CSBS), the National Governors Association, the National Conference of State Legislatures (NCSL), all fifty state attorneys general and others.[4] The OCC also ignored congressional requests for extra time to consider the implications of its new rules.[5] Under the OCC's new rules, most state consumer protection laws would be preempted.

Even if the new OCC rules were defensible with respect to national banks – and they are not – they cannot serve as a basis for the rulemaking sought in the petition. Because national banks are federally created entities, they operate within a federal framework that at least has the potential to preempt state law. The OCC similarly attempts to defend its rules extending preemption to operating subsidiaries of national banks, asserting that operating subsidiaries of national banks are, in effect, federal entities since they "conduct their activities under a Federal license, subject to the same terms and conditions as apply to the parent banks." 69 FR 1904, at 15 (Jan. 13, 2004). However, no such arguable justifications exist for either state banks or

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[4] *See, e.g.*, Comments of NCSL to the Honorable John D. Hawke, Jr., Comptroller of the Currency (Oct. 6, 2003), available at http://www.ncsl.org/standcomm/scfin/occ031006.htm (last visited May 13, 2005); Comments of the National Association of Attorneys General on behalf of the Attorneys General of all fifty states and the Virgin Islands and the Corporation Counsel of the District of Columbia (Oct. 6, 2003), available at http:www.naag.org/issues/pdf/20031006-multi-occ.pdf (last visited May 5, 2005); Comments of the Center for Responsible Lending (Oct. 6, 2003), available at http://www.responsiblelending.org/pdfs/CRLCommentonOCCProposedRulemaking03-16.pdf (last visited May 13, 2005); Comments of CSBS (Sept. 29, 2003), available at http://www.csbs.org/government/regulatory/comment_ltrs/2003/cl_09.29.03.pdf (last visited May 13, 2005); Comments of Consumers Union (Oct. 1, 2003), available at http://consumersunion.org/pub/core_financial_services/000770.html (last visited May 13, 2005).

[5] See, e.g. *OCC Preemption* Hearings, fn. 2 above (opening statement of Chairwoman Sue Kelly, Jan. 28, 2004).

operating subsidiaries of state banks. State banks and their operating subsidiaries are state-chartered corporations, historically regulated by states under their respective laws. States have long held an unquestioned primacy in regulating state-chartered corporations. Courts have repeatedly upheld states' authority to exercise comprehensive supervision over the corporations they charter and to license and regulate corporations chartered by other states that transact business within their borders. As stated by the Supreme Court, "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at 89. Thus, there is no basis to immunize either state banks or their operating subsidiaries from the laws of the states in which they do business.

C. <u>The Proposed Rules Do Not Represent Sound Public Policy: They Will Not Preserve the Dual Banking System and Will Undermine the Ability of States to Protect Their Citizens</u>

1. The Proposed Rules Will Result in a Race to the Bottom

The proposed rules would not preserve the dual banking system. Although the petition asserts that the proposed rules are necessary to prevent a migration of state banks to national banks, the proposed rules would result in just another form of migration. If adopted, the proposed rules would cause states to compete with one another for bank charters by offering minimal and inexpensive regulation and encourage state-chartered banks to migrate from states that actively regulate to those that do not. Such a migration took place in response to the enactment of the most favored lender law enacted in 1980. At that time, many credit card banks moved to Delaware and South Dakota so that they could export high interest rates. If the relief sought in the petition is granted, consumers and businesses will receive less protection. Moreover, in an effort to stop such migration, states will be tempted to weaken their own regulatory standards and consumer protections.

2. The Proposed Rules Will Leave a Gaping Regulatory Vacuum.

The proposed rules would effectively gut states' ability to legislate and take enforcement action against improper lending and other banking practices within their borders. If the petition is granted, the OCC, which has abused its regulatory mandate in aggressively promoting preemption of state laws with respect to national banks, but whose decisions are accorded substantial deference, will become the de facto arbiter of what state laws are preempted with respect to state banks and their subsidiaries. And, given the OCC's unduly expansive view of what laws are preempted, most state laws in states where out-of-state banks do business, including consumer protection laws, will fall victim to the OCC's overbroad preemptive reach if Congress or the courts do not reign in OCC.

The regulatory void resulting from supplanting the laws of the states in which state banks and their operating subsidiaries do business would be significantly greater for state banks and their subsidiaries than for their national counterparts. When state regulatory laws are supplanted, there will not necessarily be equivalent home state laws that address adequately, if at all, the needs of the foreign state and its citizens. In addition, supplanting such state laws is likely to leave an enforcement void. In contrast to the OCC, which is the primary regulator of national banks and has at least publically committed to vigorously enforcing consumer protection laws against national banks and their subsidiaries, the FDIC is not the primary regulator of insured state banks. The FDIC's primary function is as an insurer responsible for overseeing the financial solvency of insured banks. The enforcement of state consumer protection laws is not a focus of the FDIC's supervisory activities, and its role with respect to the enforcement in this area is accordingly limited. The FDIC does not routinely examine institutions for compliance with state laws, and the FDIC generally takes no position on the proper interpretation of state law provisions governing the applicability of specific state laws to insured state nonmember banks and affiliated entities.

States have historically been responsible for regulating and creating a legal framework for state banks and other state-chartered financial entities that operate within their borders. However, the rules proposed by the Roundtable threaten to deprive the states of the power to protect their citizens from predatory and other improper lending engaged in by state banks or their subsidiaries, practices that cause substantial injury to some of the states' most vulnerable citizens – low income, elderly and minority homeowners. States would face numerous difficulties enforcing the laws of a bank's home state, not the least of which is familiarizing themselves with the laws of all the states in which such banks are chartered. Home states would not necessarily be able to enforce their laws in other states where their state-chartered banks do business and would have little or no incentive to do so.

Rules immunizing state banks and their subsidiaries from application of host state laws would also cripple the kind of innovation and experimentation that is the hallmark of a federalist system. States have long been touted as the laboratories for experimentation, and effective legislation at both the state and federal levels often derives from the efforts of a single or handful of states attempting to grapple with a demonstrated problem. States would lose the ability to respond promptly and in a manner tailored to meet the needs of their residents and would be forced to await action by the home state. When a problem emerged in one or more states, those states would not be able to enact legislation to address those problems. They would instead be dependent on the legislatures of the home state to act on their behalf. Moreover, the proposed rules would create massive uncertainty about which laws are preempted and which apply. And, because there is no clear mechanism for making these determinations, the rules would create widespread confusion and enforcement delays. At the very least, the proposed rules would result in a cumbersome process that would hamstring the states' ability to respond swiftly and creatively to problems within their borders.

3. The Proposed Rules Would Not Achieve Parity or Uniformity

The Roundtable also asserts that their proposed rules are necessary to achieve uniformity. In fact, the need for uniformity is greatly overstated. Congress has recognized the importance of state regulation in this area and has made clear in Riegle-Neal that states retain a vital interest in application of state law to banking activities, particularly with respect to community reinvestment, consumer protection and fair lending.

Moreover, the proposed rules would not achieve uniformity. Adopting rules that require application of home state laws whenever a state law is preempted with respect to national banks would yield a haphazard patchwork of regulation. While preemption of state laws with respect to national banks arguably results in a single national standard being applied to national banks, the same would not be true for state banks under the rules proposed by the Roundtable. State banks and subsidiaries operating within a single state would be subject to potentially 50 differing laws, depending solely upon where the given bank were chartered. The result would be disparate treatment for banks within the same state and widespread confusion among consumers, businesses and regulators.

D. <u>The Proposed Rules Are Not Needed</u>

The petition fails to state any factual basis for concluding that state banks are burdened by compliance with the laws of the states in which they do business any more than other businesses. The petition likewise fails to explain why the banking industry should operate differently from other industries, such as securities, firearms, farming and mining, that operate in a dual regulatory environment.

Moreover, there is no need for blanket federal regulations to achieve parity between national and state banks because states have undertaken a variety of steps on their own to achieve such parity. Many states, such as New York, have adopted “wild card” statutes and have entered into cooperative agreements that permit state banks a considerable degree of parity with national banks. State wild card statutes provide a mechanism by which state-chartered banks can obtain permission to engage in activities permissible for national banks. These statutes allow states to provide parity for state-chartered banks in a thoughtful and responsible manner while retaining regulatory flexibility over matters states deem appropriate. In addition, since 1997, state banking departments across the country have been parties to a nationwide cooperative agreement that has as its goals promoting a comprehensive nationwide system for safety and soundness of financial institutions, coordinating the supervision and examination of multi-state banks, fostering effective coordination and communication among the states to minimize the regulatory burden on multi-state banks, and enhancing responsiveness to local needs and interests in an interstate banking and branching environment.[6] The state cooperative agreement recognizes that the home state banking supervisor is “the primary regulator and will act as the single point of contact,” but that host state supervisors “have a legitimate interest in monitoring the safety and soundness of out-of-state banks that operate branches in their states and in making sure those branches are operated in compliance with host state law.”[7]

Certain other aspects of the requested rules are also unnecessary. For example, there is no need to adopt rules with respect to section 27 of the FDIA. Section 27, which allows state banks to export the interest rate of their home state, has been law for more than 20 years. It was enacted to provide state banks "competitive equality" with national banks. As the FDIC recognizes in its Notice of Proposed Rulemaking, section 27 is modeled on sections 85 and 86 of the National Bank Act, 12 U.S.C.A. §§ 85 and 86, and has been construed by the courts and by

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[6] *See* Nationwide Cooperative Agreement, Section 2.2, available at http:www.csbs.org/government/agreements/html/nationwide_coop_agrmnt.htm (last visited May 5, 2005).

[7] *Id*. at Section 2.3.

the FDIC itself in virtually the same manner as the OCC and the courts have construed sections 85 and 86 of the National Bank Act. 70 Fed. Reg. at 13143. *See*, *e.g.*, FDIC General Counsel Opinions 10 and 11, 63 Fed. Reg. 19258 (Apr. 17, 1998) and 63 Fed. Reg. 27282 (May 18, 1998) respectively; *see also Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993). There is simply no reason why a rule implementing section 27 is needed at this time.

Conclusion

The FDIC should decline the proposed rulemaking in its entirety. Over the past hundred years, Congress has repeatedly acted to preserve the dual banking system and to maintain a balance between state and national banks. When Congress has wanted to preempt state laws with respect to national or state banks, as in the case of usury limits and branch banking, it has done so clearly and explicitly. The FDIC should not allow rulemaking to circumvent the legislative process and should not entertain reversing, by administrative fiat, states' historical authority over their own internal affairs and entities that operate within their borders.

The argument that these rules are necessary to maintain competitive equality for state banks in light of the OCC's preemptive rulemaking is misguided. The OCC had no authority to adopt its sweeping preemptive rules. Until the OCC aggressively pushed its preemption agenda, the states had effectively exercised enforcement and regulatory authority over national and state banks without controversy for years. It is time to see the OCC's efforts for what they are: a dangerous threat to consumers, federalism and the democratic process. The solution is to overturn the OCC's rules with respect to national banks and their operating subsidiaries, not to further supplant or restrict the application of state laws to state-chartered banks and their subsidiaries. It is up to Congress and the courts to restore the proper balance.

The states have seen firsthand the adverse effects of abusive practices in the areas of lending, credit, debt collection and telemarketing, including practices arising from the partnership of non-banks with banks in an effort to avoid legitimate regulation. The states have taken a leadership role in devising legislation and taking enforcement action to restrict such practices. These efforts have been largely successful. We therefore ask that the FDIC not undertake actions that will further erode the ability of states to police banks and other financial institutions within their borders.

Very truly yours,

ELIOT SPITZER