

A Preemption Primer

By

Raymond Natter

Barnett Sivon & Natter, P.C.

September 21, 2009

A Preemption Primer

Raymond Natter¹
Barnett Sivon & Natter, P.C.

From the very establishment of the national bank system in 1864, Congress has repeatedly made the policy determination that the powers and activities of national banks should be governed by federal, not state law.² Starting with a basic definition of the term “preemption,” this paper will explain the policy and legal basis for Congressional and regulatory actions that result in overriding certain state laws that otherwise would apply to federally chartered depository institutions. The paper demonstrates:

- Preemption is based on the Supremacy Clause of the Constitution.
- From the very inception of the national banking system, preemption has been recognized by Congress and the courts as necessary to accomplish the goals of the National Bank Act.
- Preemption permits the establishment of uniform nationwide standards that facilitate creation of an efficient banking system with nationwide capabilities.
- Preemption enhances the safety and soundness of our banking system by providing a check against state actions that would otherwise impede the safe operations of insured institutions.
- Preemption did not enable national banks to originate unsound mortgage loans, and the overwhelming majority of these loans were originated by state regulated entities.

What is Preemption?

The term “preemption” refers to the Constitutional principle that federal law overrides or “preempts” state laws that are not compatible with the federal law.

The preemption of state law flows directly from the Constitution’s Supremacy Clause, which states that the Constitution and laws of the United States are the “Supreme Law” of the land, notwithstanding anything in the Constitution or laws of the states to the contrary.³ This Clause was the basis for the landmark 1819 Supreme Court decision in McCulloch v. Maryland establishing the principle that state law cannot stand as an obstacle to the accomplishment of federal legislative goals, in this instance, by a state’s attempt to tax the Bank of the United States.

¹ This paper was prepared by Raymond Natter, of the law firm Barnett Sivon & Natter, P.C., through the support of the American Bankers Association. The views expressed are those of the author, and do not necessarily represent the views of the American Bankers Association or its members.

² In certain cases Congress has made an exception to this general principle; for example, in determining the branching rights of a national bank within its home state, the national bank may only branch to the extent permitted for state chartered banks.

³ U.S. Const. Art. VI, cl.2.

But Didn't National Banks Have to Comply With State Law Until Very Recently?

Since the National Bank Act was passed in 1864 the courts have repeatedly found that they are not subject to state laws that interfere with their powers.

As early as 1868, the National Bank Act was found by the lower federal courts to preempt conflicting state law.⁴ In 1874 the Supreme Court held that under federal law national banks may charge higher interest rates than allowed for state banks.⁵ A year later, in 1875, the Supreme Court held that state remedies for usury were preempted by the National Bank Act and therefore not applicable to national banks.⁶

Did Congress Want State Laws to Be Preempted?

The legislative history of the 1864 legislation clearly shows that it was intended to create a national banking system that would be, as far as possible, independent from state interference.⁷ In 1874, the Supreme Court reviewed the legislative history of the National Bank Act and concluded that: "National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks."⁸ In 1903 the Supreme Court again reviewed the National Bank Act's legislative purposes and determined that Congress intended to establish a "banking system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."⁹

Are All State Laws Preempted for National Banks?

State laws that conflict with, or significantly interfere with, national bank powers are preempted. Most state laws still apply.

Under the Supremacy Clause, Supreme Court rulings, and regulatory interpretations, only state laws that conflict with or significantly interfere with national bank powers are preempted. Most state laws that affect the day-to-day operations of a national bank still apply. Thus, national banks are subject to state laws regulating contracts, torts, criminal justice, zoning, as well as many other state commercial and business laws.

⁴ National Exchange Bank v. Moore, 17 F. Case. 1211 (1868).

⁵ Tiffany v. National Bank of Missouri, 85 U.S. 409 (1874).

⁶ Farmers' and Mechanics' National Bank v. Dearing, 91 U.S. 29 (1875).

⁷ See, e.g. statement of Sen. Sumner ("Clearly, the [national] bank must not be subjected to any local government, state or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions.") Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864).

⁸ Tiffany v. National Bank of Missouri, 85 U.S. 409, at 412-13 (1874).

⁹ Easton v. Iowa, 188 U.S. 220 (1903).

What Is Meant By Express Preemption and Implied Preemption?

Preemption can be express or implied, and state laws may be deemed preempted even if there is no direct conflict with the federal law.

The courts have categorized preemption as either “express” or “implied.” Express preemption occurs when a federal law explicitly overrides state law. For example, the Federal Deposit Insurance Act provides that notwithstanding any state law to the contrary, the FDIC may be appointed receiver of a failed insured bank.¹⁰ This federal law explicitly preempts any state law that prevents the FDIC from becoming the receiver of a failed insured institution. Another example is a section in the National Housing Act¹¹ that explicitly overrides any state law that limits the amount of interest that an FDIC-insured institution may pay depositors.

Implied preemption refers to the situation in which the federal law is silent about its effect on state law, but preemption is nevertheless “implied.” For example, if it is physically impossible to comply with both the federal and state laws at the same time, the state law is implicitly preempted.¹² Even if it is not impossible to comply with both laws, the state law will be preempted if it significantly interferes with the policy or goals of the federal law,¹³ or as the Supreme Court has stated, if the State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of the federal law.¹⁴ Other formulations of the test used by the Supreme Court to find that a state law is not applicable to a national bank include situations in which the state law: “[is] unduly burdensome and duplicative,” “conflicts with the purposes of the National Bank Act,” “prevents or significantly interferes” with national bank powers, “significantly burdens” national bank authority, or “curtails or hinders a national bank’s efficient exercise of any other power.”¹⁵

The basic policy for these decisions remains the same today as in 1864. National banks were created by Congress to serve federal purposes. State laws that hamper, hinder or significantly interfere with the ability of these federal instrumentalities to carry out these purposes are inconsistent with federal law and thus preempted.

What is Occupation of the Field?

Occupation of the field occurs when a court finds federal regulation of an area is so comprehensive as to leave no room for state action.

The Supreme Court has also found preemption when federal regulation of an area is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”¹⁶ This concept is referred to as “Occupation of the Field.”¹⁷

¹⁰ 12 U.S.C. § 1821(c).

¹¹ 12 U.S.C. § 1735f-7a (2).

¹² Florida Lime & Avocado Growers, Inc. v. Paul, 474 U.S. 132 (1963).

¹³ Barnett Bank. v. Nelson, 571 U.S. 25 (1996).

¹⁴ Id.

¹⁵ Watters v. Wachovia, 550 U.S. 1 (2007).

¹⁶ Fidelity Fed. Sav. & Loan v. De la Cuesta, 458 U.S. 218 (1982).

¹⁷ Rice v. Santa Fe Elevator, 331 U.S. 218 (1947).

What is the Preemptive Effect of Regulations?

Federal regulations as well as statutes may preempt state law.

Valid federal regulations have the same preemptive effect as federal statutes. As stated by the Supreme Court with respect to OTS regulations: “federal regulations have no less preemptive effect than federal statutes.”¹⁸

Why Did the OCC Issue Preemption Regulations?

The OCC and the OTS issued many opinion letters and regulations that have the effect of preempting state law. In 2004 the OCC issued a regulation that, according to the OCC, essentially codifies these prior letters and regulations in one place, that incorporates the preemption standards as pronounced by the courts, and that provides examples of state laws that are preempted and laws that are preserved. At the same time the OCC issued a second regulation that clarified the agency’s position with respect to the authority of the states to examine and supervise national banks, under the statutory provision granting the OCC “exclusive visitorial” authority.

The OCC has a long history of issuing legal opinions that particular state laws are inconsistent with the National Bank Act and, therefore, preempted. When challenged, these opinions were almost always upheld in the courts. In 2004, the OCC, after reviewing the relevant case law, as well as OTS regulations and preemption opinions, issued two regulations relating to preemption. The first regulation specifies that a national bank and its operating subsidiaries are not subject to state laws that “obstruct, impair, or condition” the bank’s federally authorized powers to accept deposits or make loans.¹⁹ The regulation then provided a specific list of types of state laws that are preempted under this standard, as well as state laws that would not be preempted. With respect to other laws not included in either list, the OCC regulations specify that the agency will make case-by-case determinations, based on the standard established by the courts and incorporated into the regulation. Thus, this codification provides the reader with a concise statement of the law relating to preemption, without the need to review all of the prior precedents and regulations.

The second OCC regulation, also issued in 2004, deals with the related issue of visitorial powers, e.g., the authority to examine and supervise national banks. This regulation interprets the statutory provision granting the OCC “exclusive visitorial” powers over national banks.²⁰ It explains that if a state law is not preempted, the enforcement of that law with respect to national banks is carried out by the OCC, and not the states, unless federal law provides otherwise. As will be discussed later, the Supreme Court recently issued an opinion regarding the authority of state Attorneys General to bring actions in state court, notwithstanding the OCC’s exclusive visitorial statute.

¹⁸ Fidelity Federal Savings and Loan Assn. v. De La Cuesta, 458 U.S. 141 (1982).

¹⁹ 12 C.F.R. §§ 7.4008, 7.4009, 34.4.

²⁰ 12 U.S.C. § 484.

Savings Associations

The Office of Thrift Supervision, and its predecessor agency, the Federal Home Loan Bank Board, have also taken the position that the Home Owners Loan Act and agency regulations preempt state law.²¹ The OTS regulations provide that they “occupy the field” and preempt state laws affecting the operations of federal savings associations and their operating subsidiaries.²² The OTS regulations provide illustrative examples of the types of state laws that are, or are not, preempted under this regulation.

Comparison of Preemption Regulations

OCC and OTS preemption are very similar.

Table A shows lending and deposit-taking laws preempted by regulations issued by the OCC and the OTS. Table B lists types of other state laws that have not been preempted by the federal banking regulators.

Table A

Types of State Lending and Deposit-Taking Laws Preempted by the OCC and OTS Regulations

	OCC	OTS
Abandoned and dormant accounts	√	√
Aggregate amount of funds that may be lent on the security of real estate	√	
Checking/share accounts	√	√
Covenants and restrictions necessary to qualify leaseholds as security property for a real estate loan	√	
Credit reports, access to and use of	√	√
Credit terms	√	√
Creditor insurance/credit enhancements/risk mitigants	√	√
Due-on-sale clauses	√	√
Escrow, impound and similar accounts	√	√
Funds availability		√
Interest rates and fees	√	√
Licensing, registration, filings and reports	√	√
Loan-to-value ratios	√	√

²¹ See, e.g., *Fidelity Federal Savings and Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982).

²² 12 C.F.R. §560.2. Letter of Carolyn Lieberman, Acting Chief Counsel, OTS. (Oct. 17, 1994).

Mandated statements and disclosure requirements	√	√
Mortgage origination, processing and servicing	√	√
Repayment/disbursement	√	√
Savings account orders of withdrawal	√	√
Security property, including leaseholds	√	√
Special purpose savings services (deposit-taking)	√	√

Table B

Types of State Laws Not Preempted by the OCC or OTS Regulations

	OCC	OTS
Contract	√	√
Criminal	√	√
Debt collection	√	
Homestead (12 USC 1462(a)(f))	√	√
Incidental effect only	√	√
Real Property	√	√
Taxation	√	
Torts	√	√
Zoning	√	

Did Preemption Result in Predatory Mortgage Loans?

Some have argued that preemption removed regulatory constraints on national banks, and in order to provide equal treatment for state-chartered banks, the states relaxed their consumer protection laws, resulting in an avalanche of high cost mortgage loans given to consumers who did not have the means to repay the debt. This criticism is not supported by the facts. The limited role that both national and insured state banks played in the mortgage lending crisis strongly suggests that preemption had little to do with that crisis.

As early as 2003, the OCC directed national banks and their subsidiaries not to engage in predatory lending practices, and required national banks and their subsidiaries to make an appropriate determination that the borrower has the ability to repay the loan before it is made.²³ In 2004, the OCC issued a regulation that prohibited national banks and their subsidiaries from making mortgage loans based on the expected value of the home, and without regard to the borrower's actual ability to repay the mortgage.²⁴ In 2005, the OCC followed up on these steps

²³ OCC Advisory Letter No. 2003-2 (Feb. 21, 2003).

²⁴ 12 C.F.R. § 34.3(b).

by issuing enforceable guidelines on mortgage lending that provided additional consumer protections.²⁵ In 2006, all the federal banking agencies issued an interagency statement specifically directed to non-traditional mortgage products,²⁶ and in 2007 all of the federal banking agencies issued additional guidance on subprime lending.²⁷

As a result of these measures, as well as the close supervision of depository institutions by the OCC and other regulators,²⁸ the overwhelming majority of problem loans were granted by non-bank, state regulated, mortgage originators.²⁹ This fact was recognized by all 50 state Attorneys' General, who wrote in an amicus brief:

Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.³⁰

The relative lack of bank involvement in the origination of problem mortgage loans was also recognized by the Treasury Department, which noted in a recent white paper that 94 percent of "high-priced loans" to "lower income borrowers" were originated by non-depository institution lenders.³¹

²⁵ 70 Fed. Reg. 6329 (Feb. 7, 2005).

²⁶ 71 Fed. Reg. 58609 (Oct. 4, 2006).

²⁷ 72 Fed. Reg. 7569 (July 10, 2007).

²⁸ "OCC-supervised institutions accounted for approximately 12 to 14 percent of the non-prime originations in the years 2005-2007." Foreclosure rates for these OCC regulated originators were "markedly lower than for other types of originators." Letter from Comptroller John Dugan to Elizabeth Warren (Feb. 12, 2009) ("Dugan Letter").

²⁹ State regulated, non-depository institutions accounted for nearly 60 percent of non-prime mortgages in the worst ten metropolitan areas in 2005-2007. Dugan Letter at page 1 of attachment. The 40 percent of loans issued by federally regulated entities includes loans issued by entities that are not covered by OCC or OTS preemption, such as state chartered banks and subsidiaries of bank holding companies.

³⁰ Brief for Amicus Curiae State Attorneys General, Nat'l Home Equity Mortgage Ass'n v. OTS, No. 02-2506, 2003 U.S. Dist. LEXIS 12109 (D.D.C. Mar. 21, 2003).

³¹ Department of the Treasury, "*Financial Regulatory Reform A New Foundation: Rebuilding Financial Supervision and Regulation*" (June 17, 2009) at 69-70. Rep. Barney Frank, Chairman of the House Financial Services Committee, also acknowledged that federally regulated banks have not been major originators of unsafe mortgages. In the 110th Congress, during the floor debate on H.R. 3915, the "Mortgage Reform and Anti-Predatory Lending Act of 2007," Chairman Frank explained: "We have had two groups of mortgage originators recently. We have had banks subject to the regulation of the bank regulators, and they've made mortgage loans. And then we have had mortgage loans made by brokers who were subject to no regulation, who had access to pools of money that were not regulated and could sell it to an unregulated secondary.... The difference is the absence of regulation so that pressures to do things that were irresponsible were checked by regulation in the banking area and were left unchecked elsewhere. Essentially what [H.R. 3915] does in its most important form is to try to conceptualize the rules that bank regulators used to prevent loans from being made that should not have been made and apply them to all loan originators." Congressional Record at page H.139978 (Nov. 15, 2007).

What Have the Courts Said About the OCC and OTS Regulations?

The courts have consistently upheld OCC and OTS preemption regulations.

The courts have consistently upheld federal banking agency regulations that have a preemptive effect. In Wachovia v. Watters,³² the Supreme Court held that under the National Bank Act and OCC regulations, operating subsidiaries of national banks are not required to obtain a state license to engage in lending activities, and that such subsidiaries are not subject to state examinations. In Bank of America v. San Francisco,³³ a U.S. Court of Appeals held that city ordinances proscribing ATM fees for non-customers were in direct conflict with OCC regulations authorizing such fees, and were therefore preempted. In Wells Fargo Bank v. James,³⁴ the same U.S. Circuit Court of Appeals held that a state law requiring checks to be paid “at par” was in direct conflict with, and thus preempted by, an OCC regulation authorizing national banks to charge non-interest fees and charges. And in Rose v. Chase Manhattan Bank, N.A.,³⁵ the court of appeals held that state disclosure laws were in direct conflict with OCC regulations authorizing national banks to make loans without regard to state limitations concerning disclosures and advertising.³⁶

The OTS has similarly been validated in the courts when arguing that its regulations have preemptive effect. For example, the Supreme Court upheld that regulations issued by the Federal Home Loan Bank Board (the predecessor agency to the OTS) invalidating a California court ruling that prohibited savings associations from deeming a mortgage payable in full when the home securing the loan was sold or transferred.³⁷ More recently, in State Farm Bank, FSB v. Meinberg,³⁸ the Sixth Circuit held that under OTS regulations a federal savings bank did not have to register its third-party exclusive agents under state law because such a licensing requirement would interfere with the operations of the savings institution. In Silvas v. E*Trade Mortgage Corporation,³⁹ the U.S. District Court held that an OTS regulation that federal law “occupies the field” of lending regulation for thrift institutions preempts state remedies for violations of the federal Truth-in-Lending Act.

But Didn't the Supreme Court Recently Limit the OCC Preemption Authority?

The Supreme Court recently opined on the extent of the OCC's exclusive authority to examine national banks, but the Court did not limit the authority of the OCC to preempt state laws that interfere with national bank operations.

³² 550 U.S. 1 (April 17, 2007).

³³ 309 F.3d 551 (9th Cir. 2002)

³⁴ 321 F3d. 488 (5th Cir. 2003). See also, Bank of America, N.A. v. Sorrell, 248 F.Supp.2d 1196 (N.D. Ga. 2002) holding that OCC regulations preempted the Georgia “at par” law.

³⁵ 396 F.Supp.2d 1116 (C.D. Ca. 2005).

³⁶ 513 F.3d. 1032 (9th Cir. 2008).

³⁷ Fidelity Federal Savings and Loan Assn. v. De La Cuesta, 458 U.S. 141 (1982).

³⁸ 539 F.3d 336 (6th Cir. 2008).

³⁹ 421 F.Supp. 1315 (S.D. Ca. 2006).

In the case of Cuomo v. the Clearing House,⁴⁰ the Supreme Court determined that the OCC could not prevent a state from enforcing its non-preempted law against national banks in state courts. However, the case only relates to *enforcement* of non-preempted law, it does not dispute the validity of the OCC regulations that preempt state requirements.

What Are the Arguments For and Against Preemption?

The doctrine of preemption is contentious. Some view the doctrine as limiting the ability of the states to enforce consumer protection measures against federally chartered depository institutions, and, in particular, national banks and federal savings associations. The effectiveness of the federal regulators to enforce consumer compliance provisions is questioned by consumer advocates, and state attorneys general argue that their ability to bring actions against federally chartered banks should not be curtailed.

On the other hand, as Congress has previously recognized, federal instrumentalities such as national banks must operate free from state interference in order to accomplish national objectives. In today's modern economy, in which many banks operate nationwide franchises, and capital flows across the continent with the speed of an electronic pulse, it is even more essential that these federal instrumentalities have a consistent and level legal playing field, and are not subject to different rules in each state, county or city. Requiring compliance with a myriad of state and local regulations would make it much less efficient to provide nationwide services, would increase the cost of products and services for consumers, and would open up the possibility of having to comply with inconsistent requirements in different areas. In a national economy, financial services pricing and product availability should not be dictated by state and local governments.

The concern that compliance with numerous state laws can have an adverse impact on the cost and availability of financial products is borne out in academic research. For example, a study by Professors Anthony Sanders of Ohio State University and Brent Ambrose of the University of Kentucky found:⁴¹

It is also well known that state-level regulations regarding borrower rights and responsibilities can have considerable impact on expected default losses (or recovery rates) and as a result would impact borrower credit costs...state laws that increase the lender's costs associated with borrower default result in additional costs of credit for all borrowers.

This particular study estimated that such state laws add one-third of a percent to the interest rate of mortgage loans.⁴² Other studies have found that these state laws result in increased loan losses and/or fewer loans being made.⁴³

⁴⁰ 129 S.Ct. 2710 (June 29, 2009).

⁴¹ Ambrose and Sanders, *Legal Restrictions in Personal Loan Markets* at page 4 (April 17, 2003).

⁴² *Id.* at 20.

⁴³ See, e.g. Clauretje and Herzog, *Journal of Money, Credit & Banking*, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry* (May, 1990); Barth, Cordes, and Yezer, *Journal of Law and Economics*, *Benefits and Costs of Legal Restrictions on Personal Loan Markets* 357-80 (1986).

Another important factor that must be considered is safety and soundness. Unlike the states and municipal authorities, the FDIC deposit insurance funds, backed by the full faith and credit of the U.S. Treasury, bears the risk of losses by depository institutions. In the late 1970s and early 1980s, when interest rates reached record high levels, many consumers were unable to afford market rates for home mortgages, and therefore homeowners had difficulty selling properties without significantly lowering the asking price. In order to protect consumers, California and other jurisdictions began to prohibit banks and savings associations from exercising “due on sale” clauses in mortgages. These state actions allowed a consumer to purchase a home and assume the existing mortgage with its old (lower) rate of interest. While benefiting some consumers, and existing homeowners, the effect of these measures increased losses in the depository institutions, which were funding mortgages at market rates but receiving the lower rate of return specified in the older mortgages. The impact of the mismatch between deposit rates and mortgage rates on existing loans caused significant losses to the savings and loan industry, which by some accounts was essentially insolvent by 1982. When the federal regulator preempted state actions in this area, the argument was made that the federal regulation was anti-consumer, and was litigated to the Supreme Court, where the regulation was eventually upheld.⁴⁴

In the mid-1980s, states began to enact laws that greatly expanded the types of investments that savings associations could make. Unfortunately, many of these associations invested in speculative ventures, and the industry began to accumulate massive losses, in particular, in the states that had adopted these permissive laws.⁴⁵ In 1985, the federal regulator issued a regulation preempting these state laws and thereby reducing the ability of federally insured savings associations to engage in these risky investments. This regulation was also highly controversial, but helped stem the losses in the savings and loan industry.

A more recent example can be found in a California provision that prohibits a bank from charging more than one day of interest before a mortgage loan is recorded. Delays in recording a mortgage are often beyond the control of the lender, for example, because of a backlog in the county courthouse. However, since the funds are disbursed to the borrower soon after the closing of the mortgage, the bank’s funding costs for the loan begin as of the date of disbursement, and the consumer has the benefit of the funds from that date as well. Thus, the provision imposes potential costs on the lender due to factors beyond the control of the bank. Federal regulations preempting this provision were upheld by the Court of Appeals in 2005.⁴⁶

In sum, state regulatory initiatives can raise important safety and soundness implications for insured depository institutions.

⁴⁴ Fidelity Federal Savings Assn. v. De La Cuesta, 458 U.S. 141 (1982).

⁴⁵ “As long as the Federal government was responsible for picking up the tab for a failed state-chartered thrift, there was no great incentive for many state legislatures to deny the sweeping demands for additional investment powers made by the thrift industry. The results were tragic. Seventy percent of all FSLIC expenditures during 1988 went to pay for problems created by high-risk, ill-supervised, state-chartered thrifts in California and Texas.” House Banking Committee report, page 297 (101st Cong. 1st Sess. 1989).

⁴⁶ Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005).

Finding the Right Balance

The current law on preemption in the banking industry is now well settled. The Supreme Court and the lower federal courts have clarified the authority of the banking agencies to issue regulations that have preemptive effect. The exclusive visitorial authority of the OCC over national banks and operating subsidiaries is also established.

Policymakers can, of course, change the current legal structure through legislation. However, it is important to consider the ramifications of any such action. A review of the history of the federal laws that created national banks and federal thrifts indicates that Congress saw these entities as federal instrumentalities, principally subject to federal law. The ability to preempt state law has played an important role in facilitating a national marketplace and protecting the safety and soundness of insured depository institutions (and thereby protecting the federal deposit insurance funds).

On the other hand, consumer advocates and some states note that state consumer protection standards may be more stringent than federal standards, and that the federal regulators can be lax in looking after consumer interests. State attorneys general argue that their ability to enforce consumer protection laws should not be restricted.

A balanced approach needs to consider the costs involved in multiple consumer protection standards for a lender engaging in a nationwide business. The costs involved in complying with up to fifty different disclosure requirements and other restrictions will ultimately be passed back to the consumer. These costs include potential litigation and damages for the inadvertent errors that will no doubt occur.

National standards could be maintained and consumer protection concerns could be addressed through uniform provisions, such as a national predatory lending standard, that are enforced through the federal regulators. These regulators are accountable to Congress, and they can be held accountable for the effectiveness of their regulatory enforcement. Yet, the unnecessary costs of multiple, and perhaps inconsistent, regulatory requirements, can be avoided.

RN
9/21/2009