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December 13, 2005

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Attention: Comments/Legal ESS

Re: Proposal on Interstate Banking and Interest Rate Authority
70 *Federal Register* 60019, October 14, 2005

Dear Mr. Feldman:

The American Bankers Association ("ABA") is responding to the proposal issued by the Federal Deposit Insurance Corporation ("FDIC") to codify as regulations: 1) the current provisions of the Riegle-Neal Act Amendments of 1997 clarifying the state laws that apply to interstate branches of state banks; and 2) the current FDIC General Counsel Opinions on interstate interest rate preemption for state-chartered banks. The ABA, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country.

Background

The proposal is in response to a petition for rulemaking, the goal of which was to create, for state banks operating across state lines, a uniform system of laws comparable to the system of interstate law applicable to national banks. Many industry participants believe that as more and more state banks operate on an interstate basis, they will convert to national banks to take advantage of the preemption of state laws for national banks. The result would be that most larger interstate banks would have national charters, while much smaller banks would maintain their state charters, thereby weakening the dual banking system. Accordingly, the petition made a number of regulatory requests intended to provide parity for state banks competing with national banks to reduce the incentives to change charters and promote the vitality of the dual banking system.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal I")[1] authorized interstate branching by state and national banks. Under Riegle-Neal I, branches of state banks operating outside of their chartering or "home" state in another "host" state ("interstate state bank branches") were made subject to the law of the host state just as though they had been chartered in the host state. Such interstate state bank branches could conduct only those activities that were authorized by *both* the home and host states.

Shortly after the law went into effect, Congress realized there was a significant practical disparity between the treatment of interstate branches of state banks and national banks when the Office of the Comptroller of the Currency ("OCC") preempted a state law. The Riegle-Neal Act Amendments of 1997 ("Riegle-Neal II")[2] was enacted to address this situation. Thus, under Riegle-Neal II, when OCC preempted a state law, the law was also deemed to be preempted for interstate state bank branches operating in that state. The interstate state bank branch would instead be subject to the law of its home state, if any relevant law existed.

Since the adoption of Riegle-Neal I and II along with the advent of the Internet and the expansion of electronic commerce, banks market their products and services wherever their business plans dictate—locally, regionally or nationally—leading far more banks to operate across state lines. With that expansion has come the increased costs of offering products that must comply with the laws of more than one state. When the differences between state laws are significant, it becomes more expensive to serve customers across state lines, sometimes significantly more expensive. As a result, institutions operating in a number of states have converted from state charters to national charters to take advantage of the uniformity provided by a federal regulatory scheme.

ABA Position

1. Riegle-Neal II

FDIC's first proposed change would implement Riegle-Neal II by specifically preempting for such interstate state branches, state laws that are also preempted for national bank branches in the same state. The proposal expressly states that it does not apply to state bank operations in states where the bank does *not* have a branch.

In accordance with the statutory language, preemption would "apply to any branch" of a state bank in a host state. The proposal would further define "any branch" to include activities "of, by, through, in, from, or substantially involving, a branch." ABA believes that this definition not only is fully supported by the Congressional colloquy when Riegle-Neal II was enacted, but also by the overriding purpose of the statute—to promote parity between state and national banks operating outside of their home states. Accordingly, ABA supports the proposed definition.

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[1] Pub. L. 103-328 (1994).
[2] Pub. L. 105-24 (1997).

The proposal further requires that state banks may rely on such state bank preemption only in cases in which either OCC or a court has determined in a writing that a specific state law is preempted. Thus, under the proposal, it appears that state banks may *not* be able to rely on OCC's preemption rules[3] that specify only the general types of state laws that are preempted for national banks, but rather could rely only on the agency's preemption opinions specifically preempting a state law.[4]

This limitation raises significant implementation problems for state banks. In the vast majority of cases where OCC has not preempted a specific state law, state banks could be forced to seek from OCC an opinion that their particular state law is preempted—an opinion that OCC might not be required to provide. The costly alternative would be to seek a declaratory judgment from a court that the specific state law would be preempted for national banks. Such a requirement would be so burdensome as to make meaningless much of the potential benefits of the parity proposal.

We recognize that OCC has a valid concern that state banks not seek opinions from agencies other than OCC to interpret the National Bank Act. Nonetheless, there are ways to address these concerns without eviscerating the proposal. OCC, of course, could commit to respond to every request for an opinion sought by state banks in a timely manner. This may, however, be a burdensome result for OCC, especially since one of the reasons it codified its various opinions and court decisions on National Bank Act preemption into a regulation was to avoid having to opine on the laws of the fifty different states that, in large part, presented the same issues.

Alternatively, FDIC could, with the concurrence of OCC, permit state banks to use the same process long used by national banks to make business decisions that are impacted by preemption of state laws. As a practical matter, national banks do not seek an opinion from OCC each and every time they wish to take advantage of preemption of state laws. Rather, they obtain an opinion of counsel that, based on OCC's rules and precedents, the state statute at issue is preempted. By relying on such opinions of counsel, national banks accept the risk that their actions may be challenged by state authorities.

This mechanism could be achieved simply by 1) eliminating the requirement in the regulatory language of the proposal for a written opinion from OCC or the courts and 2) adding language to the preamble of the rule stating clearly that FDIC will not entertain any requests for such interpretations. By doing so, state banks would be able to take advantage of OCC's preemption rules based on legal opinions just as national banks do, thereby furthering true parity with national banks.

[3] 12 C.F.R. §§ 7.4007-4009, 34.3 and 34.4.

[4] An example of such a specific writing is OCC's determination that the Georgia predatory lending law is preempted for national banks.

2. State Usury Laws

The second proposal would codify in a regulation the preemption of state usury laws under section 27 of the Federal Deposit Insurance Act[5] that had already been understood and applied by various FDIC General Counsel opinions. Among other things, the proposed rule would:

- Parallel the OCC and OTS regulations implementing their respective statutory counterparts to section 27 by defining certain types of fees as interest even if they are not deemed to be interest under state law;
- Incorporate a "most favored lender" rule;
- Address the "location" of a state bank that
    - Does not have branches in another state,
    - Does have branches in another state; and
    - Operates exclusively over the Internet;
- Address the interest rates that should apply in the above situations;
- Define and describe the three non-ministerial functions that are the factors to be considered in determining "where" a loan is made by an interstate state bank (*i.e.,* approval, extension of credit, and disbursal).
- Provide direction on the appropriate state interest provisions to apply to a loan made by an interstate state bank when the three non-ministerial functions incident to making the loan occur
    - In the same state;
    - In different states; or
    - When the circumstances involving a loan provide a nexus to a state where the bank maintains a branch.

Importantly, under the proposal, majority-owned operating subsidiaries of state banks that engage only in activities authorized for the state bank would also be able to take advantage of this preemption.

Because this proposal, like the Riegle-Neal II codification, is intended to provide parity with national banks, the proposal incorporates a rule of construction that would clearly permit state banks to rely on OCC interpretive letters addressing section 85 of the National Bank Act and implementing rules.

ABA supports this codification, in particular the rule of construction, which will significantly facilitate implementation for both state banks and FDIC.

[5] 12 U.S.C. § 1831d.

Conclusion

ABA supports the proposal to codify as a regulation the provisions of Riegle-Neal II with the recommended revisions. We also support the proposal to codify as a regulation the judicial and regulatory interpretations on preemption of state usury laws. Both of these proposals, we believe, will help level the competitive playing field between state and national banks and, as a result, support the continued vitality of the dual banking system.

If you have any questions, please feel free to contact the undersigned or Cris Naser at 202-663-5332.

Sincerely,

James D. McLaughlin