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State Banks Press FDIC on Preemption Rule Allowing Greater Parity with National Banks
June 16, 2005

In response to a petition submitted by the Financial Services Roundtable on behalf of a working group of state-chartered banks, the FDIC held a public hearing on May 24, 2005 to discuss requested rulemaking that would preempt the application of certain state laws to the interstate operations and activities of insured state banks and their subsidiaries.

Generally, the requested rules would provide that a state bank's home state law governs the interstate activities of state banks and their subsidiaries to the same extent that the National Bank Act (NBA) governs national banks' interstate activities, establishing greater parity between state and national banks regarding their interstate operations and activities.

The petition requests that the FDIC:

1. clarify that "home" state law applies to all activities conducted in a "host" state by an out-of-state state bank to the same extent that the NBA applies to an out-of-state national bank, regardless of whether the activities are conducted through a host state branch, an operating subsidiary or by any other lawful means

2. clarify that the governing law applicable to activities conducted by a state bank in a state where the bank does not have a branch is its home state law to the same extent that host state law is preempted by the NBA

3. clarify that the law applicable to activities conducted by an operating subsidiary of a state bank is the same law applicable to the bank itself

4. adopt rules construing the scope and application of Section 104(d) of the Gramm-Leach-Bliley Act (GLBA) to clarify that a state law or action is expressly preempted 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 in-state bank

5. adopt a rule under Section 27 of the Federal Deposit Insurance Act (FDIA), similar to regulations enacted by other federal banking regulators, concerning the scope of the express preemption for the interest rate charged in interstate lending transactions by state banks.

The petition asserts that it "is not requesting a comprehensive federal preemption of state law in the ordinary sense;" rather, "it seeks to fully implement an existing federal statutory framework for determining which state law applies when state banks operate across state lines." The petition asserts that the parity and other actions requested have previously been sanctioned by Congress in enacting the McFadden Act, Section 27 of the FDIA and the 1997 amendments to the Riegle-Neal Act (Riegle-Neal II), which sought to provide parity between state and national banks with respect to interstate banking.

The petition notes that the FDIC has ample authority to implement the relief sought by the Roundtable, asserting that "Sections 8 and 9 of the FDIA and well-settled principles of administrative law" fully support the power of

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the FDIC to implement Riegle-Neal II and Section 104 of the GLBA.

The petition seeks clarification that any host state statute, rule, order, etc., that would be preempted under the terms of the OCC preemption rule, or in an OCC preemption letter, would also be preempted for a state bank. Any uncertainty about whether the OCC rules would provide preemption for national banks should be decided by the home state regulator (subject to a final determination by the FDIC, after consultation with the OCC, as needed). Similarly, if a home state statute is silent, the home state regulator can determine the applicable law by rule, order or interpretive letter.

Any requested rulemaking would be afforded considerable deference by the courts under the so-called Chevron doctrine. This would be particularly helpful for interest rate preemption under Section 27 of the FDIA. The FDIC has published only advisory opinions in this regard, which do not have the force or effect of law. As industry observers can attest, this concept has been a powerful tool in both the OCC's and OTS' rulemaking arsenal.

The petition raises various fundamental legal, policy and jurisdictional issues. First and foremost is whether Congress intended to provide the comprehensive parity envisioned by the petition and whether a preemptive rule in these areas is necessary to preserve the dual banking system. Many of the industry commentary also questioned the proprietary of determining these issues in a regulatory forum.

The Roundtable itself has acknowledged that the FDIC's authority to grant all of the relief requested is subject to question. Specifically, under Riegle-Neal II, parity between the interstate banking operations of state and federal banks is limited to activities and operations conducted through "branches" and not operating subsidiaries and other non-branch offices, such as trust or loan production offices. Accordingly, the FDIC's rulemaking authority concerning the applicability of home state law would depend upon actual branch involvement in any activity conducted in the host state. Similarly, the FDIC could decline to codify Section 104 on the grounds that it does not have express rulemaking authority with respect to that section.

It is unclear when or to what extent the FDIC will act upon the requested rulemaking. Certainly, just holding a public hearing on the petition is a favorable development. In light of the considerations noted above, however, the FDIC may determine that Congress is a more appropriate forum to achieve the stated goal of competitive parity in interstate operations, and limit its rulemaking to Section 27 interest rate preemption.

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