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In the Name of Parity: An Analysis of the FDIC's Proposed Rulemaking to Preempt Certain State Banking Laws

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In the Name of Parity: An Analysis of the FDIC’s Proposed Rulemaking to Preempt Certain State Banking Laws

I. INTRODUCTION

Preemption is one of the most polarizing issues in the banking community.¹ The viability of the dual banking system has always depended upon “relative competitive parity” between a state charter and national charter.² In fact, the ongoing struggle between state and national regulators has been compared to the swinging motion of a pendulum, in that whenever “the competitive balance has tipped too far in one direction, Congress or the states have stepped in to restore that balance.”³

According to many industry analysts and state regulators, the dual banking system is currently far from balanced.⁴ In 2000, state chartered banks in states with anti-predatory lending laws accounted for nearly forty percent of the overall deposit share, while nationally chartered bank deposits constituted roughly twenty-two percent.⁵ By 2005, these figures were approximately thirty percent for state banks and thirty-five percent for national banks.⁶ The rapidly increasing popularity of nationally chartered banks has led many organizations, such as the Utah Association of Financial Services and the Utah Bankers Association, to assert that the dual banking system is in a state of “crisis” and measures

³. Id.
⁴. See, e.g., Letter from Johnson Fin. Group, to Robert Feldman, Executive Sec’y, Fed. Deposit Ins. Corp. 2 (Dec. 12, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c09prointerstate.pdf (describing the “unnecessary costs and risks that might be avoided only by changing to a national charter”).
⁶. Id.
are desperately needed to alleviate the "erosion of parity" between state and nationally chartered institutions.\(^7\)

In March of 2005, the Financial Services Roundtable (Roundtable), a trade association for integrated financial service companies, submitted a Petition for Rulemaking (Petition) to the Federal Deposit Insurance Corporation (FDIC).\(^8\) In general, the Petition requests that the FDIC adopt rules clearly providing that state chartered banks operating interstate are to be "governed by a single framework of law and regulation to the same extent as national[ly] [chartered] banks."\(^9\) Under the pendulum analogy, the Roundtable argues that, in the wake of recent preemption regulations\(^10\) and court decisions favoring nationally chartered banks,\(^11\) this Petition attempts to achieve equilibrium by tipping the balance back in the direction of the state charter by "provid[ing] 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 a national bank’s interstate activities."\(^12\) According to the Roundtable, not only would its suggestions help to put state and nationally chartered banks on a level playing field, this Petition would

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7. See, e.g., Letter from Utah Ass’t of Fin. Serv. and the Utah Bankers Ass’n, to Robert Feldman, Executive Sec’y, Fed. Deposit Ins. Corp. 1 (Dec. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c55prointerstate.pdf (“By some estimates, [the percentage of assets held in state banks] could decline further in the next few years to as little as 15% of assets. At that level, state banks will have relatively little significance in the banking system . . .”).


9. Id. at 13,417-18.

10. Id. at 13,424 (citing 12 C.F.R. § 5.34 (2006); 12 C.F.R. § 7.4006 (2006)).


mitigate the confusion surrounding the law applicable to the interstate banking activities of state chartered banks.\footnote{13} On October 14, 2005, the FDIC issued a formal Notice of Proposed Rulemaking (Proposed Rulemaking) in response to the Roundtable’s Petition.\footnote{14} After recognizing the problem articulated by the Roundtable and summarizing the statements and comments received during the public hearing held on the Roundtable’s Petition on May 24, 2005, the FDIC proceeded to lay out the rationale and terms of its Proposed Rulemaking.\footnote{15} According to the FDIC, its proposed rules will reflect the Congressional intent behind the Riegle-Neal Amendments Act of 1997 (Riegle-Neal II),\footnote{16} which mandates the equal application of host state law to state and nationally chartered bank branches.\footnote{17} Although the FDIC seems to agree with the Roundtable that measures should be taken to increase parity, the FDIC makes several significant amendments to the Roundtable’s suggestions.\footnote{18}

This Note argues that, if finalized, the FDIC’s Proposed Rulemaking would provide only a small increase in parity between state and nationally chartered institutions, leaving many interstate banking issues untouched.\footnote{19} At the same time, it may significantly undermine the ability of states to enforce their own consumer protection laws.\footnote{20} Part II of this Note explains how two provisions

\begin{itemize}
  \item \footnote{13} Id.
  \item \footnote{14} Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019 (Oct. 14, 2005) (to be codified at C.F.R. pts. 331 and 362) (presenting the FDIC’s Notice of Proposed Rulemaking). The discussion in this Note will be limited to the FDIC’s proposed regulation relating to Section 24(j) of the Federal Deposit Insurance Act (FDI Act), which is to be codified at C.F.R. pt. 362.
  \item \footnote{15} See id. at 60,022 (noting that instead of directly replying to the Roundtable, the “[i]ssue of the proposed rules serves as the FDIC’s response to the rulemaking petition”).
  \item \footnote{17} Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. at 60,024 (quoting, among others, Rep. Marge Roukema, Riegle-Neal II’s principal sponsor, who stated that “the essence of [Riegle-Neal II] is to provide parity between State-chartered banks and national banks,” and that it “is critical to the survival of the dual banking system.” 143 CONG. REC. H3,088-89 (daily ed. May 21, 1997) (statement of Rep. Roukema)).
  \item \footnote{18} See infra notes 38-73 and accompanying text.
  \item \footnote{19} See infra notes 42-61 and accompanying text.
  \item \footnote{20} See infra notes 74-97 and accompanying text.
\end{itemize}
of the Proposed Rulemaking, proposed C.F.R. sections 362.19(a)(4)\textsuperscript{21} and 362.19(c),\textsuperscript{22} will affect the current preemption landscape with regards to competitive parity and consumer protection.\textsuperscript{23} Part III concludes that although the FDIC has several legitimate reasons to delay enactment of the Proposed Rulemaking, there are also a few amendments that the FDIC should implement as a means of generating greater parity and heightened consumer protection.\textsuperscript{24}

II. HOW THE PROPOSED RULEMAKING WILL AFFECT EXISTING LAW

A. The Law Currently Applied to Activities Conducted at a Branch

Presently, section 24(j) of the Federal Deposit Insurance Act (FDI Act)\textsuperscript{25} sets forth the law applicable to the activities of branches of out-of-state banks operating within other states.\textsuperscript{26} This section essentially provides that the host state, the state that is acting as host to the out-of-state state or nationally chartered branch, shall apply its laws to the activities of an out-of-state state branch only if these laws apply to national banks conducting those

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  \item 21. Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019, 60,031 (Oct. 14, 2005) (defining “activity conducted at a branch” to mean “an activity of, by, through, in, from, or substantially involving a branch”).
  \item 22. Id. (requiring the issuance of a writing from a federal court or the Office of the Comptroller of the Currency to determine whether an activity will be subject to the laws of the host state).
  \item 23. See infra notes 25-97 and accompanying text.
  \item 24. See infra notes 98-106 and accompanying text.
  \item 26. 12 U.S.C. § 1831a(j)(1)(2000). Section 24(j), in its entirety, states: 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.
\end{itemize}
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same activities in the host state.\textsuperscript{27} If the host state's laws do not apply to the activities being conducted by the national bank, the out-of-state state bank will be governed by its home state's laws.\textsuperscript{28}

Although seemingly straightforward on its face, state chartered banks doing business across state lines face a myriad of uncertainties regarding which state's law is applicable to certain activities.\textsuperscript{29} For example, Jean D. Winnike, Senior Vice President and Counsel of State Central Bank in Iowa, described in her comment letter to the FDIC the cost and confusion associated with determining which law would apply to State Central Bank when it tried to promote a new home equity product in facilities located near state lines.\textsuperscript{30} State Central Bank was notified by the company that provides its lending forms that, if State Central Bank wanted to promote this product in neighboring states, it would have to purchase entirely different forms for each state due to the discrepancies in those states' laws relating to home equity products.\textsuperscript{31} Since all of its branches are located in Iowa, State Central Bank was hesitant to incur the costs of developing four different sets of forms, but it was forced to comply to meet the needs of its many interstate customers.\textsuperscript{32} In short, this lingering problem caused significant delays in the introduction of the home equity product for State Central Bank.\textsuperscript{33} Nationally chartered banks, on the other hand, face little uncertainty with regard to the applicable law, and rarely pay compliance costs as a precaution due to the uniform set of rules found in the NBA.\textsuperscript{34}

\begin{itemize}
\item[27.] Id.
\item[28.] Id.
\item[29.] See Letter from the Financial Services Roundtable, to Robert Feldman, Executive Sec'y, Fed. Deposit Ins. Corp. (Nov. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c48prointerstate.pdf (noting that, unlike their nationally chartered counterparts, "there is widespread confusion and uncertainty with respect to applicable law governing state banks engaged in interstate banking activities").
\item[30.] Letter from State Central Bank, to Robert Feldman, Executive Sec'y, Fed. Deposit Ins. Corp. (Nov. 17, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c04prointerstate.pdf ("[A number of State Central Bank's branch] locations put the bank in a 'tri-state area' at both ends of the state - Iowa, Illinois, and Missouri at the southern end and Iowa, Illinois and Wisconsin at the northern end.").
\item[31.] Id.
\item[32.] Id.
\item[33.] Id.
\item[34.] See Letter from the Financial Services Roundtable to Robert Feldman, supra
\end{itemize}
Officials representing state chartered banks have also questioned why preemption is triggered only when activities are conducted at an out-of-state branch in the first place. For example, Dennis Long, Chief Executive Officer of The Bank of the Pacific, chartered in the State of Washington, described in his comment letter to the FDIC the costs associated with servicing clients in the neighboring state of Oregon through its Oregon offices. Since the Oregon offices are not branches, they are not permitted to provide full service banking to their customers, which, in turn, results in the costs associated with shipping deposits back to Washington. Long notes that he and his customers do not understand why these compliance costs are necessary on one side of the Columbia River but not the other, and that the Proposed Rulemaking would be a “welcome improvement.”

B. Defining “Activities Conducted at a Branch”

1. Expanding Preemption of Host-State Law

The Proposed Rulemaking attempts to alleviate the types of problems encountered by state chartered banks, such as The Bank of the Pacific and State Central Bank, by defining section 24(j)’s phrase “activity conducted at a branch.” According to the Proposed Rulemaking, the phrase will mean “an activity of, by, through, in, from, or substantially involving a branch” (New Definition). By clarifying that the connection between the activity and the branch need only be a loose connection, the New Definition will generally have the effect of allowing more

note 29 (noting that the national banks and federal thrifts can conduct interstate activities under a uniform set of rules).


36. Id.

37. Id.


interstate branch activities to remain subject to home state law.\textsuperscript{40} In the case of State Central Bank, if the Proposed Rulemaking is enacted, the activities conducted by the branches located near state lines would clearly not require State Central Bank to purchase four separate sets of forms, thereby decreasing the cost of compliance.\textsuperscript{41}

2. Limited Parity

The FDIC's New Definition, however, stops far short of allowing the degree of preemption requested by the Roundtable.\textsuperscript{42} Indeed, the Roundtable requested that host-state law be preempted whenever the activity is conducted by the branch in the host state, by an operating subsidiary, or by "any other lawful means."\textsuperscript{43} This provision of the Petition is clearly a response to the

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\item \textit{See id.} at 60,022-25. Before the issuance of this provision, there was no definition for the phrase "activities conducted at a branch," hence the confusion surrounding applicable law. \textit{See, e.g., supra} note 29 and accompanying text (describing the uncertainty felt by state chartered banks participating in interstate banking with regards to the applicable law). The New Definition was designed by the FDIC to further the congressional intent behind Riegle-Neal II, which sought to achieve parity between state and national charters. \textit{See supra} note 17 and accompanying text. \textit{But see} Letter from Comerica Bank, to Robert Feldman, Executive Sec'y, Fed. Deposit Ins. Corp. (Dec. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05cl2prointerstate.html (arguing that use of the word "substantially" may have the effect of undermining the Congressional intent behind Riegle-Neal II).

\item \textit{See supra} notes 31-34 and accompanying text.

\item \textit{Compare} Notice of Public Hearing on Petition for Rulemaking to Preempt Certain State Laws, 70 Fed. Reg. 13,413, 13,414 (Mar. 21, 2005) (providing an overview of each of the five areas in which the Roundtable would like the FDIC to issue a rulemaking, one of which is "the law applicable to activities conducted by an operating subsidiary) \textit{with Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019, 60,025 (proposed Oct. 14, 2005) (to be codified at C.F.R. pts. 331 and 362) (admitting that "the plain language of section 24(j)(1) indicates that it preempts host state law only with respect to a branch in the host state of the out-of-state, state bank")}.

\item Notice of Public Hearing on Petition for Rulemaking to Preempt Certain State Laws, 70 Fed. Reg. at 13,414. Specifically, the Roundtable's Petition requested that the FDIC:

make clear that "home" state law applies to an out-of-state state bank in a "host" state to the same extent as the National Bank Act applies to an out-of-state national bank, whether the business of the bank is conducted by the bank through the host state branch, by or through an operating subsidiary, or by any other lawful means.

\textit{Id.}
\end{enumerate}
\end{footnotesize}
regulations issued by the Office of the Comptroller of the Currency (OCC) in 2001, which specify that state law applies to national bank operating subsidiaries only to the extent that state law applies to the national bank itself.\textsuperscript{44} The FDIC's Proposed Rulemaking, however, effectively declines the Roundtable's request.\textsuperscript{45} Noting the repeated use of the word "branch" in section 24(j),\textsuperscript{46} the FDIC admits that the "plain language" of section 24(j)(1) serves as a clear indication that host state law is only meant to be preempted by branch related activities.\textsuperscript{47} Thus, the New Definition does not alter the status quo with regard to the law applicable to operating subsidiaries of out-of-state state banks or

\textsuperscript{44} Id. at 13,424 (referring to 12 C.F.R. 7.4006 (2006)).

\textsuperscript{45} See Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. at 60,025 (here, the FDIC concedes that the plain language of 24(j) will not permit the activities of out-of-state, state-chartered, non-branch entities to preempt host state law, a concession the Roundtable was not willing to make).


(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.

Id. (emphasis added).

\textsuperscript{47} Notice of Proposed Rulemaking for Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. at 60,025. \textit{But see} Letter from the Financial Services Roundtable, supra note 29, at 22-23 (asserting that the FDIC’s plain language reading “gives undue, talismanic weight to the word ‘branch’ and in doing so undercuts the achievement of the parity intended by Congress.”). It is worth noting that, by conceding that Section 24(j) was drafted to deal only with “state banks that have interstate branches,” the FDIC avoided the bulk of authority-based challenges that were asserted against the Roundtable’s Petition. \textit{See}, \textit{e.g.}, Comment Letter from Eliot Spitzer, Attorney General of New York, writing in response to the Roundtable’s Petition on behalf of the Attorneys General of the States a of Connecticut, Illinois, Iowa, New Mexico, North Carolina, and Vermont, to Robert Feldman, Executive Sec’y, Fed. Deposit Ins. Corp. 2-7 (May 16, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c6petition.pdf (arguing that the FDIC lacks the authority to implement the Roundtable’s Petition, and that any attempt to do so would be in violation of the original purposes of the FDIC and the Congressional intent of Riegle-Neal II).
any other activities that are conducted without the involvement of a branch.  

Not surprisingly, the FDIC's restraint on this topic has been criticized by entities such as World's Foremost Bank, which, without maintaining a branch in any state, issue "standardized products" to countless card bearers and must incur the steep compliance costs associated with serving fifty different jurisdictions. Unless World's Foremost Bank begins coordinating its activities with out-of-state branches, the New Definition will have little to offer. SunTrust Banks was similarly disappointed that the expanded preemption offered under the Proposed Rulemaking did not cover state chartered banks' non-branch activities. SunTrust illustrated its concern by noting that, unlike the subsidiaries of its nationally chartered counterparts, SunTrust's subsidiaries must meet rigorous nation-wide compliance criteria, necessitating the full-time employment of persons who "examin[e] files for state law compliance, prepar[e] for state examinations and audits, and maintain[] licensing, lending and reporting requirements in each of these jurisdictions." National bank subsidiaries, by contrast, are rarely subject to state licensing requirements, lending laws, or mandated disclosures and statements. 

Curiously, by defining an "activity conducted at a branch" to include activities "substantially involving a branch," the FDIC may have actually narrowed the field of permissible activities that

48. But see infra notes 74-97 and accompanying text (noting that the New Definition potentially allows the actions of other parties, including non-banks, to use the new, looser connection required between activity and a branch to preempt host state law).


50. See id.


52. Id.

53. Id.

may be conducted by an out-of-state state bank, rather than expanding it. That is, since nationally chartered banks will benefit from preemption whether or not their branches are substantially involved, requiring the activities of state chartered banks to substantially involve a branch will create a chasm between the regulation of state and national bank activities. For this reason, the Roundtable has requested that the FDIC delete this language, or, "at a minimum," supplement this provision with language indicating that substantial involvement may mean "any formal involvement or role of the branch, any involvement of a branch employee, any use of systems or facilities serving the branch, or any other type of contact with the branch."

Ultimately, however, the substantial involvement requirement may not exacerbate the difference in parity because, under the language of the Proposed Rulemaking, substantial relation to a branch is merely a sufficient, but not a necessary, condition to trigger preemption. That is, even if a state chartered bank’s activities do not substantially involve a branch, the laws of the host state may nevertheless be preempted if the bank’s activities meet the lesser requirement of being conducted "through" a branch or "from" a branch. As such, it is not clear why a state chartered bank would ever argue that its activities in question are "substantially" related to a branch, when it could just...
as easily argue that the same activities are being conducted “through” a branch. 61

C. The Writing Requirement

Another important difference between the FDIC’s Proposed Rulemaking and the Roundtable’s Petition is the FDIC’s addition of 12 C.F.R. § 362.19(c) (Writing Requirement). This section provides that the laws of the host state will not apply to the activities of an out-of-state state bank as long as a federal court or the OCC “has determined in writing that the particular host State law does not apply.” 62

In a sense, the FDIC’s rationale for inserting this provision is logical, as the OCC or a federal court is well positioned to determine whether host state law applies to a particular activity of a branch of an out-of-state national bank. 63 Further, in theory this procedure should not be unduly burdensome since it is like “the consultations that the FDIC engages in currently when making determinations regarding the permissible activities of a national bank under section 24(a) of the FDI Act.” 64

The Writing Requirement, however, has been met with nearly universal disapproval. 65 It has been argued that not only does this measure fail to help put state chartered banks on equal footing with nationally chartered banks, this provision is actually a significant competitive step backwards for state chartered banks. 66

61. Id.

62. Id. at 60,031 (to be codified at 12 C.F.R. 362.19(c)) (providing that: A host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, State bank to the same extent that a Federal court or the Office of the Comptroller of the Currency has determined in writing that the particular host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, national bank.

63. Id. at 60,025.

64. Id. at 60,025 (citing 12 U.S.C. 1831a(a)). But see Letter from Arnold & Porter, to Robert Feldman, Executive Sec’y, Fed. Deposit Ins. Corp. (Dec. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c26prointerstate.pdf (noting that “it would be unlikely that the OCC would issue separate letters for each of the fifty states stating that the same activity is permissible under federal law in that state”).


66. Letter from First-Citizens Bank & Trust Company, to Robert Feldman,
David Sorrell and Robert Braswell, Commissioner and Commissioner Appointee, respectively, of the Georgia Department of Banking and Finance, assert that a state bank should be able to determine the law applicable to its activities by relying on whether or not a similarly situated national bank is disregarding a certain state law. It follows that this reliance method would obviate the need for written permission.

Moreover, in instances where there is no particular ruling on the activity, the state bank would effectively be held captive to the OCC's writing, which could render state banks less competitive "than they were . . . before the rule." Indeed, since the OCC is not required to respond to any of these inquiries, the Writing Requirement might effectively compel state banks to seek applicable law determinations from federal courts on each individual host state law. This would be a menacing notion for any commercial entity and certainly an expensive regulatory encumbrance for banks. Additionally, the OCC would seem to have little incentive to issue a speedy response to its state bank competitor. For this reason, several commenters have mentioned that if the FDIC is determined to include the Writing Requirement, it should at least be implemented with a timing clause, wherein if the FDIC or the OCC does not respond to a

67. Letter from Ga. Dept. of Banking and Finance to Robert Feldman, supra note 55; see also, Letter from the Financial Services Roundtable to Robert Feldman, supra note 29, at 5 (noting that since the OCC frequently adopts rules that "broadly preempt categories of state law, rather than 'particular' state laws," coupled with the "fact that the OCC now rarely makes written determinations addressing a specific state law or rule," this provision would only frustrate the pursuit of parity).


69. Id.

70. See id. at 2.

71. See e.g., Letter from Conference of State Bank Supervisors to Robert Feldman, supra note 65.

bank’s petition to preempt the laws of a host state within a certain time, the bank may proceed to follow its home state’s law.\textsuperscript{73}

D. Consumer Protection Concerns

At the other end of the spectrum, consumer advocacy groups are claiming that the Proposed Rulemaking, particularly the New Definition, will significantly compromise the ability of states to enforce and monitor their own consumer protection laws.\textsuperscript{74} Under the New Definition, it seems possible that “non-bank vendors and alternative financial service providers, such as those who offer payday loans and refund anticipation loans,”\textsuperscript{75} may conduct some small portion of their business “through”\textsuperscript{76} a branch, perhaps even via the internet, as a means of triggering the preemption language in the New Definition.\textsuperscript{77} This “loophole effect” is precisely what concerns the National Consumer Law Center.\textsuperscript{78} Essentially, since some portion of the activity need only be performed “through” the branch of a bank, there appears to be nothing preventing third parties, such as “mortgage brokers, appraisers, loan closing agents, title insurance companies, and credit insurance companies” from preempting the laws of their host state.\textsuperscript{79} For this reason, the National Consumer Law Center buttresses this point by raising the interesting question of whether the state certification and licensing requirements established by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) will be trumped by the Definitional Change, such that the appraisers will be governed by the laws of their home state rather than the laws of the state in which they do business. \textit{Id.}

\textsuperscript{73} Letter from the Financial Services Roundtable to Robert Feldman, \textit{supra} note 29.


\textsuperscript{76} 70 Fed. Reg. 60,019, 60,031 (to be codified at 12 C.F.R. 362.19(a)(4)).


\textsuperscript{78} See e.g., Letter from Nat’l Consumer Law Center to Robert Feldman, \textit{supra} note 74.

\textsuperscript{79} Id. The National Consumer Law Center buttresses this point by raising the interesting question of whether the state certification and licensing requirements established by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) will be trumped by the Definitional Change, such that the appraisers will be governed by the laws of their home state rather than the laws of the state in which they do business. \textit{Id.}
has suggested that the FDIC narrow its definition of "activity conducted at a branch" to read, "an activity conducted by the branch at its facility in the host state."\textsuperscript{80} Such an amendment, however, would clearly run contrary to the FDIC's overall goal of expanding the scope of preemption.\textsuperscript{81} In fact, the FDIC readily acknowledges that the scope of the Proposed Rulemaking is "not limited to particular areas or subjects, but is broader and might preempt host state laws dealing with lending, deposit-taking and other banking activities."\textsuperscript{82}

Each consumer protection related argument can be traced out to the larger debate concerning whether the Proposed Rulemaking will spawn a "race to the bottom," wherein banks will have the incentive to move their operations to states with more lenient consumer protection laws, and "export" these laws to states with stricter standards.\textsuperscript{83} On the face of the Proposed Rulemaking, there seems to be nothing preventing this phenomenon.\textsuperscript{84} There are, however, numerous counterarguments to the race to the bottom theory.\textsuperscript{85} Practically, one may question why a bank would choose to evade state regulations and consumer protection laws by converting from one state charter to another state charter when switching to a national charter would be a more certain route to achieve the same ends.\textsuperscript{86} Even under the race to

\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{See supra note 17 and accompanying text.}
\textsuperscript{84.} \textit{Id.}
\textsuperscript{85.} Letter from Wisconsin Dep't of Fin. Institutions, to Robert Feldman, Executive Sec'y, Fed. Deposit Ins. Corp. (Dec. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c08prointerstate.html. ("Considerations that are important to the efficient and profitable operation of [credit card banks and others] will determine where banks will be located, not which state has lax consumer protection laws.").
\textsuperscript{86.} Letter from Comerica Bank, \textit{supra} note 40 (arguing that use of the word "substantially" may have the effect of undermining the Congressional intent behind Riegle-Neal II). \textit{But see}, Yolanda McGill & Kathleen Keest, Comments on Petition for Rule-Making to Permit Preemption of State Laws with Respect to the Interstate Activities of State Banks (May 16, 2005), http://www.fdic.gov/news/conferences/agency/public_mcgill/test.html (pointing out that a race to the bottom did occur when
the bottom theory, some state's consumer protection laws will apply, and the notion that state regulators will intentionally use the preemptive effects of the Proposed Rulemaking to attract charters and exploit the consumer friendly laws of sister states seems dubious on two counts. First, there is little historical evidence suggesting that state regulators are anything but zealously motivated to protect their citizenry. Secondly, it has been argued that serious abuses would likely expose culpable state regulators to an adverse political reaction.

The speculation over whether or not the Proposed Rulemaking will actually result in a race to the bottom is endless. As a policy matter, however, it would seem hard to justify the issuance of a rulemaking that could potentially have such deleterious effects on the economically vulnerable. Moreover,
the Proposed Rulemaking currently provides no mechanism by which consumers may rectify such abuses. That is, if the citizens of State A feel harmed by the exported laws of State B, the citizens of State A can only hope that State B voters will seek political redress, unless, of course, the citizens of State A understand that their own state’s law is being preempted and consequently take their business to banks chartered in State A.

One possible way of curbing the effects of a race to the bottom is for the FDIC to include a mandatory disclosure provision requiring banks to inform customers of the applicable state law. While such disclosures theoretically would alert consumers that their own state law may not be applicable, the manner in which such disclosures would manifest themselves in the marketplace is uncertain. For example, it is unlikely that such provisions will be beneficial to consumers unless banks are required to make a “clear and conspicuous” disclosure, separate from any boilerplate language, that clearly notifies consumers that their own state’s law is inapplicable. As noted, however, many likely as non-Hispanic whites to be denied mortgage loans” and “2.25 times more likely [than non-Hispanic whites] to receive high cost loans”).

92. See Letter from the Center for Responsible Lending, to Robert Feldman, Executive Sec’y, Fed. Deposit Ins. Corp. (Dec. 13, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c31prointerstate.pdf (arguing that the Proposed Rulemaking should include an “opt-out” provision which will enable host states to prevent other states from exporting their laws inside the host state’s boundaries).

93. Id.

94. See Comments of the National Consumer Law Center, supra note 74 (asserting that such a provision “could have a salutary affect on the market when banks realize that consumers prefer to deal with local entities who apply local law to the relationship”). In its General Council Letter No. 11, the FDIC noted the importance of disclosure statements with regard to the exportation of interest rates, stating that “[i]nterstate State Banks should make an appropriate disclosure to the customer that the interest to be charged on the loan is governed by applicable federal law and the law of the relevant state which will govern the transaction.” General Counsel Op. No. 11, Interstate Charges by Interstate State Banks, 63 Fed. Reg. 27,282 (May 18, 1998).

95. Id.

96. Id. (suggesting that the FDIC adopt a phrase which provides: “In consumer transactions, as defined by 15 U.S.C. § 1602, an insured state bank shall disclose to the consumer the identity of the state whose law governs the transaction. The notice shall be made clearly and conspicuously in writing and shall be segregated from all other information. The insured state bank shall make the disclosure before consummation.”)
financial institutions themselves are confused about whether or not the host state's law applies.\textsuperscript{97}

III. CONCLUSION

Regardless of what the FDIC ultimately decides to do, its decision will be met with cautious enthusiasm and vigorous criticism.\textsuperscript{98} Given the uncertainty surrounding the OCC's recent decisions regarding operating subsidiaries,\textsuperscript{99} coupled with the throng of plausible consumer protection related concerns,\textsuperscript{100} continued inaction may be the FDIC's wisest course.\textsuperscript{101}

On the other hand, if the FDIC wants to achieve its stated goal of achieving more competition between national and state charters, it should amend the Proposed Rulemaking by removing the Writing Requirement or the "substantial involvement" language from the New Definition, as these provisions may actually make state charters less competitive.\textsuperscript{102} Such an amendment would no doubt broaden the scope of preemption, and pacify many banks and non-banks with interstate interests.\textsuperscript{103} The outcry from consumer advocacy groups and state regulators, however, would be deafening.\textsuperscript{104} An interesting middle ground, therefore, might entail making the aforementioned changes, but inserting a disclosure provision requiring banks to notify their customers of the applicable state law.\textsuperscript{105} Regardless, as a

\textsuperscript{97} See supra note 29 and accompanying text.
\textsuperscript{98} See supra note 91 and accompanying text.
\textsuperscript{99} See supra note 11 and accompanying text.
\textsuperscript{100} See supra note 74 and accompanying text.
\textsuperscript{101} See Letter from the Center for Responsible Lending, supra note 92. Contra Letter from the Financial Services Roundtable, supra note 29 (noting that the Proposed Rulemaking is "timely and critical for the future of the dual banking system," which is "at an historic crossroads"); see also Letter from Branch Banking & Trust Company, to Robert Feldman, Executive Sec'y, Fed. Deposit Ins. Corp. (Dec. 16, 2005), http://www.fdic.gov/regulations/laws/federal/2005/05c49prointerstate.html (asserting that, due to the "critical nature of this issue," the FDIC should "implement the present proposal, and then immediately being to address the other matters suggested in the Roundtable's Petition").
\textsuperscript{102} Letter from the Financial Services Roundtable, supra note 29 (requesting these and other amendments).
\textsuperscript{103} See supra notes 49-53 and accompanying text.
\textsuperscript{104} See supra note 74 and accompanying text.
\textsuperscript{105} See supra notes 94-97 and accompanying text.
procedural matter it would be worthwhile to gather more ideas by holding another public hearing based on the Proposed Rulemaking before any final decisions are made, given the substantial differences between the FDIC’s Proposed Rulemaking and the Roundtable’s Petition.  

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