# Mired in the Process?: The Future of State Bank Preemption

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## INTRODUCTION

They were supposed to have died out long ago with the enactment of the National Bank Act in 1864[1] (the "NBA") but scrappy, innovative, and nimble state banks have found a way not only to survive but to thrive over the last 140-plus years. During this time, the United States dual banking system has grown and developed on a steady diet of competition and the efforts of Congress, state legislatures and state and federal banking regulators to maintain a more or less level playing field. Developments over the last several years, particularly the Office of the Comptroller of the Currency ("OCC") preemption and visitorial powers rules[2] have, once again, arguably called into question the continuing competitiveness of state bank charters amid cries that the dual banking system will not survive and consumers will suffer.

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1. Act of June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended in Title 12, U.S.C.).

2. *See* 69 Fed. Reg. 1895, 1903–04 (Jan. 13, 2004); *see also* 12 C.F.R. §§ 7.4000, 7.4007, 7.4008, 7.4009, 34.3, 34.4 (2006). The rules address, among other things, the extent to which the NBA as amended and codified at 12 U.S.C. § 85 (2000), preempts the application of state and local laws to national banks and their operating subsidiaries. The visitorial powers rule specifically clarifies that federal law commits the supervision of national banks' banking activities exclusively to the OCC (except where federal law provides otherwise) and that states may not use judicial actions as an indirect means of regulating those activities. *See* 69 Fed. Reg. 1895 (Jan. 13, 2004). The preemption rule indicates that categories of state laws that relate to bank activities and operations are preempted, describes the test for preemption that the OCC will apply to state laws that do not fall within the identified categories and lists certain types of state laws that are not preempted. *Id.* at 1903–04.

In an effort to address these concerns, the Financial Services Roundtable ("FSR") submitted a Petition to the Federal Deposit Insurance Corporation ("FDIC") requesting that the FDIC adopt rules that would clarify the ways in which FDIC-insured state banks enjoy parity with national banks.[3] The FDIC responded by initiating a public and interactive rulemaking process that may end in the adoption rules of similar to those requested in the FSR's petition, and which many FDIC-insured state banks believe are necessary to maintain the attractiveness of state charters. The effort to promulgate rules reflecting state bank preemption authority appears to have become mired in process, however, due in part to the departure of the FDIC's Chairman Donald E. Powell, an apparent lack of consensus among the remaining FDIC Board members, and public developments relating to industrial loan companies and related filings before the FDIC. The FDIC's process currently appears to be as focused on reacting to recent developments as providing serious new deliberations.

## The Comptroller of the Currency and National Bank Preemption

### New Preemption Rules

In 2003 the OCC proposed preemption regulations for national banks that would give national banks similar preemption authority to federal savings associations which have long enjoyed broad "field" preemption over a host of state laws.[4] The rules, which were adopted with some modification in January of 2004, specified the types of state laws that do not apply to national banks' lending and deposit activities, as well as the types of state laws that generally do apply to national banks.[5] The list of the types of state laws that are preempted are substantially similar to the Office of Thrift Supervision's ("OTS") description of the scope of its exercise of broad preemptive authority.[6] In addition, the OCC's list of the types of state laws that are not preempted is substantively the same as in the OTS's

3. 70 Fed. Reg. 13413 (Mar. 21, 2005) [hereinafter "FSR Petition"].

4. *See* 68 Fed. Reg. 6363, 6366–70 (Feb. 7, 2003). The United States Supreme Court has recognized that the Federal Home Loan Bank Board ("FHLBB"), the predecessor to the Office of Thrift Supervision ("OTS"), was vested with plenary authority to administer the Home Owners' Loan Act, ch. 64, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C.A §§ 1461–64 (West 2001 & Supp. 2006)). *See also* Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). Pursuant to this authorization, the FHLBB promulgated extensive regulations governing the powers and operations of every federal savings institution "from its cradle to its corporate grave." *Id.* at 145 (quoting People v. Coast Federal Sav. & Loan Assn., 98 F. Supp. 311, 316 (S.D. Cal. 1951)). It successor, the OTS, subsequently has issued regulations providing that the OTS similarly occupies the field of lending regulation for federal savings banks. *See* 12 C.F.R. § 560.2 (2006). Courts have found the OTS's regulations, including those extending preemption authority to operating subsidiaries of federal savings associations, to be within the OTS's congressionally authorized authority. *See, e.g.*, Bank of America v. City and County of San Francisco, 309 F.3d 551 (9th Cir. 2002), *cert. denied,* 538 U.S. 1069 (2003); Silvas v. E*Trade Mortg. Corp., 421 F. Supp. 2d 1315 (S. D. Cal. 2006); WFS Fin., Inc. v. Super. Ct., 44 Cal. Rptr. 3d 561 (Cal. Ct. App. 2006), *vacated,* 150 P.3d 692 (Cal. 2007); Lopez v. World Sav. and Loan Ass'n, 130 Cal. Rptr. 2d 42 (Cal. Ct. App. 2003).

5. 69 Fed. Reg. 1895, 1903–04 (Jan. 13, 2004).

6. *See* 12 C.F.R. § 560.2(b) (2006).

corresponding rule, with the addition of laws relating to rights to collect debts, taxation, and zoning in the OCC's rule.

Except where made applicable by federal law, state laws that "obstruct, impair or condition" a national bank's exercise of its lending, deposit-taking or other federal powers do not apply to national banks.[7] The OCC stated that its new preemption regulations only clarified what types of state laws apply to national banks,[8] and did not create any new preemptive authority for national banks or expand national banks' pre-existing preemptive authority. The OCC further stated that the preemption standards in its new rule were consistent with the standards and other law articulated by the United States Supreme Court.[9] Although much controversy has surrounded the OCC's new rules, courts generally have applied

7. *See* 12 C.F.R. §§ 7.4007(b)(1), 34.4(a) (2006).

8. The OCC has specifically cited anti-discrimination laws, uniform commercial codes, unclaimed property laws, and assignee liability as state laws applicable to national banks. *See,* respectively, OCC Letter 998 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, March 2004 (published Aug. 2004), *available at* http://www.occ.treas.gov/interp/aug04/int998.pdf; OCC Interpretive Letter 1005 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, June 10, 2004 (published Sept. 2004), *available at* http://www.occ.treas.gov/interp/sep04/int1005.pdf; OCC Interpretive Letter No. 1016 from Daniel P. Stipano, Acting Chief Counsel, Jan. 14, 2005 (published February 2005), *available at* http://www.occ.treas.gov/interp/feb05/ont1016.pdf.

Similarly, the Superior Court of California in *Miller v. Bank of America N.T. & S.A.,* No. CGC-99-301917, 2004 WL 3153009 (Cal. App. Super. Ct. Dec. 30, 2004), *rev'd on other grounds,* 51 Cal. Rptr. 3d 223 (Cal. Ct. App. 2006), found that claims brought under California law against a national bank for seizing governmental benefits deposited into accounts held at the bank were not preempted by federal law. The court stated that the bank had the burden of demonstrating preemption and had failed to do so. The court disagreed with the bank's preemption standard of "impair, obstruct or condition," stating that the standard in *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996), was "to forbid, or to impair significantly the exercise of a power that Congress explicitly granted." *Miller,* at *28 ¶ 72. The court found no specific federal authority for national banks to deduct non-sufficient fund fees from exempt social security benefits that were directly deposited in savings or checking accounts. *Id.* at *28 ¶ 73. Additionally, the court found that the issue related to unlawful debt collection, a subject area traditionally within the state's historic police powers and therefore subject to the presumption against preemption. *Id.* at *29 ¶ 74. Moreover, the court indicated that the California laws did not conflict with the bank's ability to charge fees or take deposits as the plaintiffs' action did not challenge the bank's ability to charge fees, but rather, challenged the bank's collection of monetary claims through the exercise of a setoff against exempt governmental benefits. *Id.* at *28 ¶ 73.

Certain grey areas of national bank preemption continue to be challenged, including whether state-law limitations on the authorized practice of law prevent non-lawyers at national banks from charging and performing document preparation fees and related services. In *Fuchs v. Wachovia Mortg. Corp.,* No. 17000-03, 2005 WL 3076343, at *5 (N.Y. Sup. Ct. Nov. 15, 2005), the New York Supreme Court of Nassau County held that charging a document preparation fee is permitted under the federal law and regulations as a "safe and sound" banking practice, and to the extent that any New York statute purports to prevent federally chartered banks from collecting such a fee, they are preempted by federal statutes and regulations. *Id.* The court found that this preemption applies equally to an operating subsidiary of a national bank. *Id.* However, an Indiana appellate court has held that the NBA does not preempt an action under state law alleging that charging a separate fee for the preparation of the mortgage instrument constitutes the unauthorized practice of law. Charter One Mortg. Corp. v. Condra, 847 N.E.2d 207, 216 (Ind. App. 2006), *opinion vacated.* The Indiana court specifically noted that the Indiana law at issue does not "stand as an obstacle to the accomplishment and execution of the purposes and objectives" of the OCC regulation allowing national banks to assess non-interest charges and fees, including the document preparation fees at issue (12 C.F.R. § 7.4002). *Id.*

9. OCC Interpretative Letter No. 1016, *supra* note 8.

the rules and have not held that the OCC exceeded its authority in promulgating the rules.[10]

The most controversial part of the OCC preemption rules have been their application to operating subsidiaries. The OCC position, which has thus far been accepted by the courts,[11] is that operating subsidiaries of national banks have the same preemption authority as the national bank.[12]

## GAO Studies

The OCC's new rules and rule-making procedure have been the subject of study by the United States Government Accountability Office ("GAO"). With respect to the substance of the OCC's rules, the GAO issued a report finding that the OCC should clarify the applicability of state consumer protection laws to national banks.[13] The GAO found that although the OCC sought to clarify the applicability of state laws by relating them to certain categories, subjects, or activities conducted by national banks and their operating subsidiaries, the OCC's rule does not fully resolve uncertainties about the applicability of state consumer protection laws, particularly those aimed at preventing unfair and deceptive acts and practices.[14] The GAO's analysis of OCC and other data shows that, from 1990

10. For example, citing to the new OCC preemption regulation for support, a federal district court found that the NBA and corresponding federal regulations preempted the Ohio Retail Installment Sales Act. Abel v. KeyBank USA, N.A., 313 F. Supp. 2d 720 (N.D. Ohio 2004). The court rejected the plaintiffs' argument that the Ohio RISA was not preempted because it was a consumer protection statute, citing to the OCC testimony on the new OCC preemption regulations before the Subcommittee on Oversight and Investigations of the Committee on Financial Services of the U.S. House of Representatives on January 28, 2004. *Id.* at 728–29. The court interpreted that testimony, which directly addressed state consumer protection statutes, to indicate at least in a general sense the federal government's intent to preempt state consumer protection laws by enacting the revisions to the federal regulations. *Id.* at 729. *See also* National City Bank of Indiana v. Turnbaugh, 367 F. Supp. 2d 805, 813–22 (D. Md. 2005), *aff'd*, 463 F.3d 325 (4th Cir. 2006), *cert. filed*, 75 USLW 3267 (Nov. 7, 2006) (No. 06-653). *See generally* Darrell L. Dreher and Elizabeth Anstaett, *Emerging Trends in Preemption Impacting Interstate Lending by Federally-Regulated Financial Institutions*, 60 Consumer Fin. L. Q. Rep. 244 (2006).

11. *See, e.g.*, Wachovia Bank N.A. v. Burke, 414 F. 3d 305, 318 (2d Cir. 2005) (as it appears that Congress "has intentionally left open a gap concerning the treatment of national bank operating subsidiaries, . . . the OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking—business that the national bank itself could conduct directly—through an operating subsidiary;" "having so defined a national bank's power to conduct business through an operating subsidiary, the OCC further has the authority to preempt states law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank"), *cert. filed*, 74 USLW 3233 (Sept 30, 2005) (No. 05-431); Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 563 (6th Cir. 2005) (agreeing with the Second Circuit that the OCC's rules "reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending" quoting *Burke*, 414 F.3d at 321), *aff'd*, 127 S.Ct. 1559 (2007).

12. *See, e.g.*, 12 C.F.R. § 7.4006 (2006).

13. U.S. Government Accountability Office, Report to the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives, OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks, GAO-06-387 (April 2006), *available at* http://www.gao.gov/new.items/d06387.pdf [hereinafter "GAO Report"].

14. GAO Report, *supra* note 13, at 43.

through 2004, less than two percent of the nation's thousands of banks changed between the federal and state charters.[15] According to the report, measures that could address states' concerns about protecting consumers include providing for some state jurisdiction over operating subsidiaries, establishing a consensus-based national consumer protection lending standard, and further clarifying the applicability of state consumer protection laws.[16]

The GAO's previous report also concluded that the OCC followed the statutory framework for rulemaking and applicable executive orders when issuing its final "visitorial powers" and "preemption" rules in January 2004.[17] The GAO criticized certain aspects of the OCC's procedures by indicating that it was difficult to determine the basis for some OCC actions or assess the extent of its consultation with stakeholders because the OCC did not always document its actions.[18] In addition, the GAO indicated that the OCC had not followed its own guidance or procedures for its rulemaking process and instead used a rulemaking checklist as a guide for completing reviews and routing documents.[19] Although the OCC disagreed with certain observations made by the GAO in its report, the OCC concurred that its rulemaking process could benefit from detailed written rulemaking procedures.[20] Thus, the OCC indicated that it intended to develop such procedures.[21] The OCC also indicated that it intended to enhance its efforts to consult with state officials and organizations where appropriate in connection with rulemaking proceedings.[22]

It is against this backdrop of rulemaking and criticism that the FDIC entertained the FSR's preemption petition.

## The FSR's Preemption Petition

Responding to the expanded understanding of preemption available to national banks, the FSR submitted its petition, urging the FDIC to adopt rules providing parity between state banks and national banks.[23] Specifically, the petition requested a rule providing that an insured state bank's home state law governs the interstate activities of the bank and its subsidiaries to the same extent that the National Bank Act governs a national bank's interstate business.[24] According to the petition, the OCC and the OTS have interpreted federal law to permit national banks and federal savings associations to do business across state lines under a single set of federal rules. The petition asserts that the same is not true for state

15. *Id.* at 9.
16. *Id.*
17. U.S. Government Accountability Office, OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process, GAO-06-8, at 13–14 (Oct. 2005), *available at* http://www.gao.gov/new.items/d068.pdf.
18. *Id.* at 15–21.
19. *Id.* at 23.
20. *Id.* at 46.
21. *Id.*
22. *Id.* at 47.
23. *See supra* note 3.
24. FSR Petition, *supra* note 3, at 13414.

banks, with resulting confusion and uncertainty.[25] The petition further asserts that the FDIC has the authority to correct this imbalance.[26]

The FSR argued that insured state banks were at a significant competitive disadvantage to national banks. Accordingly, the FSR's petition sought the promulgation of rules to provide that an insured state bank can conduct interstate operations under its home state law to the same extent that a national bank can under the National Bank Act and OCC regulations, and to preempt host state usury laws for insured state banks in a manner parallel to the OCC's preemption of host state usury laws for national banks.[27] The FSR asserted that such action by the FDIC would achieve the result that Congress sought in enacting the Riegle-Neal Interstate Banking and Branching Efficiency Acts (collectively, "Riegle-Neal")[28] and the Gramm-Leach-Bliley Act[29] ("GLB Act"), by providing competitive equality for state banks and national banks.[30]

In particular, the FSR's petition requested: (i) a rule clarifying that home state law applies to an out-of-state state bank in a host state to the same extent as the NBA applies to national bank's interstate activities whether the state bank's business is conducted through a host state branch, an operating subsidiary or otherwise; (ii) that the rule make clear that state banks may operate under home state law in any other state, even if the bank has no branch in that state, to the same extent as a national bank; (iii) that the rule clarify that an operating subsidiary of a state bank is subject to the same laws as the state bank; (iv) that the rule provide that state laws that impose requirements, limitations or burdens on an insured state bank are preempted to the same extent as it is preempted to a national bank; and (v) that interest preemption rules for FDIC-insured institutions be adopted like those adopted by the OCC for national banks in 12 C.F.R. section 7.4001.[31]

According to the petition, such rules are necessary and the cost of a failure by the FDIC to adopt such rules will be significant.[32] The petition asserted that the federal charters for national banks and federal thrifts have been correctly

25. *Id.*
26. *Id.*
27. *Id.* at 13416, 13421.
28. *Id.* at 13417. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 102, 108 Stat. 2338, 2351 (the "1994 Act") modernized federal branching law by allowing banks to branch and merger across state lines. The 1994 Act was amended by the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, § 2, 111 Stat. 238, 238 (codified at 12 U.S.C.A. § 1831a(j)(1) (West 2001 & Supp. 2006)), which specifically addressed the applicability of host state law to out-of-state branches of FDIC-insured banks by providing:

> 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.

29. Pub. L. No. 106-102, § 104(d), 113 Stat. 1338, 1353 (1999).
30. FSR Petition, *supra* note 3, at 13417.
31. *Id.* at 13418.
32. *Id.*

interpreted by the OCC and OTS, with the repeated support of the federal courts, to provide broad federal preemption of state laws that might appear to apply to the activities or operations of a banking institution in that state.[33] The petition contrasted the position of national banks and federal savings banks with the position of state banks that face great uncertainty regarding the applicability of state law. The FSR asserted that this uncertainty carries a risk of litigation and enforcement actions, which deters state banks from pursuing business opportunities.[34] According to the FSR, this uncertainty has caused national bank charters to become increasingly more attractive, and state bank charters to become increasingly less attractive.[35] Thus, the FSR argued, the increased risk associated with state bank charters threatens the dual banking system, and is contrary to Congressional intent in enacting Riegle-Neal and the GLB Act.[36]

The petition asserts that the FDIC has the responsibility and the authority to correct the current imbalance, to implement Riegle-Neal, and to address any gaps or necessary clarification of the statute to effect Congressional intent.[37] The petition stated that the legislative history of Riegle-Neal makes clear that Congress's goal was to facilitate competitive equality for state banks and national banks in interstate banking, quoting from Congressional representatives and senators relating to Riegle-Neal.[38]

The FSR's petition acknowledges that Riegle-Neal did not expressly address the law applicable to banks outside states where they maintain a branch, but refers to section 104(d) of the GLB Act as expressing Congressional intent to level the playing field. Section 104 of the GLB Act[39] deals with the applicability of state law, and provides that, except with regard to certain insurance activities, states may not prevent or restrict a depository institution from engaging in any activity authorized or permitted under the GLB Act.[40] The petition concludes that, given section 104(d) and the FDIC's authority to address compliance with law under section 9 of the Federal Deposit Insurance Act[41] ("FDI Act"), the FDIC can adopt a rule consistent with the logic and policy of Riegle-Neal that will provide state banks with competitive equality in every state.[42]

The FSR petition recognizes that whether a state bank can have an "operating subsidiary" will be determined by the appropriate home state authorities under the bank's charter law.[43] Nevertheless, the FSR petition asserts that the FDIC clearly has the authority to determine that a state bank operating subsidiary that is treated for all purposes as if it were a division of the bank will be subject to the

33. *Id.* at 13414.
34. *Id.*
35. *See id.* at 13425.
36. *Id.* At 13419.
37. *Id.*
38. *Id.* at 13420–21.
39. GLB Act, *supra* note 29, § 104 (codified at 15 U.S.C. § 6701(d) (2000)).
40. FSR Petition, *supra* note 3, at 13420.
41. Ch. 967, § 2[9], 64 Stat. 873, 881 (codified as amended at 12 U.S.C. § 1819 (2000)).
42. FSR Petition, *supra* note 3, at 13420.
43. *Id.* at 13424.

FDI Act and FDIC rules in the same way as its insured bank parent, parallel to a national bank operating subsidiary.[44]

## The FDIC's Response

### Public Hearing

The FDIC held a public hearing on May 24, 2005 in response to the FSR's petition. Written and oral statements were given in response to the petition and the FDIC request.[45] Sixteen speakers presented oral testimony and eighteen others provided written testimony, including bankers, trade associations, public interest groups, state regulators, members of Congress and state Attorney Generals.[46]

The issues considered at the hearing included the necessity of preserving the dual banking system, the impact on consumers of broader preemption, the impact on state banking regulation, the role of Congress in the preemption debate, any negative impact of the FDIC adopting such a regulation, the state interest in how banks conduct business within their borders, the benefit to state banks from preemption regulations, and whether there is a need for clarification of federal preemption in regard to state banks.[47] Those in favor of an FDIC preemption rule discussed the need for parity in order for state banks to remain competitive, while those opposed to a preemption rule focus on state consumer protection laws. The two sides also disagreed over the FDIC's authority to issue such a rule.[48]

### The FDIC's Proposed Rule

After the public hearing, the FDIC issued a notice of proposed rule making in response to the FSR's petition, proposing a rule that would clarify many of the issues relating to the scope of preemption applicable to insured state banks.[49] The FDIC summarized the testimony at the hearing in the commentary to the proposed rule.[50]

The FDIC concluded that it has authority to issue a preemption rule under 12 U.S.C. section 1819(a) and 12 U.S.C. section 1820(g).[51] In the explanation for the proposed rule, the FDIC focused on section 24(j) of the FDI Act, which gives state banks full parity with respect to interstate branching, and Section 27 of the FDI Act, which allows insured state banks to export interest rate limitations like national banks.[52] Thus, the FDIC did not choose to rely on section 104 of the GLB Act.

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44. *Id.* at 13425.
45. 70 Fed. Reg. 13413 (Mar. 21, 2005) (notice of public hearing).
46. Public Hearing on Preemption Petition (May 24, 2005) (transcript and written statements *available at* http://www.fdic.gov/news/conferences/agency/noticemay162005publichearing.html).
47. *Id.*
48. *Id.*
49. 70 Fed. Reg. 60019 (Oct. 14, 2005).
50. *Id.* at 60020–22.
51. *Id.* at 60025; 12 U.S.C.A. §§ 1819(a), 1820(g) (West 2000, Supp. 2006, & Supp. 2007).
52. 70 Fed. Reg. at 60026. FDI Act Section 24 is codified as amended at 12 U.S.C.A. § 1831a (West 2000 & Supp. 2006). FDI Act Section 27 is codified as amended at 12 U.S.C. § 1831d (2000).

The proposed rule attempts to place state banks on par with national banks in states in which the state bank has a branch by providing that the host state law does not apply to the activity conducted at a branch in a host state of an out-of-state state bank to the same extent that host state law does not apply to activities conducted at a branch in the host state of an out-of-state national bank.[53] The proposed rule further provides that, subject to certain restrictions regarding the activities of insured state banks, an out-of-state state bank that has a branch in a host state may conduct any activity at such branch that is permissible under its home state law, if it is either: (i) permissible for a bank chartered by the host state; or (ii) permissible for a branch in the host state of an out-of-state national bank.[54] The proposed rule requires reference to federal court decisions or written interpretations by the OCC to determine if host state law applies to a branch of an out-of-state national bank, and the FDIC explained that it expects to consult with the OCC in this regard.[55] The FDIC stated that this approach is similar to 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.[56] The FDIC explained that preemption under Riegle-Neal is not limited to certain areas or subjects, but is limited in that it only operates with respect to a branch of a state chartered bank. Thus, the preemption rule does not apply if the out-of-state bank does not have a branch in the host state.[57]

The proposed rule also includes a provision regarding interest rates that contain a definition of "interest," and an explanation of rate exportation like that found in the OCC's regulation applicable to national banks.[58] The FDIC included several provisions addressing the insured state bank's "location" for rate exportation purposes (i.e., which state's law will provide the applicable interest limitations). The location provisions adopt the position taken by the OCC and FDIC in prior interpretive letters.[59] In regard to location, the proposed rule provides that a state bank is located in the state where it is chartered (its home state) and in each state where the bank maintains a branch (host state).[60] A state bank that does not have interstate branches or operates exclusively through the Internet is located in the state that issued the charter.[61] For state banks located in more than one state the bank is located in: (i) the state where all three of the non-ministerial functions occur; or (ii) the home state, if the non-ministerial functions either do all not occur in one state or any of them occur in a state where the bank does not

53. 70 Fed. Reg. at 60027.
54. *Id.*
55. *Id.* at 60025.
56. *Id. See* 12 U.S.C.A. § 1831a(a) (West 2000 & Supp. 2006).
57. 70 Fed. Reg. at 60025.
58. *Id.* at 60027. *See* 12 C.F.R. § 7.4001 (2006).
59. 70 Fed. Reg. at 60026–29. *See* OCC Interpretive Letter 822 from Julie L. Williams, Chief Counsel (Feb. 17, 1998), *available at* http://www.occ.treas.gov/interp/mar98/int822.pdf; FDIC Opinion Letter No. 11 from Robert E. Feldman, Executive Secretary, 63 Fed. Reg. 27282 (May 18, 1998).
60. 70 Fed. Reg. at 60026–29.
61. *Id.* at 60028–29.

have a branch; or (iii) a host state where a non-ministerial function occurs, it there is a clear nexus.[62]

As the interest and location provisions of the proposed rule are consistent with existing case law and FDIC letters, these provisions are unlikely to generate much controversy. The courts have generally held that insured state banks have similar usury preemption as national banks based on section 27 of the FDI Act.[63] In fact, several courts have held that state usury claims are completely preempted as to insured state banks, just as they are for national banks.[64]

The FDIC's proposed rule does not address all areas requested by the FSR's petition, including preemption in states in which an out-of-state state-chartered bank does not have a branch, and preemption as applied to operating subsidiaries of state banks. The FDIC also did not address consumer protection laws, unlike the OCC which discussed consumer protection laws at length in the commentary released with the OCC proposed and final preemption rules.

## The Future

After the FDIC's proposed rule was published, the FDIC's Chairman Powell resigned and the FDIC Board remained leaderless and apparently divided (based on earlier votes) until new Chairman Sheila C. Bair was confirmed by the Senate and sworn into office on June 26, 2006.[65] By that time, controversy over industrial loan companies had captured the FDIC's attention and national headlines.[66] While FDIC staffers assert publicly that continuing progress is being made on the proposed rule,[67] the speed with which progress will be made to address issues in the absence of consensus is uncertain, especially in light of the criticism leveled at the OCC in terms of the substance and procedures attending the OCC's rule-making. The FDIC's proposed rule may well remain mired in process.

62. *Id.* at 60029.

63. *See, e.g.*, Greenwood Trust Co. v. Commonwealth of Massachusetts, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); Hunter v. Greenwood Trust Co., 679 A.2d 653 (N.J. 1996), *reinstating* 640 A.2d 855 (N.J. 1994).

64. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (complete preemption as to national banks); *In re* Community Bank of Northern Virginia, 418 F. 3d 277 (3d Cir. 2005) (complete preemption as to insured state banks); Discover Bank v. Vaden, 409 F. Supp. 2d 632 (D. Md. 2006); Forness v. Cross Country Bank, Inc., No. 05-CV-417-DRH, 2006 WL 240535 (S.D. Ill. Jan. 13, 2006).

65. Press Release, *Sheila C. Bair Sworn in as 19th Chairman of the Federal Deposit Insurance Corporation, available at* http://www.fdic.gov/news/news/press/2006/pr06063.html.

66. *See* FDIC, Industrial Loan Companies and Industrial Banks: Notice and Request for Comment, 71 Fed. Reg. 49456 (Aug. 23, 2006); *Wal-Mart Faces Bank Plan Foes*, L.A. Times, April 11, 2005, at C1; *Sides to Square Off on Bank*, L.A. Times, April 10, 2006, at C1.

67. *See* Press Release, *Remarks by Chairman Donald E. Powell Federal Deposit Insurance Corporation Before the Conference of State Bank Supervisors Annual Convention San Antonio, Texas June 3, 2005* (June 3, 2005), *available at* http://www.fdic.gov/news/news/press/2005/pr4905.html; Press Release, *FDIC Chairman Says Action at Federal Level Needed to Preserve Healthy Dual Banking System* (Sept. 26, 2005), *available at* http://www.fdic.gov/news/news/press/2005/pr9405.html.