May 9, 2024

Via Electronic Submission

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219

RE: National Bank Preemption

Dear Mr. Dowd:

Competition among state-chartered and national banks is vital to the American economy. The roots of our country's dual-chartering framework for banks can be traced back to the U.S. Constitution, and it steadily spurs innovation and ensures consumers and businesses across the country and economic spectrum have meaningful access to high-quality financial products and services. Yet, however strong and storied our dual-chartering framework may be, its continued viability depends in large part upon the Office of the Comptroller of the Currency (OCC) defending its nearly exclusive national bank visitorial powers against encroachment by state authorities and otherwise preserving the essential powers of national banks amid a range of harmful and often conflicting state laws.

12 U.S.C. §25b, as added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), provides that a state consumer financial law is generally preempted as to national banks if: (1) the law's application has a greater discriminatory effect on a national bank than on banks chartered in that state; (2) the OCC or a court determines, in accordance with the Supreme Court's *Barnett* decision, the law "prevents or significantly interferes" with a national bank's exercise of federally recognized powers; or (3) the law is preempted by a provision of federal law other than title 62 of the Revised Statutes.

Furthermore, even where application of a state law to national banks is not preempted, under 12 U.S.C. §484, national bank visitorial powers are reserved almost exclusively to the OCC.[1] Except in limited circumstances expressly detailed in federal law, state officials may not conduct national bank examinations, inspect or require the production of a national bank's books or records, or prosecute enforcement actions against a national bank. State officials otherwise seeking production of a national bank's books or records must instead follow normal judicial procedures.

As the OCC explained in Interpretive Letter 1173, when the OCC concludes a state law other than a state consumer financial law is preempted or a state consumer financial law is preempted under section 25b(1)(A)'s discriminatory effect provision or by other federal law, the OCC has

[1] Under 12 USC §484(b), lawfully authorized state auditors and examiners may, at reasonable times and upon reasonable notice to a national bank, review its records solely to ensure compliance with applicable state unclaimed property or escheatment laws upon reasonable cause to believe that the bank has failed to comply with such laws.

no obligation under the Dodd-Frank amendment to undertake a case-by-case *Barnett* analysis, to coordinate with the Consumer Financial Protection Bureau (CFPB) regarding substantively equivalent state laws, or to periodically review its conclusion. Accordingly, where any state law purports to provide state officials national bank visitorial powers unavailable to them under federal law or otherwise attempts to circumvent clear prohibitions against state officials exercising national bank visitorial powers reserved exclusively to the OCC, the OCC can and should act quickly and decisively. Relatedly, ABA and its members strongly encourage the OCC to deny all current and future requests by state officials to exercise any national bank visitorial powers not afforded to the state officials by federal law or available to them through normal judicial procedures.

Where preemption of an obstructive state consumer financial law is unavailable under either section 25b(1)(A) or 25b(1)(C) and the OCC is subject to section 25b(1)(B)'s procedural requirements, shielding national banks from the state law clearly requires OCC to undertake a more detailed analysis. An OCC preemption determination made pursuant to the *Barnett* standard must be supported by substantial evidence that the state law prevents or significantly interferes with a national bank's exercise of federally recognized powers. And the OCC must review its preemption determination every five years, publish notice of such review and provide opportunity for public comment, and submit a report to Congress.

That more is required of the OCC in these circumstances is, however, never reason for the OCC to be less willing or slower to act. And when the OCC evaluates the impact of a state consumer financial law, the OCC must bear close in mind that national banks' powers are far from limited to those expressly enumerated in the *National Bank Act* and hardly static. Rather, both the OCC and the Supreme Court have repeatedly recognized national banks' incidental powers evolve alongside financial innovations and the growing needs of an ever-more complex American economy. Less national banks quickly be made vulnerable to myriad, often conflicting state laws, the OCC must be and remain vigilant in all situations in which national bank preemption is appropriate.

If you have any questions, please reach out to Dale Baker at DBaker@aba.com.

Sincerely,

American Bankers Association
Alabama Bankers Association
Alaska Bankers Association
Arizona Bankers Association
Arkansas Bankers Association
California Bankers Association
Colorado Bankers Association
Connecticut Bankers Association
DC Bankers Association
Delaware Bankers Association
Florida Bankers Association
Georgia Bankers Association
Hawaii Bankers Association
Idaho Bankers Association
Illinois Bankers Association
Indiana Bankers Association
Iowa Bankers Association
Kansas Bankers Association
Kentucky Bankers Association
Louisiana Bankers Association
Maine Bankers Association
Maryland Bankers Association

Massachusetts Bankers Association
Michigan Bankers Association
Minnesota Bankers Association
Mississippi Bankers Association
Missouri Bankers Association
Montana Bankers Association
Nebraska Bankers Association
Nevada Bankers Association
New Hampshire Bankers Association
New Jersey Bankers Association
New Mexico Bankers Association
New York Bankers Association
North Carolina Bankers Association
North Dakota Bankers Association
Ohio Bankers League
Oklahoma Bankers Association
Oregon Bankers Association
Pennsylvania Bankers Association
Puerto Rico Bankers Association
Rhode Island Bankers Association
South Carolina Bankers Association
South Dakota Bankers Association
Tennessee Bankers Association
Texas Bankers Association
Utah Bankers Association
Vermont Bankers Association
Virginia Bankers Association
Washington Bankers Association
West Virginia Bankers Association
Wisconsin Bankers Association
Wyoming Bankers Association