M B C A

MID-SIZE BANK COALITION OF AMERICA

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 2-3
Washington, D.C. 20219

Re: **OTS Integration; Dodd-Frank Act Implementation**
Docket ID OCC-2011-0006

Dear Office of the Comptroller:

On behalf of the Midsize Bank Coalition of America ("MBCA"), I am writing to provide the MBCA's comments on the above-referenced notice of proposed rulemaking (the "Proposal") published by the Office of the Comptroller of the Currency ("OCC") on May 26, 2011.[1]

The MBCA is a non-partisan financial and economic policy organization of 24 mid-size banks doing business in the United States. Founded in 2010, the MBCA was formed for the purpose of providing the perspectives of mid-size banks on financial regulatory reform. As a group, the MBCA banks do business through more than 3,350 branches in 41 states, Washington D.C. and three U.S. territories. The MBCA's members' combined assets exceed $343 billion (ranging in size from $7 to $25 billion). Together, our members employ approximately 60,000 people. Member institutions hold nearly $258 billion in deposits and total loans of more than $205 billion. The MBCA's members include both national banks and federal savings banks/associations ("FSBs"), both of which are directly affected by the Proposal.

The MBCA strongly endorses the Proposal, which we believe accurately and appropriately implements the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act")[2] with respect to preemption of state law under the National Bank Act ("NBA") and the Home

1 *Office of Thrift Supervision Integration: Dodd-Frank Act Implementation*, 76 Fed. Reg. 30,557 (May 26, 2011).

2 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

Owners' Loan Act ("HOLA"). In particular, we believe the Proposal properly implements Congress' intent to preserve the OCC's preemption regulations published in 2004, 12 C.F.R. §§ 7.4007, 7.4008 and 34.4, as the regulatory codification of preemption of state law under the standards articulated in *Barnett Bank of Marian County, N.A. v. Nelson*, 517 U.S. 25 (1996).

We offer several suggestions for further clarifying how the OCC's regulations – including not only the 2004 preemption regulations but also the OCC's regulation authorizing national bank charges of non-interest fees – will apply to FSBs. We believe it is critical that these OCC's regulations explicitly state their application to FSBs, to ensure a clear understanding that, under the Dodd-Frank Act, state law is preempted as applied to FSBs to the full extent that it is preempted as applied to national banks.

We urge the OCC to adopt the Proposal as a final regulation as soon as possible. Prompt issuance of a final regulation will ensure that, upon the effective date of the relevant provisions of the Dodd-Frank Act (*i.e.*, July 21, 2011 – the statutory "transfer date"), national banks, FSBs, state regulators and the courts will be able to rely on the 2004 regulations, as modified by the Proposal, with respect to preemption under both the NBA and the HOLA.

I. *Barnett Bank* and the OCC's Preemption Regulations

As the Proposal explains, the OCC's preemption regulations are fully consistent with the standards set forth in Section 1044 of the Dodd-Frank Act ("Section 1044") for preemption of "State consumer financial laws" by the NBA and HOLA. That is, the OCC's preemption regulations, while not limited in application to State consumer financial laws, preempt state law to the extent that its application to a national bank (1) would have a discriminatory effect on a national bank in comparison with the effect of the law on a state-chartered bank; (2) would "prevent or significantly interfere with" a national bank's exercise of a federally granted power under the legal standard for preemption articulated in *Barnett Bank of Marian County, N.A. v. Nelson*, 517 U.S. 25 (1996), or (3) be preempted by another federal law.[3] As recently underscored by the Court of Appeals for the Eleventh Circuit, *Barnett Bank* expresses the U.S. Supreme Court's various tests for determining when state law conflicts with, and is therefore preempted by the NBA. *See Baptista v. JPMorgan Chase Bank, N.A.*, – F.3d – , 2011 WL 1772657, at *2 (11th Cir. May 11, 2011) ("[I]t is clear that under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes – that is, the test for conflict preemption."). Under *Barnett Bank*, state law conflicts with the NBA when it has any of a variety of effects on a national bank's ability to exercise its federally granted powers, including if the state law "prevents or significantly interferes with" that ability, or " 'forbid[s], or … impair[s] significantly the

[3] Dodd-Frank Act § 1044 (*codified at* 12 U.S.C. § 25b(b)).

exercise of a power that Congress explicitly granted.' " *Baptista*, 2011 WL 1772657, at *1-2 (quoting *Barnett Bank*, 517 U.S. at 33), or if it would "interfere with," "encroac[h]" upon, "hampe[r]," "condition," "restrict[]," or "limit[]" the exercise of, or "impair [the] efficiency" of, a national bank's federally authorized powers. *Barnett Bank*, 517 U.S. at 32-34.

The Proposal's clarification that *Barnett Bank* requires consideration of *all* of these various tests in order to reach a determination of whether the NBA conflicts with state law is an important confirmation of the consistency of the OCC's preemption regulations with Section 1044. Under the Proposal, the preemption regulations would no longer refer to any *particular* linguistic test for conflict preemption. As amended in accordance with the Proposal, the preemption regulations therefore would – as the Proposal states – underscore that the "phrase 'prevent or significantly interfere' is one exemplary formulation of conflict preemption used in [*Barnett Bank*]. It is not the only formulation . . . it may serve a touchstone or starting point in the analysis, but it takes meaning from the whole of the Supreme Court's decision."[4] Congress' understanding of this point in enacting the Dodd-Frank Act is confirmed by the statute's legislative history, as Congress specifically rejected a version of the legislation that would *not* have referenced *Barnett Bank* as the governing decision for NBA/HOLA preemption. *See* 156 Cong. Rec. S5888-89, S592, 2010 WL 2788025 (July 15, 2010). Indeed, the legislative history explicitly underscores, in the words of Senator Dodd himself, that as finally enacted, "the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case." *Id*. at S5902 (statement of Senator Dodd).

As amended in accordance with the Proposal, the preemption regulations would therefore clearly implement Congress' intent in the Dodd-Frank Act that *all* of the various formulations for conflict preemption under *Barnett Bank* – not just the "prevent or significantly interfere" formulation – serve to determine whether the NBA or the HOLA preempts state law as applied to national banks or FSBs, respectively.

II. The Value of the OCC's Preemption Regulations

The OCC's stated plan in the Proposal to clarify that the preemption regulations reflect the application of *Barnett Bank*, and therefore properly implement the Dodd-Frank Act, is of vast importance. Under the Proposal, the preemption regulations will continue to serve the critical role they have served since their adoption in 2004. And the value of the preemption regulations will only increase as of July 21, 2011, when, pursuant to Section 1046 of the Dodd-Frank Act, the regulations will govern FSBs as well as national banks.

[4] 76 Fed. Reg. at 30,562.

For the members of the MBCA and the banking industry in general, the preemption regulations provide extremely meaningful guidance for purposes of regulatory compliance. The clear, categorical preemption codified in the regulations enables MBCA members to plan their operations nationwide with assurance as to which state laws will apply to specific types of activities and which will not. By codifying and clarifying the boundaries of the NBA's conflict with state law as applied to national banks, the preemption regulations therefore facilitate predictability in national banks' operational planning, which in turn, benefits consumers. Indeed, that is precisely what the OCC intended when it promulgated the regulations in 2004: to provide national banks, the general public, and the courts with much-needed guidance regarding the limits of state law applications to national banks. *See* Bank Activities and Operations, 68 Fed. Reg. 46,119, 46,120 (Aug. 5, 2003) (proposed rule) (noting that without such regulatory clarity, "national banks, particularly those with customers in multiple states, face uncertain compliance risks and substantial additional compliance burdens and expense that, for practical purposes, materially impact their ability to offer particular products and services").

Based on the OCC's "experience supervising national banks," the numerous legal inquiries made to the OCC about preemption, and "the extent of litigation in recent years over . . . state efforts" to apply state law to bank activities, the OCC concluded that "national banks' ability to conduct operations to the full extent authorized by Federal law ha[d] been curtailed" as a result of "increasing efforts by states and localities to apply state and local laws to bank activities." 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004) (final rule). The OCC observed that this curtailment of national banks' ability to operate nationwide had "created higher costs and increased operational challenges." *Id.* & n.24. Such increased costs and operational challenges worked to the detriment of consumers, either because national banks were forced to "pass the costs on to consumers, or eliminate various products from jurisdictions where the costs are prohibitive." *Id.* National banks took these adverse steps to avoid potential claims brought under state law, even in situations where the banks believed the relevant state law was preempted, because they but did not want to incur the costs of litigating the issue or possible risks of reputational injury. *Id.*

The OCC's preemption regulations, like the similar preemption regulations of the Office of Thrift Supervision, 12 C.F.R. §§ 557.11-557.12 and 560.2, have helped very significantly to reduce these costs and to enable national banks to serve their customers more efficiently and effectively. Indeed, the preemption regulations have proven extremely valuable not only to national banks but also to consumers, state regulators, and the judiciary. They have eliminated ambiguity and ensured consistency in preemption determinations among the courts and the OCC. They have given banks a reliable yardstick for planning operations in multiple states, and ensured that banks understand not only which state laws are preempted but, also, which generally are not. They have provided the judiciary with clear binding rules based on the experience and

expertise of the OCC in observing how and to what extent particular types of state laws "encroac[h]" upon, "hampe[r]," "condition," "restrict[]," or "limit[]" the exercise of, or "impair [the] efficiency" of, a national bank's federally authorized powers within the meaning of *Barnett Bank*. 517 U.S. at 32-34.

The Dodd-Frank Act's explicit confirmation of the *Barnett Bank* standard, and the consistency of the OCC's preemption regulations with that standard, fully support the Proposal.

III. Suggested Adjustments to the Proposal's Regulatory Amendments

As explained in the Proposal, Section 1046 of the Dodd-Frank Act provides that determinations regarding the relationship between state law and the HOLA "shall be made in accordance with the law and legal standards applicable to national banks regarding the preemption of State law." Under the Proposal, the OCC would codify this statutory mandate in two new regulatory provisions, each of which would essentially repeat the statutory language in slightly modified form.[5]

Although the MBCA views this approach to implementing Section 1046 as reasonable, it would also seem reasonable, and in MBCA's view more helpful for purposes of judicial and other applications of the preemption regulations, to amend 12 C.F.R. §§ 7.4007, 7.4008, and 34.4 by adding the words "and Federal savings associations" after each reference to "national banks" (with conforming amendments for references to "national bank," "national bank's, and "national banks' "). That is the approach the OCC has taken in the Proposal with respect to various other regulatory provisions, such as 12 C.F.R. Part 8 (Assessment of Fees). By adding specific references to FSBs along with national banks in the preemption regulations, the Proposal would make the OCC's regulations more internally consistent and facilitate a more straightforward application of the preemption regulations to state laws with respect to FSBs.

The MBCA also believes the OCC should take a further step in clarifying preemption of state law as applied to FSBs – specifically, preemption of state law limitations on charges of non-interest fees. Under the current preemption regulations of the OTS, state law is categorically preempted as applied to FSBs with respect to "[s]ervice charges and fees" and [L]oan-related fees, including . . . servicing fees." 12 C.F.R. § 557.12(f), § 560.2(b)(5). The OCC's preemption regulations do not have parallel provisions expressly preempting non-interest fees. Instead, the OCC's regulation authorizing national banks to charge such fees, 12 C.F.R. § 7.4002 ("Section 7.4002"), provides that, to determine whether state laws that purport to limit or prohibit such fees are preempted, it is necessary to apply "preemption principles derived

[5] See 76 Fed. Reg. at 30,571, 30,573 (proposing new 12 C.F.R. § 7.4010(a) and § 34.6).

from the United States Constitution, as interpreted through judicial precedent." *Id*. § 7.4002(d).

The applicable preemption precedent referred to in Section 7.4002, of course, includes *Barnett Bank*, whose preemption standards will apply after July 2011 to state law with respect to both national banks and FSBs. However, because Section 7.4002 expressly authorizes national bank charges of non-interest fees, and the grant of that authority is critical to a determination of whether state law restricting such fees is preempted as applied to a national bank, it would seem appropriate to include in Section 7.4002 express references to FSBs along with national banks. Such amendment of Section 7.4002 would help clarify that, while rescinding the OTS preemption regulations, including their express provisions preempting state law limitations on "service charges and fees" and loan-related "servicing fees," the OCC recognizes that preemption of such state law limitations is preserved with respect to FSBs, only now under the *Barnett Bank* conflict preemption standard. Expressly referencing FSBs in Section 7.4002 would serve to underscore that FSBs, just like national banks, have the authority under their federal charters to impose non-interest fees. Although such authority is implicit in the HOLA, the OCC's express clarification of its existence and scope in Section 7.4002 would provide meaningful confirmation of that authority, particularly to state banking regulators and the courts.

IV. Conclusion

For the reasons stated above, the MBCA strongly supports the Proposal and suggests only modest amendments to the regulatory amendments it contemplates. We appreciate the opportunity to express the views of the MBCA in this context and look forward to further communication with the OCC on the preemption issue.

We appreciate this opportunity to provide you with our comments and look forward to discussing these matters with you in the future.

Yours Truly,

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Chairman and CEO, City National Bank

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