

**WRITTEN STATEMENT OF THE  
NATIONAL ASSOCIATION OF REALTORS®**

**BEFORE THE  
FEDERAL DEPOSIT INSURANCE CORPORATION  
HEARING ON THE PETITION FOR RULEMAKING  
TO PREEMPT CERTAIN STATE LAWS**

**MAY 24, 2005**

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**INTRODUCTION**

The National Association of REALTORS® (NAR) is pleased to submit its views to the Federal Deposit Insurance Corporation (FDIC) on the petition for rulemaking to preempt state laws to permit state banks to operate nationally under the laws of their home states. REALTORS® are involved in all aspects of the residential and commercial real estate industries. Because the real estate business is inherently local, the issue of preemption of state and local laws applicable to depository institutions is one of great concern to us.

NAR and its members have been deeply involved in issues relating to competition among federally-chartered depository institutions, state-chartered banks, and nonbank financial institutions because they play such an important role in helping American families purchase their homes. We believe the OCC preemption regulations, issued early last year, have hurt efforts of state and local governments to protect their citizens and provided an unfair competitive advantage to national banks. As a result, the OCC's actions have disrupted the competitive balance between national banks and state-chartered depository institutions as well as the balance between national banks and nondepository institutions that compete with national banks.

NAR also has actively participated in the joint regulatory proceedings of the Treasury Department and the Federal Reserve Board on whether to expand the definition of financial activities under the Bank Holding Company Act and the National Bank Act to include real estate brokerage and management. NAR opposes the proposed regulation because it would permit financial holding companies and financial subsidiaries of

national banks to engage in real estate brokerage and management, which are commercial activities. We firmly support this Nation's longstanding tradition of maintaining a separation between banking and commerce to protect the safety and soundness of the banking system, and believe that it is not appropriate for banking organizations to engage in commercial activities, and most especially not by regulatory fiat.

In view of our commitment to preserving strong and healthy financial institutions, we are pleased to provide our views to the FDIC on the important issues raised by the Petition.

### **SUMMARY**

NAR believes that none of the proposals presented by the Petition warrant action by the FDIC. The Petition is a response to an alleged competitive imbalance attributable to the OCC's actions. But the cure for any imbalance is for Congress or the OCC itself, under new leadership, to roll back the OCC regulations, not to use them as a model for the state banking system. NAR believes that granting the Petition would further harm the ability of states to protect their citizens; result in undue concentration of banking services and less choice for consumers; open the door to the mixing of banking and commerce; destroy the state banking system, not save it; and disrupt the competitive balance among financial service providers. Considering the significant restructuring of the financial services industry and unintended consequences that would result from granting the Petition, the decision should be the exclusive domain of Congress, not a regulatory agency. Finally, we do not believe that the FDIC possesses legal authority to grant the relief requested by the Petition. Accordingly, NAR urges the FDIC to dismiss the Petition.

## POLICY AND LEGAL CONSIDERATIONS

### A. THE RELIEF REQUESTED WILL UNDERMINE STATE CONSUMER PROTECTIONS

The Petition requests the FDIC to issue regulations that would have profound adverse consequences on the ability of states to protect their citizens. Our country recognizes the value of local control in matters relating to health, safety and welfare. As the U.S. Supreme Court has indicated in Medtronic, Inc. v. Lohr,<sup>1</sup> throughout history the states have exercised their police powers to protect the health and safety of their citizens, and states traditionally have great latitude under their police powers to legislate to protect the lives, limbs, health, comfort, and quiet of all persons. States are in a better position to determine what laws are appropriate to protect their citizens than are the federal agencies. Despite our country's cherished tradition of local control over matters such as consumer protection, the OCC has engaged in a campaign to undermine the ability of states to protect its citizens. State law after state law has been summarily set aside by OCC interpretation or regulation. *See* Preemption of State Law for National Banks and Their Subsidiaries by the Office of the Comptroller of the Currency, Congressional Research Service (January 14, 2004).

As a result of the OCC's actions, states are no longer in a position to enforce local laws against national banks, with some exceptions. National banks are free to exploit the citizens of a state with confidence that the state will be unable to enforce its laws against the bank. NAR is concerned that action by the FDIC as requested by the Petition will have a similar effect on the ability of each state to ensure that out-of-state state banks operating within its borders comply with local consumer protection laws.

The FDIC should also recognize that as the supervisor of state nonmember banks, it works in close coordination with state banking regulators to ensure the safety and soundness of state nonmember banks. Action by the FDIC to grant the Petition and permit state banks to ignore and avoid local laws of host states, as the OCC has permitted

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<sup>1</sup> 518 U.S. 470, 475 (1996).

for both home and host states, will have profound consequences for the relationship between the FDIC and state banking regulators and could disrupt the current good working relationship between the FDIC and state authorities. It may also adversely affect the relationship between host and home state governments. The FDIC should be mindful that the current imbalance between the states and the OCC is directly attributable to the OCC's actions, not the actions of the states. Action by the FDIC to provide the relief requested in the Petition will exacerbate already difficult relationships created by the OCC.

**B. THE RELIEF REQUESTED WILL RESULT IN AN UNDUE CONCENTRATION OF RESOURCES AND FEWER CONSUMER CHOICES**

The Petition makes note of the ongoing trend toward consolidation of financial services in the United States.<sup>2</sup> Mergers and acquisitions have significantly altered the banking industry and will continue to do so for the foreseeable future. According to the Federal Reserve staff, most merger transactions that took place over the past 10 years involved the acquisition of small banking organizations with operations in a fairly limited geographic area. The staff found that acquisitions had taken place in every state and that a large majority of mergers involved a target that operated in a single state and an acquirer with at least one office in that state.<sup>3</sup> Accordingly, acquisition activity over the past decade has led to the growth of interstate banking operations.

We believe that action by the FDIC could hasten the decline in the number of financial service providers available to consumers by making it more difficult for state banks that operate in a single state to compete with out-of-state banks that have acquired banks in the host state. Independent banks may find themselves at a competitive disadvantage to out-of-state banks because they will be required to comply with local laws while the out-of-state banks will not be required to do so. The competitive advantage enjoyed by out-of-state banks will force many in-state banks to “throw in the towel” and follow the trend by merging with an out-of-state bank that likely has a

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<sup>2</sup> Pilloff, “Bank Merger Activity in the United States, 1994-2003.” Federal Reserve Board Staff Study 176 (May 2004) (Fed Staff Study).

<sup>3</sup> Fed Staff Study at 22.

presence in the state. This will eliminate competition and reduce the number of providers of financial services that will be available to consumers.

**C. THE RELIEF REQUESTED WILL OPEN THE DOOR TO BANKS BECOMING INVOLVED IN COMMERCIAL ACTIVITIES**

NAR has long been concerned that the OCC's aggressive regulatory actions will ultimately lead to national banks' involvement in commercial activities, in contravention of our nation's long history of maintaining a separation between banking and commerce. Over the past several years, the OCC has engaged in a conscious and deliberate effort to erode the barrier between banking and commerce. Under the guise of incidental activities, the OCC has authorized national banks to engage in activities that typically are regarded as commercial. For example, the OCC recently permitted a bank to acquire a company that engaged in global trade management services, an activity that had always been regarded as commercial. Nonetheless, the OCC determined that trade management is an activity that is incidental to banking because it represented "a competitive response to efforts by other firms engaged in transportation and shipment to provide financing for trade as part of a complete package of services for customers seeking a single provider for their global trade requirements." According to the OCC, the acquisition of the company would enable the national bank to offer customers a package of trade-related finance and services that would be more competitive with other companies than would be the case with the national bank offering solely finance services.<sup>4</sup>

The ability of the OCC to convert a commercial activity into a bank permissible activity with the stroke of the pen, by determining the activity to be incidental to banking (i.e., "convenient" or "useful"), is a very dangerous power. It threatens to undermine the longstanding separation of banking and commerce and will inevitably lead to greater involvement by national banks in commercial activities. If such actions were combined with the OCC's aggressive attitude regarding preemption, it is likely

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<sup>4</sup> OCC Corporate Decision Letter 2005-02. Operating subsidiary application by JPMorgan Chase Bank, N.A., New York, New York to acquire Vastera, Inc. (3/24/2005).

that national banks will one day be in a position to engage in widespread commercial activities free from state restrictions and boundaries.

Combining such OCC actions with the actions requested by the Petition, state banks would automatically be permitted to engage in commercial activities authorized by the OCC for national banks. Accordingly, FDIC action will be an integral link in a chain of events that could lead to the steady erosion and ultimate elimination of the separation between banking and commerce. Such a result, of course, should be determined not by the OCC or the FDIC, but by Congress.

**D. THE RELIEF REQUESTED WILL PROMOTE COMPETITION IN LAXITY  
AMONG STATES**

The Petition asks the FDIC to permit a state bank's home state to determine what powers the bank may exercise in a host state regardless of whether the activities are conducted through a branch office, subsidiary, or otherwise. This will promote a competition in laxity among states and among state bank regulators and will inevitably result in a race to the bottom as states rush to adopt standards that will attract banks to relocate to their state.

Inevitably, states will recognize that they can attract state banks to relocate in their states by enacting laws that minimize regulatory burden, even at the expense of consumer protection and safety and soundness. Banks headquartered in the state would then be permitted to "export" the lax home state standard to their activities in host states. All states will have a strong incentive to respond by loosening their standards to prevent other states from "raiding" their state banks and to ensure that local banks do not relocate. Consequently, granting the Petition will have the effect of promoting lax regulatory standards among the states. Rather than level the playing field, preemption would have the effect of disrupting the current structure of supervision at the state level and result in a weaker and less balanced state bank supervisory system. The state "race to the bottom" would have serious implications for the safety of the federal deposit insurance fund as well.

**E. FDIC ACTION WOULD CONFLICT WITH AND UNDERMINE  
THE DUAL BANKING SYSTEM**

In enacting the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. 103-328 (Riegle-Neal), Congress crafted legislation that carefully balances the desire to provide flexibility to depository institutions that wish to create interstate banking operations and the need of states to protect their citizens. As indicated in the Conference Report on Riegle-Neal, Congress intended that the laws of the host state regarding community reinvestment, consumer protection (including applicable usury ceilings), fair lending and establishment of intrastate branches apply to any branch of a national bank or state bank in the host state to the same extent as such laws would apply to a branch of a bank chartered by that state, except when federal law preempts or when the OCC determines that the law has a discriminatory effect on the branch in comparison to branches of state-chartered banks.<sup>5</sup> These standards have remained in place since enactment of Riegle-Neal and continue in force and unaltered to this day.<sup>6</sup>

The Conference Report reaffirmed in express language the need for states to protect its citizens:

States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter the institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interest of their consumers, businesses, or communities.<sup>7</sup>

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<sup>5</sup> H.R. Rep. No 103-651, at 51 (Conference Report).

<sup>6</sup> See 12 U.S.C. §§ 36(f); 1831a(j)(1).

<sup>7</sup> Conference Report at 53.

At the time Riegle-Neal was passed, Congress was already critical of the aggressive attitude of the OCC to preempt state law. The Conference Report provides:

During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result. . . . [Citing an OCC Interpretive Letter as an example.] It is of utmost concern to the Conferees that the agencies issue opinion letters and interpretive rules concluding that Federal law preempts state law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches only when the agency has determined that the Federal policy interest in preemption is clear.<sup>8</sup>

In 1997, Congress enacted the Riegle-Neal Amendments Act, Pub. L. 105-24 (the Amendments). Unlike Riegle-Neal, there are no Committee reports accompanying the legislation. Accordingly, Congressional intent can be determined only from remarks of members at the time the Amendments were being considered. Throughout Congress's consideration, leading sponsors continued to be highly critical of the OCC's preemption actions, just as they were at the time Riegle-Neal was being debated in 1994. Senator D'Amato, Chairman of the Senate Banking Committee, stated the following:

Mr. President, this bill is especially important now because of efforts of the Comptroller of the Currency to preempt State laws and promote the national bank charter at the expense of the States and other Federal regulators. At a recent oversight hearing, I presented documentation, prepared by the OCC, that confirms that the OCC has mounted an unprecedented, aggressive marketing effort to convince State chartered banks to flip to a national charter. . . . In my judgment, in recent years the OCC has used his authority over national banks to thwart traditional areas of State regulation – such as regulation of insurance and consumer protection.<sup>9</sup>

Senator Sarbanes, Ranking Member of the Senate Banking Committee, observed that “[c]oncerns had been raised by consumer groups, both before and since enactment of

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<sup>8</sup> Conference Report at 53.

<sup>9</sup> 143 Cong. Rec. S 5637 (June 12, 1997).

Riegle-Neal, that the Comptroller has undertaken preemptive actions which were unnecessarily expansive.”<sup>10</sup>

Congress most certainly believed that the Amendments were an appropriate response to the OCC’s actions and would restore the competitive balance between national and state banks. Senator Moseley-Braun stated:

This bill . . . ensure[s] the viability of our dual banking system by clearly stating that host State law applies to branches of State-chartered banks only to the extent that it applies to national bank branches. This bill levels the playing field between State-chartered banks and national chartered banks that branch across State lines. It is important to the preservation of a strong, State-chartered banking system, which benefits the safety and soundness of the banking system as a whole.<sup>11</sup>

Similar sentiments regarding preservation of the dual banking system were expressed by the House sponsors of the bill. Rep. Marge Roukema explained:

This legislation is critical to the survival of the dual banking system. The dual banking system provides an important choice between the State or national bank charters and has served this country well for over 100 years. I believe it deserves to be reinforced.

In addition, a strong State banking system is necessary for the economic well-being of the individual States and for innovation in financial institutions. It is well known in financial circles how innovative and creative State-chartered banks have been, indeed, setting standards that have ultimately been established at the national level.

This legislation is also important for consumers, because if we do not enact this legislation, State banks will likely convert to a national charter. Certainly the incentive will be there. The end result could be that there will be no consumer protection at the State level. Those protections are sometimes stronger than the basic consumer protections of Federal law. In addition, it preserves the viability of the State charter option for banks that want to branch into other States.<sup>12</sup>

Rep. Michael Castle added:

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<sup>10</sup> 143 Cong. Rec. S 5638 (June 12, 1997).

<sup>11</sup> 143 Cong. Rec. S 5638 (June 12, 1997).

<sup>12</sup> 143 Cong. Rec. H 3088 (May 21, 1997).

Mr. Speaker, I rise in strong support of H.R. 1306, which will clarify the Riegle-Neal Interstate Banking Act to protect the viability of the State banking charter.

Our Nation has always had a dual banking system. A bank can choose a State charter or a national charter. As a former Governor, I can tell you how important maintaining a State charter is. An attractive State bank charter helps attract banking and business to a State. It helps produce jobs and revenue that help all citizens. This has been important to the success of Delaware and many other States.

As we enter the age of interstate banking and branching it is necessary to ensure that State banks can compete fairly with national banks as more banking is done between States and across the Nation. This legislation will ensure that there is a level playing field between State banks and national banks. At the same time, it will protect consumers and maintain all necessary safety and soundness standards for all banks.<sup>13</sup>

Legislative history clearly indicates that Congress enacted the 1997 Amendments to maintain parity between state and national banks in the provision of interstate banking services and preserve a viable dual banking system. By enacting the Amendments, Congress reestablished the competitive balance between national and state banks in the provision of interstate banking services and preserved the dual banking system. Action by the FDIC at this time has the potential for disrupting the dual banking system by ceding to the OCC the right to determine the powers of state banks. Permitting OCC rulings to determine what powers a state bank may exercise flies in the face of principles which underlay the dual banking system and is inconsistent with the intent of Congress when it passed Riegle-Neal in 1994 and the Amendments in 1997.

Action by the FDIC would be of particular concern in view of congressional opposition, as presented above, to the aggressive steps the OCC has taken over the past decade to override state law as applied to national banks. The FDIC should heed these Congressional concerns and be sensitive to the adverse consequences the proposed actions would have on the continued viability of the dual banking system. Again, this is an issue that is better left to the determination of Congress rather than the FDIC.

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<sup>13</sup> 143 Cong. Rec. H 3095 (May 21, 1997).

**F. THE RELIEF REQUESTED WILL DISRUPT THE COMPETITIVE BALANCE BETWEEN  
DEPOSITORY INSTITUTIONS**

The Petition contends that the FDIC should act to restore the competitive balance between national banks and state banks with interstate operations.<sup>14</sup> Other than asserting that there is an imbalance between state and national banks competing on an interstate basis, the Petition fails to present credible evidence of any disadvantages currently being experienced by state banks. The only evidence presented is the statement that assets held by national banks have increased recently.<sup>15</sup> This is hardly compelling support for FDIC action. There is no evidence that state banks are at a competitive disadvantage. Accordingly, NAR believes that FDIC action is unwarranted.

The Petition ignores the fact that any competitive advantage national banks may enjoy over state banks is attributable solely to administrative action by the OCC, not because of competitive pressures. In effect, the Petition requests the FDIC to cede to the OCC the authority to determine what host state laws apply to state banks. This, of course, is inappropriate.

Moreover, FDIC action will exacerbate any competitive imbalance that may exist because state banks headquartered in another state will not be required to comply with local law. Local banks chartered in states with stricter laws will have an incentive to convert to national charters or relocate to another state in order to avoid the need to comply with local law. Accordingly, FDIC action will not resolve fully any competitive advantage national banks may currently enjoy, and will exacerbate existing detriments that adversely affect locally-chartered state banks.

**G. ANY CONFUSION AS TO APPLICABLE LAW IS  
ATTRIBUTABLE TO OCC ACTIONS**

The Petition suggests that there is widespread confusion and uncertainty as to applicable law governing state banks engaging in interstate banking activities. We

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<sup>14</sup> Petition at 3.

<sup>15</sup> Petition at 4.

strongly disagree with this contention. We believe that Riegle-Neal is perfectly clear as to what law applies to state banks operating on an interstate basis. If there is any confusion, it is attributable not to Riegle-Neal, but rather to the OCC's aggressive and improper approach to permitting national banks to ignore state law.

Riegle-Neal established the framework: national banks and state banks engaged in interstate branching are required to comply with a host state's laws. The Act applies the host state's laws relating to community reinvestment, consumer protection, fair lending and establishment of intrastate branches to such banks unless (1) Federal law preempts state law, and (2) the OCC determines that state laws have a discriminatory effect on national banks in comparison to state banks.

Any confusion or uncertainty that is purported to exist arises solely from the actions of the OCC to aggressively preempt local laws with which it does not agree. The OCC has been consistently criticized for its actions by Congress and by knowledgeable observers. Nonetheless, the OCC has continued to relentlessly pursue its preemption agenda.

NAR believes that Riegle-Neal is very specific with respect to host state laws that are applicable to branches of state banks. There is no need, much less a compelling need, for the FDIC to pursue the OCC down the wrong path.

#### **H. THE RELIEF REQUESTED WILL ADVERSELY AFFECT COMPETITION BETWEEN DEPOSITORY AND NONDEPOSITORY INSTITUTIONS**

NAR is extremely concerned that any action by the FDIC to preempt state law will have serious adverse consequences on competition between banks and nonbank competitors and will unfairly tilt the playing field in favor of banks. As the FDIC is well aware, competition in the provision of financial services is no longer limited to bank providers. Nonbank lenders compete vigorously with banks in providing products such as consumer, auto, mortgage, and credit card loans. Securities firms and insurance companies compete head-to-head with banks in providing customers with investment

alternatives to bank deposits and certificates of deposit. The blurring between bank and nonbank providers of financial services was instrumental in leading to the enactment of the Gramm-Leach-Bliley Act (the GLB Act).

Granting the relief requested by the Petition would disrupt competition between banks and nonbank providers of financial services by permitting state banks operating on an interstate basis to ignore local laws that apply to nonbank organizations. NAR believes that the FDIC should not take actions that will disrupt the ability of nonbank providers to compete with banks that would be exempt from these local laws.

### **I. THE FDIC HAS NO AUTHORITY TO INTERPRET RIEGLE-NEAL**

The Petition assumes that the FDIC possesses legal authority to grant the relief requested. NAR believes that there are serious questions concerning the authority of the FDIC to interpret Riegle-Neal. Issues relating to preemption under Riegle-Neal have not been expressly delegated by Congress to the FDIC. Moreover, nowhere in the legislative history of Riegle-Neal or in the Amendments is there any mention of Congress conferring authority on the FDIC to interpret Riegle-Neal.

NAR believes that the interstate branching provisions of Riegle-Neal are self-executing and do not contemplate nor authorize any agency, including the FDIC, to interpret its provisions. Even if the FDIC proceeds to interpret Riegle-Neal, its interpretation would not be entitled to Chevron<sup>16</sup> deference because the Act could also be interpreted by the OCC and the Federal Reserve Board.<sup>17</sup> Accordingly, FDIC action to grant the relief requested by the Petition would impermissibly expand the scope of the Act without Congressional approval and would be subject to serious challenge as unauthorized. In a similar fashion, the FDIC's general authority to prescribe implementing rules to carry out the provisions of the Federal Deposit Insurance Act cannot be used by the FDIC as a basis for restructuring the financial system by preempting state law.

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<sup>16</sup> Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

<sup>17</sup> See Proffitt v. FDIC, 200 F.3d 855, (D.C. Cir. 2000) (when a statute is administered by more than one agency, a particular agency's interpretation is not entitled to Chevron deference).

Moreover, FDIC interpretation of Riegle-Neal as applied to insured state banks would intrude on and conflict with the authority of the Federal Reserve to supervise and regulate activities of state member banks.<sup>18</sup> Action by the FDIC that encroaches on the jurisdiction of the Federal Reserve over state member banks is entirely inappropriate and likely unsustainable.

#### **J. FDIC WILL FIND ITSELF INUNDATED WITH REQUESTS FOR INTERPRETATIONS**

Interpreting Riegle-Neal is a slippery slope fraught with danger. If the FDIC starts down this path, it will find itself mired in a quagmire of requests for interpretations. The FDIC and its staff will encounter an unending stream of requests from state banks to preempt state laws to which they object. State banks will constantly seek rulings as to whether the National Bank Act preempts host state laws and determinations of state law in instances where home state law is unclear or silent as to powers of state banks. Undoubtedly, many of these requests will generate considerable controversy. Such requests will also stretch the FDIC's resources to the limit and divert the FDIC's attention from its critical mission of protecting the deposit insurance fund.

#### **K. THE FDIC HAS NO AUTHORITY TO DETERMINE NONBRANCH ACTIVITIES OF STATE BANKS**

The Petition requests the FDIC to clarify that the law applicable to activities conducted by a state bank in a state in which the bank does not have a branch is its home state law. There is absolutely no basis in Riegle-Neal or in any other law for such an action.

Riegle-Neal establishes the framework applicable to activities conducted by a state bank at its branch established in a host state. There is nothing in Riegle-Neal that can be construed in any manner as affecting or authorizing state banks to conduct activities in a host state through nonbranch means, much less to permit state banks to ignore the laws of the state in which it is conducting business. Authorizing state banks to conduct business directly in another state outside of a branch office would undermine the

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<sup>18</sup> 12 U.S.C. §§ 321 *et seq.*

ability of a state to regulate and supervise entities doing business in the state. In the absence of state action, only Congress can authorize such activities. The request also conflicts with longstanding principles relating to the authority of a state to establish standards relating to qualification to do business in the state. Accordingly, the request should be summarily rejected by the FDIC.

NAR believes that § 104 of the GLB Act provides no support for the relief requested by the Petition. Section 104 prohibits discrimination by a state against banks and other providers of financial services. It does not address, relate to, or have anything to do with differences between the powers of state banks and national banks.

Section 104(d)(1) provides that no state may prevent or restrict a depository institution or an affiliate thereof from engaging in any activity authorized or permitted under the GLB Act. However, the seemingly broad language of § 104(d)(1) is narrowed by § 104(d)(4)(D), which provides that no state law shall be preempted to the extent that it does not discriminate against depository institutions (or their affiliates) engaged in the activity. The Conference Report on the GLB Act affirms the meaning of § 104(d):

State regulation other than of insurance or securities activities is not preempted even if it does prevent or restrict an activity so long as it does not discriminate.<sup>19</sup>

The Petition does not point to any state laws that discriminate against depository institutions as a group. Indeed, to the extent that state banks are at a disadvantage vis-à-vis national banks, it is attributable to actions of the OCC and not to discrimination by host states. Accordingly, the FDIC may not look to § 104 of the GLB Act as a basis for granting the relief requested by the Petition.

#### **L. THE FDIC HAS NO AUTHORITY TO PREEMPT HOST STATE LAWS APPLICABLE TO OPERATING SUBSIDIARIES**

The petition requests that the FDIC clarify that home state law governs the activities of an operating subsidiary of a state bank to the same extent as home state law

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<sup>19</sup> S. Rep. No. 106-44 at 157 (Conf. Rep.).

applies to the subsidiary's parent bank. There is no basis in Riegle-Neal or in the Federal Deposit Insurance Act for such a determination.

Riegle-Neal establishes the framework applicable to activities conducted by a state bank at its branch established in a host state. A subsidiary of a state bank is not the bank itself. It is a separate entity with a separate legal existence.<sup>20</sup> Operating subsidiaries of state banks are chartered as nonbank corporations. In no way can they be construed as banks. Indeed, the distinction between subsidiaries and banks is confirmed by the fact that in enacting Riegle-Neal, Congress amended the very same section of the Federal Deposit Insurance Act and used the term insured state banks rather than subsidiary when describing the interstate activities that would be permissible.

Congress recognizes the distinction between a bank and a subsidiary. Indeed, Congress distinguishes the terms in the very same section of the Federal Deposit Insurance Act.<sup>21</sup> Permitting operating subsidiaries of state banks to ignore host state law is inconsistent with the framework established by Riegle-Neal and is contrary to law. Authorizing operating subsidiaries to ignore local law would undermine the fundamental power of a state to regulate and supervise corporate entities doing business in the state. Accordingly, the relief requested by the Petition regarding operating subsidiaries of state banks should be denied.

## CONCLUSION

The Petition raises issues of fundamental concern to NAR. We would strongly oppose a decision by the FDIC to preempt state laws, as requested, because of the serious adverse consequences that would result, including limiting the authority of states to protect their citizens from deceptive practices and unfair competition, increasing concentration of banking resources, permitting the mixing of banking and commerce, disrupting the competitive balance among financial services providers, and encroaching

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<sup>20</sup> 12 U.S.C. § 1813(w)(4) (“subsidiary” means a company which is owned or controlled directly or indirectly by another company); § 1831a(c)(2) (state bank may acquire an equity investment in a subsidiary).

<sup>21</sup> 12 U.S.C. § 1831a.

on congressional prerogatives. Moreover, NAR believes that the Petition fails to present evidence supporting its position that state banks are suffering a competitive disadvantage that warrants the relief sought. Finally, we question whether FDIC has the legal authority necessary to preempt state laws as requested by the Petition. In view of the important policy and legal issues raised, NAR urges the FDIC to deny the Petition.