National Bank Preemption

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Issue Update

The Supreme Court first articulated a strong national bank preemption standard more than 200 years ago in its landmark *McCulloch* (1819) decision. State law, the Supreme Court held, cannot stand as "an obstacle" to constitutional federal operations – namely those of the Second Bank of the United States, a federally-chartered private corporation charged with public duties. Though the Second Bank of the United States was ultimately short-lived, national bank preemption took on renewed importance when, as part of the *National Bank Act of 1863*, Congress established the Office of the Comptroller of the Currency (OCC) and expressly charged it with chartering and regulating national banks.

The Supreme Court has since expansively interpreted national banks' express and implied powers. For example, in *Barnett* (1996), the Supreme Court found national banks' power to act as an insurance agent or broker to be "a broad, not a limited, permission" and held a state law limiting the types of insurance banks may sell was preempted as to national banks as it "prevent[ed] or significantly interfere[d] with [a] national bank's exercise of its powers." Congress codified the *Barnett* standard in *Dodd-Frank*.

Yet, state lawmakers on both sides of the aisle are increasingly attempting to leverage consumer financial laws that significantly interfere with core bank activities. Recently passed state laws variously attempt to dictate which risk characteristics banks may consider when opening and servicing accounts, how and with whom banks must share risk analyses and reports, and which transaction costs banks may recover.

Why It Matters

Access to Financial Services. Competition among national and state-chartered banks helps ensure consumers and businesses across the country and economic spectrum have access to the trusted financial services and products they need and deserve. Absent Congress, the courts, and federal regulators upholding a strong national bank preemption standard, national banks and many state-chartered banks operating across state lines would be subject to a burdensome patchwork of conflicting state laws and unable to efficiently serve customers across the country as they do today.

State Consumer Financial Laws are Needlessly Duplicative. Banks are already subject to and examined for compliance with robust federal consumer financial laws and regulations, and bank regulators already possess the enforcement tools necessary to resolve any compliance concerns.

Recommended Action Items

- **Urge the OCC to defend dual banking system.** Across both Republican and Democratic administrations, the OCC has been an outspoken advocate and defender of a strong national bank preemption standard and must act decisively and forcefully when states intrude on its nearly exclusive national bank regulatory and visitorial authorities.

- **Urge Congress to encourage the OCC to defend dual banking system.** Federal statutes and Supreme Court caselaw plainly support a strong national bank preemption standard. Lawmakers should not hesitate to remind the OCC of its duty to defend our dual banking system against impermissible state action.