American Bankers Association

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The Honorable Rodney Hood
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Dear Acting Comptroller Hood:

Earlier this month, the Conference of State Bank Supervisors (CSBS) asserted that OCC is compelled to rescind certain regulations that articulate core national bank preemption standards – the roots of which stretch not only through more than a century and a half of clear legislation and consistent case law but all the way back to our nation's Constitution. CSBS essentially contends that state legislatures and state banking regulators should be able to overrule – or, at the very least, seriously undermine – established national bank policy while federal agencies are engaged in a government-wide regulatory rebalancing effort. Respectfully, CSBS's assertions appear to rest on misinterpretations of legislative history, regulatory text, and case law and overlook the importance and structure of our nation's dual banking system.

As Congress, the U.S. Supreme Court, OCC, and every administration since President Lincoln has recognized, a strong dual banking system is essential to our nation's economy. Within this system, banks of all sizes have the flexibility to determine for themselves whether to pursue a state charter or a national charter based on how they want to operate and innovate to serve their customers. A national banking system with uniform rules provides national banks with the regulatory clarity and operational efficiencies necessary to operate in multiple states. On the other hand, pursuing a state charter may be best for banks seeking to serve well-defined populations or markets, banks that want to innovate quickly, and banks that are, for whatever reason, simply most comfortable with state regulators. Robust competition among national and state-chartered banks continually spurs innovation, ensuring consumers and businesses across the country and economic spectrum have meaningful access to a wide range of high-quality financial products and services.

Fully aware, after *McCulloch v. Maryland*[1], of the dangers that a patchwork of state laws would pose to the durable, uniform national bank chartering and regulatory framework it intended to establish, Congress in 1863 enshrined the foundational principles of national bank preemption in the *National Bank Act*. Congress provided national banks with the necessary operational authorities and appropriate protections from harmful state intervention. And the Supreme Court has since repeatedly recognized that Congress intended national banks' express powers to be

[1] 17 US 316 (1819).

broad, rather than limited, and that national banks' incidental powers evolve alongside financial innovations and the growing needs of an ever-more-complex American economy.

CSBS argues that OCC's *Final Rule, Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*[2] (Final Rule) conflicts with certain provisions of the *National Bank Act*, as amended by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (*Dodd-Frank*), and must, therefore, be rescinded pursuant to Executive Order 14219. CSBS is correct that, as part of *Dodd-Frank*, Congress amended Title 12 of the United States Code to expressly incorporate the national bank preemption standard articulated by the Court in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al*.,[3] into some of OCC's preemption determination processes. But the plain text of 12 U.S.C. § 25b, along with the Court's rationale in *Barnett,* contradicts CSBS's argument that OCC's Final Rule conflicts with 12 U.S.C. § 25b.

As previously explained by OCC in *Interpretive Letter 1173*, Congress prudently did not, as part of *Dodd-Frank*, require that all OCC preemption determinations include a nuanced *Barnett* analysis. 12 U.S.C. §25b(b)(1)(C) does not require that OCC engage in any case-by-case analysis when determining whether an individual or type of state consumer financial law is preempted by a provision of federal law other than Title 62 of the Revised Statutes. OCC's Final Rule is comprised of common-sense preemption determinations relevant to 12 U.S.C. §371, which authorizes national banks to engage in real estate lending and which is not part of title 62 of the Revised Statutes. Therefore, OCC was not obligated to engage in a *Barnett* analysis or any other kind of case-by-case analysis before making any preemption determinations comprising the Final Rule.

Furthermore, the Court in *Barnett* approvingly cited *Franklin Nat. Bank of Franklin Square* v. *New York*,[4] for the principle that where "Congress has not expressly conditioned [a] grant of power [to a national bank] upon a grant of state permission, this Court has ordinarily found that no such condition applies." As the *Barnett* Court said of New York's strikingly similar "special circumstances" argument, CSBS' argument that Congress intended that OCC adopt the *Barnett* standard while undermining the federal supremacy principles that *Barnett* upholds is unpersuasive. Effectively, CSBS suggests that a Congress working to protect against another economic crisis like the Great Recession also intended to expose national banks to a crippling patchwork of state laws – making it nearly impossible for them to support a national economic recovery.

Inadvertently or otherwise, acknowledging the deficiencies of its first argument, CSBS claims that OCC's Final Rule unfairly advantages national banks in contravention of Executive Order 14267. CSBS does not cite statistical evidence to support this claim – and for good reason. Our nation's dual banking system is plainly not discriminatory against state-chartered banks. If, as

[2] 76 Fed. Reg. 43549 (July 21, 2011).
[3] 517 U.S. 25 (1996).
[4] 347 U. S. 373.

CSBS claims, our nation's dual banking system disadvantaged state-chartered banks and, thereby, harmfully stifled competition for bank products and services, would the vast majority of American banks be state-chartered? Clearly not. And CSBS's suggestion that state-chartered banks cannot compete effectively under the dual banking system overlooks the strong performance of the thousands of state-chartered banks in this country, the hundreds of thousands of Americans who work for state-chartered banks, and the irreplaceable role state-chartered banks play in the American economy.

Moreover, CSBS's reliance on Executive Orders 14219 and 14267 to justify its position is misplaced. The Executive Orders do not support rescinding the Final Rule. If anything, they caution against *ad hoc* reversals of established regulatory positions, particularly where doing so would invite fragmented, state-level regulatory regimes that undermine national policy. The Executive Orders underscore the need for federal regulatory consistency and integrity and are not an opening for states to circumvent federal law or destabilize the dual banking system. In this light, OCC's Final Rule aligns with the Executive Orders' intent to preserve longstanding federal standards and regulatory clarity.

CSBS's position that OCC has impermissibly protected national banks is inconsistent with the plain text of 12 U.S.C. § 25b – specifically, 12 U.S.C. §25b(b)(1)(C). More broadly, accepting CSBS's assertions at face value risks overlooking longstanding historical and economic considerations. Such invitations are not only inherently improper but dangerously disregard the importance and structure of our nation's dual banking system, which makes our economy the envy of the world.

The American Bankers Association[5] appreciates your time and commitment to ensuring the safety and vitality of the national banking system.

Sincerely,

Hugh Carney

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Executive Vice President

[5] The American Bankers Association is the voice of the nation's $24.5 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard $19.5 trillion in deposits, and extend $12.8 trillion in loans. Learn more at www.aba.com.