Remarks of James C. Sivon
Barnett Sivon & Natter, P.C.
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Thank you. I appreciate the opportunity to be a part of this program.

My role is to speak on behalf of national banks. I was asked to do so because I have been involved in efforts to support the national bank charter for the past few years.

My involvement began in the late 90s when Carter Golembe asked me to manage an organization called the Support Group for Modern National Banking. That Group came together to oppose activity restrictions on operating subsidiaries of national banks. The Support Group has since evolved into the National Laws Group. Much of my time for that Group has been devoted to defending the OCC's preemption and visitorial powers regulations. Those regulations have been in effect for over a year now. In that time, no legal challenge to the regulations has been sustained. In fact, several federal courts have upheld the extension of preemption to operating subsidiaries of national banks. Yet, a policy debate over the regulations rages on.

There are continuing concerns about the future of the state banking system, and the ability of individual states to enact consumer protection laws. These are legitimate concerns, which should not be dismissed lightly. This morning, I would like to address these concerns by offering some advice to both sides of the debate. I'll start with the OCC.

Much of the controversy over the OCC's preemption regulation reflects concern over the reach of the regulation. For example, in a recent article in the New York Law Journal, two Assistant State AGs for the State of New York argued that the preemption standard in the OCC regulation permits the preemption of any state law that merely "conditions" a national bank's ability to exercise federally authorized powers. This, they claimed, permits the OCC to preempt all state laws.

There is much the OCC could do to address this and other concerns related to the regulation. Most importantly, the OCC could issue a formal guidance to clarify the scope of the regulations. With respect to the preemption standard, such a guidance could state that (1) the preemption regulation does not change the standard for preemption set forth in relevant Supreme Court cases; (2) the preemption regulation does not authorize any new powers for national banks; and (3) the term "condition" does not mean that any state requirement is preempted. Consistent with relevant Supreme Court cases, this term refers to state laws or other requirements that are so burdensome as to interfere with a bank's authorized activities. For example, a simple requirement to file a "doing business as" notice with a state, while a condition, should not be preempted by the regulation.

Additionally, such a guidance could clarify that the preemption regulation does NOT preempt (1) nondiscriminatory state laws that form the infrastructure for conducting a banking business or other business, including UCC provisions; (2) state laws that have only an incidental affect on a national bank's exercise of its federally authorized powers; (3) state unfair and deceptive practice acts; (4) state anti-discrimination acts; or (5) state escheat laws.

With respect to operating subsidiaries of national banks, the guidance could state that (1) operating subsidiaries must comply with non-discriminatory state licensing and doing business as laws; (2) operating subsidiaries must comply with a state's business code, including rules on corporate governance; and (3) operating subsidiaries are subject to non-discriminatory state tax laws.

Finally, with respect to the enforcement of applicable laws, the guidance could state that (1) the OCC will refer complaints involving non-bank affiliates to State AGs and will cooperate with the State AG in investigating such complaints; and (2) the OCC will share information with State AGs on alleged violations of state law involving a national bank or operating subsidiary of a national bank, subject to a confidentiality agreement. Such a guidance may not address all of the concerns associated with these regulations, but it would address many.

Now, what about the states? Here, I have two suggestions.

First, I suggest that the states seek changes in federal law to enhance the dual banking system. The benefits of the dual banking system are best realized by competition between the states and the Federal Government. Jim Wilcox of the University of California at Berkeley wrote a paper that makes this case. Professor Wilcox concludes that competition between state and federal banking regulators promotes innovation in banking products and services, increases choices for banks and their customers, and improves the efficiency of both banks and regulators. Unfortunately, federal laws, such as the Federal Deposit Insurance Act and the Bank Holding Company Act, have diminished the potential for competition between state and federal banking regulators.

Today, the FDI Act imposes a host of conditions and limitations on state banks, including a prohibition on the ability of state banks to engage in activities, as principal, that are not permissible for national banks. Similarly, the Bank Holding Company Act places limits on the scope of affiliations permissible for state banks. If the states had greater freedom to regulate state banks, the dual banking system would be stronger, and the states would be far less concerned about the actions of the OCC. It would not be easy to unwind the various restrictions and limitations imposed on state banks by federal law. Most of these restrictions and limitations were imposed in response to safety and soundness concerns. Yet, if Professor Wilcox is correct, and I believe he is, the states should have a strong economic incentive to pursue such a path.

My second suggestion is that the states give greater consideration to the impact of proposed consumer protection laws on the financial integrity of the banking system. To a large degree, the OCC's preemption regulation was a response to a growing number of legislative initiatives by state and local governments that impacted the operations of national banks. While these state and local legislative initiatives were intended to provide increased benefits and protections for consumers, they can cause, and have caused, unnecessary financial losses to insured institutions, reduced the availability of credit, or increased the cost of credit. Many state consumer protection laws have had this effect because the

states are not financially responsible for the failure of banking institutions. As a result, state and local legislators do not have to balance their legislative initiatives against the adverse costs that those initiatives may impose on the banking system. Examples of such laws include laws that prohibit banks from foreclosing on loans in default; limit or restrict a bank's ability to recover on foreclosed loans; prohibit the enforcement of due on sale clauses; prohibit prepayment penalties; and prohibit NSF charges. Clearly, the need for federal preemption would be reduced if the states considered the safety and soundness impact of such laws before they are enacted.

In sum, I think there are actions both sides could take to address the policy concerns that have arisen since the release of the OCC's preemption and visitorial powers regulations. The OCC could issue a formal guidance that dispels many of the concerns related to the scope of the regulations. The states could strive to enhance the dual banking system by asking Congress to revise or eliminate federal laws that restrict their ability to independently regulate state banks. They also could reduce the incidence of preemption determinations by giving greater consideration to the impact of consumer protection laws on the financial integrity of the banking system.