

Remarks by
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**The Need to Preserve
Uniform National Standards for National Banks**

I welcome this opportunity for a return engagement before Women in Housing and Finance at this very critical time. We are, of course, in the middle of an important national debate about how best to address the gaps and weaknesses in financial regulation that were exposed by the financial events of the last two years. In this context, the Treasury Department's plan to strengthen our regulatory framework is both thoughtful and comprehensive, and I support many of its core elements.

Among these are certain parts of the plan that would enhance consumer protection. One is the establishment of a strong federal rulewriter – which Treasury proposes as a new Consumer Financial Protection Agency or “CFPA” – to issue uniform national rules for consumer protection. These rules would apply equally not just to federally regulated banks, but also – and this is critically important – to the literally hundreds of thousands of nonbank financial providers, such as finance companies and mortgage brokers, that have been unregulated or lightly regulated by the states. It is well established that this “shadow banking system” of unregulated financial providers has

been the source of the worst consumer protection and underwriting abuses, especially in the area of subprime mortgages.

For the same reason, I support providing the CFPA with supervisory and enforcement authority over these nonbank financial providers, which is crucial to ensure their compliance with CFPA rules to the same extent as banks. However, for reasons that have received a great deal of attention in congressional hearings and media accounts, I think the plan should not strip such authority from bank regulators, where I believe the current system has worked well.

Today I would like to focus my remarks on a different part of the consumer protection plan that has received less attention than I think it deserves, given its critical importance. That is the sweeping proposal to eliminate uniform national consumer protection standards by repealing key parts of the National Bank Act's preemption of state laws, which unfortunately I cannot support. This radical change is fundamentally at odds with the concept of efficient national standards for national products and services offered across state lines in national markets – a concept that has been central to the economic prosperity of the United States since the adoption of our Constitution, and one that has been critical to the flourishing of our national banking system since 1863. More importantly – and especially with the strong federal consumer protection rules envisioned by the new CFPA – truly uniform national standards that provide real benefits to consumers would be undermined by the repeal of national bank preemption.

Importance of National Standards in US History

Let me explain my strong concerns, beginning, if you will indulge me, with a brief history of the important role that national standards have played in our economic

history. After the Revolutionary War, the critical and well recognized weakness in the Articles of Confederation was that it permitted individual states to erect commercial barriers to trade with neighboring states and foreign powers.¹ The ensuing problems precipitated the adoption of our national Constitution in 1789, because the framers understood that fragmentation via differing state laws was incompatible with economic growth, efficiency, and innovation by the nation as a whole. Indeed, one of the most critical changes the Constitution made was to grant Congress plenary authority over commerce in Article I, Section 8. Aptly referred to as the “Interstate Commerce clause,” this provision empowered Congress to establish uniform national standards to govern economic activities that span state boundaries, clearing the way for the emergence of a truly national economy.²

How these principles should apply to banking, and whether the national interest was served by a federal role in the banking system, was one of the earliest policy debates addressed by the new government. Creation of the First Bank of the United States in 1791 and the Second Bank of the United States in 1816 substantially benefited the nation’s finances, but proved hugely controversial. Beyond attracting charges of excessive concentration of power, these federal banks were seen as threats to state-chartered institutions. Maryland’s attempt to prevent effective operation of the Second Bank through state taxation resulted in a landmark Supreme Court decision – *McCulloch v. Maryland* – that confirmed the national government’s power to establish a bank and the supremacy of federal over state law.

¹ For example, some states with ports exacted a price from producers in landlocked states to move goods to market; states adopted bankruptcy laws that advantaged local creditors and debtors at the expense of others; and states sought to tax and regulate the United States mails.

² “To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes[.]”

The controversy came to a head in 1836, when Andrew Jackson vetoed the renewal of the Second Bank. His principal political opponent, Henry Clay, articulated a very different vision, rooted in the ideas of Alexander Hamilton, of a truly American system based on national standards and institutions. Clay proposed to extend the life of the national bank, protect American industry, and establish a national network of roads and rails. And it was one of Clay's most enthusiastic followers, Abraham Lincoln, who was to ensure that Clay's national vision ultimately prevailed.

In 1861, the departure of secessionist legislators from Washington marked a critical step on the path to Civil War. But it also ushered in a period of unprecedented legislative productivity that advanced national economic goals. This included the construction of a transcontinental railroad, expansion of the national telegraph network, improvements in roads and canals, and of course, establishment of our national banking system through the National Currency Act of 1863 and the National Bank Act of 1864, which Lincoln helped shape into law.

In adopting these measures, Congress did not abolish state banking. But it did include explicit protections in the new framework so that national banks would be governed by federal standards administered by a new federal agency – the Office of the Comptroller of the Currency. The OCC has successfully carried out those duties for nearly 150 years, and over that same period, a series of Supreme Court decisions have confirmed the fundamental principle of federal preemption as applied to national banks: that is, that the banking activities of national banks are governed by national standards established by Congress, subject to supervision and oversight by the OCC.

With this design, the state and national banking systems have grown up around one another, creating the “dual banking system” we know today. Encompassing both large institutions that market products and services nationally and very small institutions that do business exclusively in their immediate communities, it is a diverse system with complex linkages and interdependencies. In this context and over time, a crucial benefit has been clear: the “national” part of the dual banking system, the part that has allowed large and small national banks to operate under uniform national rules across state lines, has strongly fostered the growth of national products and services in national and multi-state markets.

Repeal of National Bank Preemption

Returning to the Treasury plan, it’s important to recognize that key parts of it promote and endorse the concept of uniform national standards. Indeed, as previously discussed, one of its critical intended benefits is that strong federal rules issued by the new CFPA would apply equally to all financial providers, whether bank or nonbank. Another of its goals is to raise the level of compliance with such rules by nonbanks, which today are unregulated or very lightly regulated, to the same level as currently applies to federally regulated banks. Both of these aspects of the plan are fully consistent with the principle of uniform national standards, uniformly applied – as are other aspects of the plan.³

³ See, e.g., Proposal, *supra* note 1, at 69 (discussing the proposed CFPA, observing that “[f]airness, effective competition, and efficient markets require consistent regulatory treatment for similar products,” and noting that consistent regulation facilitates consumers’ comparison shopping); and at 39 (discussing the history of insurance regulation by the states, which “has led to a lack of uniformity and reduced competition across state and international boundaries, resulting in inefficiency, reduced product innovation, and higher costs to consumers.”).

Unfortunately, however, the very principle of uniform national standards is expressly undermined by the plan's specific grant of authority to individual states to adopt different rules; by the repeal of uniform standards for national banks; and by the empowerment of individual states, with their very differing points of view, to enforce federal consumer protection rules – under all federal statutes – in ways that might vary from state to state. In effect, the resulting patchwork of federal-plus-differing-state standards would distort and displace the CFPA's federal rulemaking. This is true even though the CFPA's federal rules would be the product of an open public comment process and the behavioral research and evaluative functions that the plan highlights.

In particular, for the first time in the 146-year history of the national banking system, federally chartered banks would be subject to multiple state operating standards, because the plan would sweepingly repeal the ability of national banks to conduct retail banking business under uniform national standards. This rejection and reversal of such standards is an extreme change that is, in my view, both unwise and unjustified.

Given the CFPA's enhanced authority and mandate to write stronger consumer protection rules, and the thorough and expert processes described as integral to its rulemaking, there should no longer be any issue as to whether sufficiently strong federal consumer protection standards would be in place and apply to national banks. In this context there is no need to authorize states to adopt different standards for such banks. Likewise, there is no need to authorize states to enforce federal rules against national banks – which would inevitably result in differing state interpretations of federal rules – because federal regulators already have broad enforcement authority over such institutions and the resources to exercise that authority fully.

More fundamentally, we live in an era where the market for financial products and services is often national in scope. Advances in technology, including the Internet and the increased functionality of phones, enable banks to do business with customers in many states. Our population is increasingly mobile, and many people live in one state and work in another – as is true for many of us in the Washington, D.C. area.

In this context, regressing to a regulatory regime that fails to recognize the way retail financial services are now provided, and the need for a single set of rules for banks with customers in multiple states, would discard many of the benefits consumers reap from our modern financial product delivery system. Such a balkanized approach could give rise to significant uncertainty about which sets of standards apply to institutions conducting a multistate business. That in turn would generate major legal and compliance costs, and major impediments to interstate product delivery.

Moreover, this issue is very real for all banks operating across state lines – not just national banks. Recognizing the importance of preserving uniform interstate standards for all banks operating in multiple states, Congress expressly provided in the “Riegle-Neal II” Act enacted in 1997 that state banks operating through interstate branches in multiple states should enjoy the same federal preemption and ability to operate with uniform standards as national banks.⁴

Accordingly, repealing uniform national standards for national banks would create fundamental, practical problems for all banks operating across state lines, large or small. For example, there are a number of areas in which complying with different standards set by individual states would require a bank to determine which state’s law governs – the law of the state where a person provides a product or service; the law of the

⁴ 12 U.S.C. § 1831a(j); *see also id.* at 1831d (interest rates; parity for state banks).

home state of the bank; or the law of the state where the customer is located. It is far from clear how a bank could do this based on objective analysis, and any conflicts could result in penalties and litigation in multiple jurisdictions.

And think about some of the practical problems that could arise from different grace periods for credit cards; different internet advertising rules; different solicitation standards for telephone sales, with different duties for sales personnel; different employee compensation limits; and different licensing requirements for new products.

Or consider a more detailed example involving terms for a checking account. Today a bank can offer customers checking accounts with uniform terms and uniform disclosures through branches in multiple states, over the Internet, and through various forms of media. Under the plan, individual states could adopt particular required or prohibited terms for different aspects of these checking accounts, as well as additional disclosure and advertising requirements. For example, there could be state-by-state differences in rules on the number and amount of withdrawals or deposits, permissible minimum balance requirements, and ATM screen disclosures. States could assert that those requirements apply according to the law of the state in which the branch offering the account is located, the home state of the bank, the state where the customer resides, or someplace else. States could have different standards for exerting jurisdiction over the terms and disclosures, creating the potential for the laws of two or more states to apply to the same transaction. How would a bank advertise in the newspaper or on the radio to promote its checking accounts if it were located in a multistate region – such as the Washington D.C. area – if different states imposed different requirements regarding terms and disclosures? Even if the bank figured all this out for a particular customer, that

could all change if the customer moved, or if the bank merged with another bank located in a different state. Would that mean the customer would have to open a new account to incorporate the state's required terms? And even if Congress added language to address some of the questions we can think of today, there would only be more uncertainties tomorrow – and no realistic possibility of writing a fix into national law each time a new issue arose.

Such uncertainties have the real potential to confuse consumers, subject providers to major new liabilities, and significantly increase the cost of doing business in ways that will be passed on to consumers. It could also cause providers to pull back where increased costs erase an already thin profit margin – for example, with “indirect” auto lending across state lines – or where they see unacceptable levels of uncertainty and risk.

Moreover, a bank with multistate operations might well decide that the only sensible way to conduct a national business would be to operate to the most stringent standard prevailing in its most significant state market. It should not be the case that a decision by one state legislature about how products should be designed, marketed, or sold should effectively replace a national regulatory standard established by the federal government based on thorough research and an open and nationwide public comment process, as would be the case with the new CFPA.

Finally, subjecting national banks to state laws and state enforcement of federal laws is a potentially crippling change to the national bank charter and a rejection of core principles that form the bedrock of the dual banking system. For nearly 150 years, national banks have been subject to a uniform set of federal rules enforced by the OCC, and state banks have generally been subject to their own states' rules. This dual banking

system has worked well, as it has allowed a state to serve as a “laboratory” for new regulation – without compelling adoption of a particular regulation as a national standard.

That is, the dual banking system is built on individual states experimenting with different kinds of laws, including new consumer protection laws, that apply to a state’s own banks, but not to state banks in all states and not to national banks. Some of these individual state laws have proven to be good ideas, while others have not. When Congress has believed that a particular state’s experiment is worthwhile, it has enacted that approach to apply throughout the country, not only to national banks, but to state banks operating in other states that have not yet adopted such laws. As a result, national banks operate under an evolving set of federal rules that are at any one time the same, regardless of the state in which the banks are headquartered, or the number of different states in which they operate. This reliable set of uniform federal rules is a defining characteristic of the national bank charter. It has helped banks provide a broader range of products at lower cost, with savings that can be passed along to the consumer.

Preemption Has Not Harmed Consumers

In short, there are many good reasons to oppose the plan’s rejection of uniform national standards for national banks, especially given the strong rulewriting role envisioned for the CFPB. But are there good reasons for supporting this aspect of the proposal? I think not. The argument I’ve heard most often is that repealing national bank preemption is necessary to stop national banks from engaging in activities that caused the financial crisis, like predatory subprime lending, which critics say state consumer protection laws would have prevented.

That argument is just plain wrong. Its premise is that national banks were the source of predatory and unsafe mortgage loans, while state-regulated institutions were not. That's exactly backwards. It is widely recognized that the worst subprime loans that have caused the most foreclosures were originated by nonbank lenders and brokers regulated exclusively by the states. Although the OCC has little rulewriting authority in this area, we have closely supervised national bank subprime lending practices. As a result, national banks originated a relatively smaller share of subprime loans and applied better standards, resulting in significantly fewer foreclosures – as demonstrated in an attachment to this speech prepared last year by OCC staff. Meanwhile, nothing in federal law precluded states from effectively regulating their own nonbank mortgage lenders and brokers. Indeed, that's why the plan's grant of strong rulewriting and enforcement authority at the federal level over the shadow banking system of unregulated financial providers, through the CFPB, is such a good idea – and why granting the states new authority over national banks is not.

Another argument I hear focuses on enforcement, asserting that the new law should empower state officials to enforce consumer protection rules against national banks – including federal consumer protection rules issued by the new CFPB – because there supposedly can never be “too many cops on the beat.” But this assertion is simply not true in a world that has only a limited number of “cops.” State resources are finite, and there are hundreds of thousands of nonbank financial providers, including subprime lenders and brokers, that have been the disproportionate source of financial consumer protection problems. These are the firms most in need of supervisory and enforcement attention, by both the states and the new CFPB. That's where state enforcement

resources should be devoted, rather than diluting them on national banks that are already extensively supervised by the OCC. And if state officials have information that national banks appear to be violating applicable law or otherwise engaging in inappropriate practices, we want to hear about it, we will follow up on it, and we will be open with those officials about what we find and what we propose to do about it. All of us want consumers to be treated fairly and honestly; by collaborating rather than duplicating, we can better help achieve that result.

Conclusion

In sum, throughout our history, uniform national standards have proved to be a powerful engine for prosperity and growth. Such standards for national banks have been very much a part of this history, and have produced real benefits for consumers. As Congress moves forward with legislation on financial consumer protection, its goals should be to strengthen federal rules and apply them more uniformly to all providers of the same financial products – goals shared by the Treasury Plan. It should not be to undermine those goals by inviting every state to adopt its own rules for national banks – a course of action likely to produce far greater costs than benefits.

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