[CSBS Comment Letter: Activities and Operations of National Banks and Federal Savings Associations]

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Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2020-0003

Re: *Activities and Operations of National Banks and Federal Savings Associations.*

The Conference of State Bank Supervisors (CSBS)[1] writes in response to the invitation of the Office of the Comptroller of the Currency (OCC) for public comment on the notice of proposed rulemaking titled "Activities and Operations of National Banks and Federal Savings Associations" (Docket ID OCC-2020-0003) (the proposed rule).[2]

For the reasons highlighted below and detailed in the attached Appendix, CSBS strongly opposes those aspects of the proposed rule related to so-called "non-branch" offices.

The "non-branch" rules make far-reaching and unprecedented changes without legal authority.
The proposed rule would expand the scope of activities that may occur at non-branch offices purportedly without regard to locational or other restrictions imposed by state law. These proposed revisions represent an unprecedented departure from settled law and congressional intent by no longer requiring a national bank to apply to establish a branch in order to:

- perform both loan approval and loan origination functions at a single, publicly accessible office;
- disburse loan proceeds via an operating subsidiary even if this activity provides a competitive advantage to the national bank; and
- establish drop boxes and certain unstaffed facilities.

Despite the significance of the proposed changes and a related need to have clear and unequivocal statutory and caselaw authority, the OCC proposal fails to provide a persuasive, thorough, or consistent explanation of the legal basis for this proposed expansion of permissible non-branch activities. There is a simple explanation for this failure: the OCC simply lacks that authority.

The proposed "non-branch" rules undermine the dual banking system including the policy of competitive

equality between state and national banks coupled with deference to state standards.
The proposed revisions to the non-branch office rules contravene policies that form the foundation of the dual banking system itself, namely, "competitive equality" between state and national banks coupled with "deference to state standards".[3] Congress has deliberately maintained an equality of competitive conditions between state banks and national banks in order to preserve the spirit of competitive federalism reflected in dual banking system.[4] This policy of competitive equality is perhaps most notable with respect to restrictions on the ability of state and national banks to expand geographically, including state law restrictions on branching. The proposed rule would upset the competitive balance between state and national banks regarding restrictions on geographic expansion via non-branch offices. These actions clearly and obviously undermine the vitality of the dual banking system by tipping the scale in favor of national banks.

The proposed rule would upset the balance of federal and state power struck by Congress in constructing the dual banking system. Congress has deferred to the state standards by incorporating certain fundamental aspects of each state's banking regulations into federal banking laws, including the National Bank Act (NBA). Aspects of state law which have been so incorporated are those touching on important policy and police powers matters for state and local communities, including state restrictions on geographic expansion through branching, licensing, and other operational restrictions. Unfortunately, the proposed rule continues the long-running pattern of hollowing out the definition of branch by interpretation and regulation to allow national banks to avoid state branching restrictions and gain competitive advantages over state-chartered banks.

Congress's incorporation of state standards on these matters is a recognition of the importance, in our federalist system, of permitting state and local communities to exercise control over their economic destiny. Congress has consistently recognized the importance of having those controls administered by state and local officials accountable to the communities they serve. Unfortunately, the proposed rule does not give the same recognition to importance of state and local communities being able to govern their own economic lives without interference by an outside, centralized authority. The proposed rule is yet another attempt by the OCC to unilaterally nullify the role which Congress intended state law to serve in governing the geographic expansion of national banks into and within each state.

The proposed "non-branch" rules conflict with the limits on NBA preemption prescribed by Congress.
This is not the first time that the OCC is proposing or has taken uniliteral action to eviscerate the application of state geographic restrictions and thereby favor national banks over their state bank competitors. Fortunately, Congress has taken steps to limit the scope of NBA preemption by the OCC. Congress has provided the tools needed to prevent the OCC from preempting the field of state law and regulation in order to maintain the balance of federal and state power in the dual banking system. These limitations apply regardless of where the non-branch office rules appear in the OCC's regulations or how those rules are categorized. In fact, as explained in the Appendix, the premise of the non-branch office rules—that national banks have the incidental authority to employ agents to engage in certain ministerial activities apart from their main office without complying with state operational and licensing restrictions—conflicts with the clear statement of Congress that NBA preemption does not apply to agents, affiliates or subsidiaries of national banks.

The proposed "non-branch" rules would allow national banks to operate de facto branches without branch-related obligations under the Community Reinvestment Act.
A critical distinction between the proposed OCC "non-branch" but de facto branches, on the one hand, and an actual branch office, on the other, is that the latter (but not the former) is obligated under the federal Community Reinvestment Act ("CRA") to meet the credit and banking needs of its local community.[5] States and local communities have significant stakes in their local economies, and in the application of the CRA to ensure that the needs of local communities are met. By expanding what can occur at non-branch national bank offices the proposed rule enables avoidance of CRA obligations associated with licensed branches. We are opposed to legal

loopholes and technicalities that adversely impact investment in and the strength of local and state economies.

The OCC's rulemaking process is truncated and flawed.
Our significant substantive concerns are only further aggravated by the truncated process employed in issuing the proposal. In this rulemaking, the OCC has afforded a notably brief period for public input during a health and economic crisis without recent precedent. This truncated process has unfortunately become all too common in recent OCC rulemakings.[6] CSBS believes that issues of such importance to the balance of federal and state power in the dual banking system should not be rushed through the rulemaking process to avoid meaningful public input because well-reasoned, thoughtful and informed public policy demands time and consideration.

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For the reasons highlighted above and detailed in the Appendix, we urge the OCC to rescind the proposed rule.

Sincerely,

John Ryan
President & CEO

Footnotes

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.
[2] For the sake of brevity, this letter refers to national banks and federal savings associations, collectively, as national banks.
[3] See Watters v. Wachovia Bank, N.A., 550 U.S. 1, 25-26 (2007) (". . . we observed in First Nat. Bank in Plant City v. Dickinson, 396 U.S. 122, 133, 90 S. Ct. 337, 24 L. Ed. 2d 312 (1969), that "[t]he policy of competitive equality is. . . firmly embedded in the statutes governing the national banking system." So firmly embedded, in fact, that "the congressional policy of competitive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency." Id., at 138, 133, 90 S. Ct. 337, 24 L. Ed. 2d 312."); see also First Nat'l Bank v. Walker Bank & Tr. Co., 385 U.S. 252, 261 (1966) (". . . Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned.")
[4] Not only is little weight given to notion the competitive federalism embodied in our dual banking system, the proposed rule gives little emphasis to federalism itself. For instance, the proposal suggests that the OCC could permit a national bank to adopt a combination of corporate governance provisions from the laws of several different States. While national banks may be federal corporations, insofar as they may elect to follow the corporate governance under state corporation law, it is not clear why, as a policy matter, they should be permitted to exempt themselves from the experimentation process which contributes to the improvement of those laws, let alone whether doing so would actually comport with the law or the constitution.
[5] See 12 C.F.R. 5.30(e).
[6] As CSBS noted in its recent letter in response to the OCC's notice of proposed rulemaking amending its licensing rules, the OCC had begun adopting a truncated notice-and-comment process in which the period of time provided to comment on the proposal begins tolling from the date the proposal was published on the OCC's website rather than, as is customary, from the time the proposal was published in the Federal Register. So, for instance, here the proposed rule was published in the Federal Register on July 7th, 2020 and comments are due on August 3rd, 2020. This practice has the effect of discouraging meaningful public input on OCC rulemaking

and reflects a lack of receptivity to such input on the part of the OCC.

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