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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 7, 2017

Representative Mitch Greenlick
900 Court Street NE H493
Salem OR 97301

Re: House Bill 2112—Preemption issues

Dear Representative Greenlick:

You asked whether the introduced version of House Bill 2112 would apply to nationally chartered banks. The bill, on its face, does apply to nationally chartered banks. The application of the bill's requirements to nationally chartered banks raises issues of federal preemption; as discussed below, we think that at least a portion of the bill is likely to survive a preemption challenge, but our conclusion is not free from doubt.

In brief, House Bill 2112 requires a financial institution, when unilaterally closing a customer account, to provide 60 days' notice and disclosure of its reasons for doing so, unless the account is being closed because of suspicions of unlawful activity.

On its face, the bill applies to nationally chartered banks. The bill applies to a "financial institution," which is a broad term that includes credit unions (including Oregon credit unions, out-of-state credit unions operating in Oregon, and federal credit unions) and "insured institutions," which are defined as companies holding deposits that are insured under the Federal Deposit Insurance Act. ORS 706.008. ("Company" is in turn defined by reference to 12 U.S.C. 1841, which defines the term as "any corporation, partnership, business trust, association, or similar organization" with exceptions not applicable here.) Nationally chartered banks are companies that hold deposits insured by the FDIC and are therefore "financial institutions" within the scope of the bill.

However, state laws that apply to nationally chartered banks are ineffective if preempted by federal law. The federal Dodd-Frank Act provides that a state consumer finance law (defined in relevant part as a state law that regulates "terms and conditions" of any account related to a financial transaction) is preempted if the law "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. 25b (b). *See also Barnett Bank of Marion Cty., NA v. Nelson*, 517 U.S. 25, 33 (1996).

A national bank's authorized powers include "incidental powers as necessary to carry on the business of banking." 12 U.S.C. 24. Courts have held that such incidental powers are "not limited to activities deemed essential to the exercise of enumerated powers but include activities closely related to banking and useful in carrying out the business of banking." *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 723 n.6 (9th Cir. 2012), *quoting Bank of Am. v. City and Cnty. of San Francisco*, 309 F.3d 551, 562 (9th Cir. 2002).

House Bill 2112 effectively imposes two requirements on a bank that unilaterally closes a customer account. First, the bank must disclose its reasons for closing the account. Second, the bank must wait 60 days to close an account from the time it makes the decision to do so, since the bill requires 60 days' notice to the customer. The issue, then, is whether either of these two requirements prevent or significantly interfere with a national bank's exercise of federally authorized powers.

We have not located any cases addressing a state law similar to the one proposed by House Bill 2112, and our analysis here is necessarily speculative. However, we think that the first requirement, notice of a bank's reasons for closing an account, is likely to survive a preemption challenge. A bank is free to choose or refuse to do business with any customer; the ability to close a customer's account *without notice* is not a necessary incident to that freedom. The requirement "does not impose any constraints on banks' lending or servicing powers," but merely imposes "certain procedural hurdles." *Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009, 1020 (N.D. Cal. 2012) (finding no preemption of state foreclosure procedural statute).

We note that federal regulations specifically provide that a national bank may exercise its deposit-taking and lending powers without regard to state laws concerning disclosure requirements. 12 CFR 7.4007; 12 CFR 7.4008; *see Rose v. Chase Bank USA, N.A*., 513 F.3d 1032, 1037-38 (9th Cir. 2008) (finding preemption of state law requiring disclosures on face of "convenience checks"). Courts have held that state laws that fall within these sections are preempted, with no further analysis necessary. *See Larin v. Bank of Am.*, 725 F. Supp. 2d 1212, 1217 (S.D. Cal. 2010), *citing Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). We think, however, that a court is unlikely to find that closing a customer account without notice is an exercise of a bank's deposit-taking or lending powers, because a bank can exercise (or refuse to exercise) such powers without closing a customer's account.

The second requirement, which effectively mandates a 60-day waiting period between the time a bank decides to close an account and the actual closure, is less likely to survive a preemption challenge. A bank may choose to close a customer account for a variety of reasons within the bank's business judgment. A nationally chartered bank's freedom to "carry on the business of banking" is precisely what federal preemption of state banking laws is intended to protect. We think that a court is likely to find that mandating a waiting period before closing an account significantly interferes with a bank's ability to carry out its normal business processes. *See, e.g*., *Gutierrez*, 704 F.3d at 723-25 (finding preemption of state unfair competition law as applied to prohibit bank's "high-to-low" posting of overdraft charges, as posting order is a pricing decision properly within the bank's business judgment).

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Very truly yours,

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