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“To best protect consumers, we need federal regulators and federal enforcement authorities ensuring rules are applied uniformly to all national banks.”¹
- Richard Hunt, Former President of the Consumer Bankers Association, 2011

I. INTRODUCTION

The 2008 financial crisis that rocked the United States, and much of the world, sent tremors through the banking industry and drastically changed the framework for how experts and the public at large view the business of banking. Partly in response to public outcry, the federal government reacted to the 2008 crisis by enacting a string of legislation that heavily impacted lending and banking operations.² The general public sentiment now holds banks as the enemy, and President Obama has expressed his view that government must take a more active role in regulating the size and activities of the nation’s largest banking institutions.³

Yet the debate over banking regulation should not focus on whether banking regulations are implemented, but rather who will implement them, and which banks will be subject. A healthy and stable financial system can drive innovation and spur business growth that ultimately leads to a solid national economy. Our legislation should, but so far has failed to consider the relative impact of overregulation and competing interests on national banks specifically, and on a macroeconomic level, the effect of these regulations on the national economy.

The dual-banking system in the United States has severe implications for the security of larger national banks, and business in general, if not properly controlled. The fundamental goal of traditional banking regulation is to protect the safety and soundness of

the banking system. Yet large national banks are often subjected to regulations handed down from not only the federal government, but also the legislatures of the multiple states in which they operate. Nuanced versions of multiple regulations can raise administrative costs and increase the burden on national banks. The effect of these state laws, especially those that affect the right of national banks to collect debts, can lead to uncertainty, increasing the risk of every investment, and driving down lending.

In 2004, the Office of the Comptroller of Currency (OCC) promulgated new regulations designed to address these concerns by preempting various types of state laws that were particularly restrictive on national banks. While courts were at first willing to find preemption of cumbersome state repossession laws, recent shifts in Congress and jurisprudence have signaled a change in the way federal preemption is applied to state repossession laws that affect national banks. As a result, current practices hold that national banks are subject to the repossession laws in every state in which they operate when collecting on non-real estate consumer loan debt, thereby exposing national banks not only to cumbersome notice requirements, but also liability and stringent penalties for non-compliance.

This comment explores the current shift, in Congress and the courts, away from the federal preemption of state notice and repossession laws as applied to national banks’ non-real estate

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5 Epps v. JP Morgan Chase Bank, N.A., 675 F.3d 315, 320 (4th Cir. 2012) (“Federa}ly chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA.” (citing Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007))).
7 See generally John Mingo & Benjamin Wolkowitz, The Effect of Regulations on Bank Balance Sheet Decisions, 32 J. FIN. 1605, 1605 (1977) (stating that risks and liabilities are just as important of considerations as the rate of return in a bank’s portfolio and investing choices).
10 Epps v. JP Morgan Chase Bank, N.A., 675 F.3d 315, 326 (4th Cir. 2012); see also Aguayo v. U.S. Bank, 653 F.3d 912, 928 (9th Cir. 2011).
consumer lending activities. In discussing this shift, this work investigates the history and purpose behind federal protection of national banks, and the likely impact this shift towards non-preemption will have on the business of banking and industry in general. Finally, this work proposes a rational change in course from the current trend that will result in a more efficient regulation of national banks that is more in line with the historical policy and purpose behind national banks, and will retain the balance of the dual banking system that benefits the economy.

II. BACKGROUND

A. The Development of Federal Preemption under the National Bank Act

In part due to its Federalist roots, the United States utilizes a dual banking system\textsuperscript{11} wherein both federal and state governments issue charters and regulate banking activity.\textsuperscript{12} In 1864, Congress enacted the National Bank Act (NBA) to establish a national banking system and monitor national banks.\textsuperscript{13} Under the NBA, national banks are authorized to exercise “all such incidental powers as shall be necessary to carry on the business of banking . . . [including] . . . by loaning money on personal security.”\textsuperscript{14} At the forefront of the drafters’ minds in crafting the NBA was the concern that states would attempt to protect state chartered banks and undermine the newly established national banking system.\textsuperscript{15} In a general sense, it can be said that the NBA was drafted with preemption in mind,\textsuperscript{16} and the natural preemptive force of the NBA has long been recognized.\textsuperscript{17} In fact, the

\begin{itemize}
  \item \textsuperscript{11} See Eager & Muckenfuss III, supra note 8, at 27; Arthur E. Wilmarth, Jr., The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System, 58 FORDHAM L. REV. 1133, 1154 (1990).
  \item \textsuperscript{12} Wilmarth, supra note 11, at 1153.
  \item \textsuperscript{13} Aguayo, 658 F. Supp. 2d at 1231.
  \item \textsuperscript{14} The National Banking Act, 12 U.S.C. § 24 (Seventh) (2006).
  \item \textsuperscript{15} Raymond Natter & Katie Wechsler, Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing, 7 VA. L. & BUS. REV. 301, 314 (2012).
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id. at 315 (citing First Nat’l Bank of San Jose v. California, 262 U.S. 366, 369 (1923) (holding that a state’s attempt to regulate national banks is “void whenever it conflicts with the laws of the United States or frustrates the purpose of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created”)); see also Barnett Bank of Marion v. Nelson, 517 U.S. 25, 31 (1996) (holding a state’s laws regulating national banks are preempted when they “stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress”).
\end{itemize}
preemptive force is so strong that the ordinary presumption against federal preemption of state law does not apply to federal banking regulations.\textsuperscript{18}

To effectively monitor the activities of national banks, Congress established the OCC and authorized it to issue rules and regulations as necessary to preserve the purpose and sound operation of the national banking system.\textsuperscript{19} The OCC is an executive agency, with its director appointed by the President for a five-year term.\textsuperscript{20} The OCC is charged with the primary responsibility of ensuring that national banks operate in a sound manner and are able to exercise their powers to the full extent of federal law, should they choose to do so.\textsuperscript{21} To carry out its obligations under the NBA, the OCC may promulgate rules and regulations that preempt certain state laws that would interfere with the ability of national banks to function under federal law.\textsuperscript{22} Courts have recognized that regulations issued by a federal agency like the OCC have no less preemptive effect than a federal statute on a matter within the agency’s power to regulate.\textsuperscript{23}

B. 2004 OCC Preemption Regulations: The Old Standard

In 2004, the OCC amended, restated, and codified its regulations regarding the extent to which national banks are subject to state law in certain aspects of their consumer lending and depositing activities.\textsuperscript{24} In doing so, the OCC expressly recognized the general rule that “a national bank may make, sell, purchase, participate in, or otherwise deal in loans […] that are not secured by liens on, or interests in real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of Currency and any other applicable Federal law.”\textsuperscript{25} These regulations also laid out standards for preemption of state laws as applied to national banks’ non-real estate consumer lending

\textsuperscript{19} 12 U.S.C. § 93a (2006); 69 Fed. Reg. 1904, 1907 (Jan. 13, 2004). As an official appointed by the president, the Comptroller of the Currency may be subject to pressure from the White House, making the OCC, like all executive agencies, a slightly political governing body.
\textsuperscript{20} About the OCC, OCC, http://www.occ.gov/about/what-we-do/mission/index-about.html (last visited 3/8/2013). As an official appointed by the President, the Comptroller of the Currency may be subject to pressure from the White House, making the OCC, like all executive agencies, a slightly political governing body.
\textsuperscript{23} Fid. Fed. Savs. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982).
\textsuperscript{24} Eager & Muckenfuss, supra note 8, at 28; 69 Fed. Reg. 1904 (Jan. 13, 2004).
\textsuperscript{25} 12 C.F.R. § 7.4008(a) (2013).
operations.\textsuperscript{26}

In support of its regulations, the OCC cited an increase in states and localities applying their laws to the activities of national banks, which it found to limit the ability of national banks to conduct their operations to the full extent of federal law.\textsuperscript{27} The primary regulation, 12 C.F.R. § 7.4008(d), clearly stated a general rule that state laws were preempted to the extent that they “obstruct, impair, or condition” the exercise of the power of national banks under their federal charters. Section 7.4008(d) essentially provided national banks the freedom to make non-real estate loans without concern for state law limitations regarding “licensing, registration,” \textsuperscript{28} “security property,” \textsuperscript{29} “disclosure and advertising” and “other credit-related documents.”\textsuperscript{30} Additionally, the OCC took steps to protect consumers, including in its regulations provisions that focused on prevention of predatory lending practices. It also expressly subjected national banks to all Federal Trade Commission (FTC) Act regulations dealing with unfair and deceptive trade practices.\textsuperscript{31} The original provision also included a savings clause (§ 7.4008(e)) that held certain kinds of state laws, including “rights to collect debts,” were not preempted to the extent that they “only incidentally affect” the ability of a national bank to exercise its powers.\textsuperscript{32}

Many states and scholars questioned the wisdom of these actions, and opposed the regulations.\textsuperscript{33} States, who generally saw these regulations as a restriction on their ability to experiment and control banking and consumer protection within their borders, urged Congress to intervene and maintain parity in the dual banking system.\textsuperscript{34} Similarly, state bank supporters decried the regulations as an affront to the tradition of the dual banking system, engaging in wild speculation about the possible impact that such regulations would have on state banks.\textsuperscript{35}

Despite the public pressure, these regulations remained in place for

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\textsuperscript{26} 12 C.F.R. § 7.4008(d) (2013).
\textsuperscript{29} 12 C.F.R. § 7.4008(d)(6) (2011).
\textsuperscript{31} See Eager and Muckenfuss, \textit{supra} note 8, at 28-32.
\textsuperscript{32} 12 C.F.R. § 7.4008(e)(4) (2011); Eager & Muckenfuss, \textit{supra} note 8, at 30.
\textsuperscript{33} See Eager and Muckenfuss, \textit{supra} note 8, at 34.
\textsuperscript{34} Id. at 34-35.
\textsuperscript{35} See generally Arthur E. Wilmarth, Jr., \textit{The OCC’s Preemption Rules Exceed the Agency’s Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection}, 23 \textit{Ann. Rev. Banking & Fin. L.} 225, 274 (2004); Eager and Muckenfuss, \textit{supra} note 9, at 34.
\end{flushleft}
seven years. Yet these regulations were not without their problems. The main issue with the preemption standard outlined in § 7.4008(d) was that it failed to specify exactly which state laws had been preempted.36 This issue was clearly illustrated in a line of cases dealing with disputes regarding state repossession statutes, and particularly the notice requirements as applied to national banks.37 Nevertheless, in each of the early cases regarding this issue the district courts had no trouble finding that § 7.4008(d) clearly preempted state repossession laws, and their accompanying notice requirements, when applied to national banks, and that these laws did not fall within the savings clause of § 7.4008(e).38

However, in the aftermath of the 2008 financial crisis Congress saw fit to change the preemption standards as part of its banking and regulatory overhaul of the financial system.

C. The Dodd-Frank Act, and the New Preemption Standards for State Consumer Financing Laws

Among the abundant changes implemented in the wake of the 2008 financial crisis, the Dodd-Frank Act made several changes to federal law regarding the preemption of state consumer financing laws; further increasing the burden of compliance on national banks. One of the significant actions was the codification of new federal preemption standards within the text of the NBA.39 The Dodd-Frank Act created Section 25b, a new code section in the NBA, to expressly deal with, amongst other things, the preemption of state consumer financing laws as applied to national banks and their subsidiaries.40 Under Section 25b, state consumer financing laws are now preempted when applied to national banks only where . . .

(1) the [state consumer financing law] would have a ‘discriminatory effect’ on national banks when compared to the effect of the [state consumer financing

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36 Aguayo v. U.S. Bank, 653 F.3d 912, 921 (9th Cir. 2011).
38 Id.
law] on state-chartered banks; (2) where ‘[i]n accordance with the legal standard for preemption in the decision of the Supreme Court of the United States’ in *Barnette Bank of Marion County N.A. v. Nelson*, ‘the state consumer financing law prevents or significantly interferes with the exercise by the national bank of its powers’ [. . . ]; or (3) the [state consumer financing law] is preempted by a provision of federal law other than the NBA.41

Additionally, the Dodd-Frank Act stripped the OCC of some of the power and discretion that it once possessed. Under the new standard, no OCC regulation or order is to be interpreted or applied so as to invalidate or preempt a state consumer financing law unless “substantial evidence” supports the finding of preemption in accordance with the standards set forth by the Supreme Court in *Barnett*.42

**D. 2011 Amendments to § 7.4008: A More Stringent Preemption Standard**

The change in federal law prompted the OCC to amend its rules to comply with the Dodd-Frank Act regarding preemption of state consumer financing laws.43 In substance, the amendments adopted by the OCC simply reasserted the standard set out in the Dodd-Frank Act, to ensure no ambiguity between congressional and OCC mandates.44 The new 2011 rules were published in the Federal Register, and went into effect on July 21, 2011.45 Most significantly, the new 2011 rules eliminated the language in the 2004 rules which allowed for the preemption of any state laws that would “obstruct, impair, or condition” a national bank’s exercise of its federally authorized powers.46 Additionally, the new regulations incorporate the Supreme Court’s *Barnett Bank* standard. This change marks a shift away from the consideration of the impact on the business of a national bank, and instead encourages a traditional preemption analysis.

41 See Wutscher, Karek & Waguespack, *supra* note 39, at *2.
44 *Id.*
45 *Id.* at *3.
46 *Id.*
E. **Barnett Bank of Marion County, N.A. v. Nelson**

Both Congress and the OCC have adopted the Supreme Court’s standard for federal preemption of state banking regulations set forth by *Barnett* in 1996. In *Barnett*, the Court addressed the issue of whether a federal statute that permitted national banks to sell insurance in small towns preempted a state law which forbade them to do so. The Court found that while the federal and state laws were not in direct conflict, the federal law nonetheless authorized national banks to engage in activities which the state statute expressly forbid. The Court held that the state statute served to “prevent or significantly interfere with the bank’s exercise of its powers,” and was preempted by federal law.

By incorporating the Supreme Court’s *Barnett* standard, Congress and the OCC have adopted a standard of conflict preemption for state banking laws. While this standard seems to imply a concern for the impact of various state laws on the business of national banks by including the “prevents or significantly interferes” language, in fact, this language has been read to only find preemption in cases where state law substantially conflicts with federal law. In adopting this standard of preemption, Congress exposed national banks to the plethora of state regulations that the NBA was designed to prevent.

Section 1048 of the Dodd-Frank Act provided that the effective date for its changes in the preemption standard would be the “designated transfer date,” July 21, 2011. Therefore, the majority position for courts has been that the new provisions under the Dodd-Frank Act do not apply to transactions entered into prior to July 21, 2011. Accordingly, it appears that transactions like the one entered into in *Epps v. JP Morgan Chase Bank, N.A.*, should be decided under the old standard of preemption. However, despite this mandate, the

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48 Id. at 31.
49 Id. at 31-34.
50 Id. at 33-34.
54 See Natter & Welchslr, supra note 15, at 353-54.
overall approach and clear change in congressional intent may be affecting the determinations of courts in their analysis of preemption under the old regulations.

III. *Epps v. JP Morgan Chase Bank*, and the Shifting Interpretation of Federal Preemption under the Pre Dodd-Frank Policies

A. The District Court of Maryland Protects National Banks and Finds Preemption

In *Epps v. JP Morgan Chase Bank*, the District Court held that the Maryland Credit Grantor Closed End Credit statute (CLEC) – which provided that a credit grantor such as a national bank could repossess property securing a loan, but only by following certain notice provisions – was preempted when applied to national banks. Amongst other things, the CLEC required that a notice be sent within 5 days after repossession which included language regarding: 1) the borrower’s right to redeem property; 2) the borrower’s rights as to resale and liability for deficiency; and 3) the exact location where the property is stored. Additionally, the CLEC mandates a lender provide the debtor with notice of the exact time and place of the sale ten days prior to the sale, and a detailed accounting post sale. Under the CLEC, failure to follow the appropriate notice requirements will prevent the lender from collecting a deficiency judgment and can result in the lender having to pay a penalty of up to three times the amount of any interest or charges the debtor has paid to the bank.

In *Epps*, a debtor defaulted on an auto-loan she obtained in 2007, which was secured by the vehicle. On December 9, 2009, when the debtor failed to pay, Chase repossessed the vehicle. On December 11, 2009, Chase sent a notice to the debtor informing her that the vehicle would be sold at a private sale sometime after December 28,

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56 MD. CODE. ANN., COM. LAW § 12-1021(e)(1)-(3) (LexisNexis 2012).
58 MD. CODE. ANN., COM. LAW § 12-1021(j)(2) (LexisNexis 2012).
60 MD. CODE. ANN., COM. LAW § 12-1018(b) (LexisNexis 2012).
62 Id.
The vehicle was sold on January 25, 2010, and on February 10, 2010, Chase sent a post-sale notice to the debtor informing her that there was a deficiency in the amount of $11,904.53 remaining on the loan after the sale.

On April 27, 2010, the debtor filed suit against Chase, alleging that Chase had violated the provisions of the CLEC through the issuing of defective notices. The complaint alleged that the pre-sale notices failed to: 1) specify the location of the car once repossessed; and 2) give the specific date and location of sale, and that the post-sale notice failed to, inter alia, specify the number of bids sought and received.

The district court, in part relying on precedent from other courts addressing the same issue under a different statute, held that the notice requirements were clearly preempted by the § 7.4008 regulations when applied to national banks. The court first held that the notices required under the CLEC constituted “other credit related documents” within the meaning of § 7.4008(d)(viii), and were thus expressly preempted by the regulations. In making this determination, the court analogized such post-repossession notices to billing statements, as both reflect the current status of the credit arrangement and prescribe the action to be taken by the borrower. The court also held that the state law’s notice provisions were “disclosure” requirements which were also specifically preempted by § 7.4008(d)(viii). Finally, the court found significant the burden that a finding of non-preemption would place on national banks. The court noted that “the burden that would be imposed on national banks of complying with the various notice and disclosure statutes” would be so substantial as to interfere with the national bank’s exercise of its federally authorized powers. In so finding, the court declined to apply the savings clause to this case, finding that the CLEC more than “incidentally” affected the exercise of a national bank’s non-real estate lending powers.

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63 Id.
64 Id.
65 Id.
66 Id.
69 Id. at *4.
70 Id. at *3.
71 Id. at *5.
72 Id.
73 See generally id. at *3-6.
The district court concluded that by levying additional post-repossession notice requirements on national banks, voiding deficiency judgments for failure to abide by its notice requirements, and imposing the possibility of additional penalties, the state laws interfered with the federal rights of national banks and must be preempted by the OCC regulations. On appeal, the Fourth Circuit reversed, joining the Ninth Circuit in setting a new trend against federal preemption, under the 2004 OCC regulations, of state repossession laws as applied to national banks. In analyzing the facts of this case, the Fourth Circuit ignored the burden that the overlapping regulations would place on the national banks, and instead undertook a traditional preemption analysis.

B. The Fourth Circuit and the Move Away from Federal Preemption Under the 2004 OCC Regulations

First, the Fourth Circuit in *Epps* found that because the right to repossess arose under state law, the state statute did not condition any power expressly granted by the national government, and was thus not expressly preempted by either the NBA, or § 7.4008. In making this determination, the court rejected Chase’s argument that the state statute placed a “readily apparent” burden on national banks so as to interfere with a national bank’s ability to exercise its federally authorized non-real estate lending powers. In so finding, the court stated that the CLEC did not directly condition any power expressly granted to a national bank.

The court then rejected the rationale that the notice documents were encompassed in the phrase “other credit related documents.” Citing the Ninth Circuit with approval, and referencing no other authority, the court held that the “other credit related documents” language in § 7.4008(d)(2)(viii) only referred to those documents that are used in an ongoing lending relationship. The court reasoned that because the CLEC’s notice provisions were only triggered after a

75 *Epps* v. JP Morgan Chase Bank, N.A., 675 F.3d 315, 326 (4th Cir. 2012). See also *Aguayo* v. U.S. Bank, 653 F.3d 912, 928 (9th Cir. 2011).
76 *Epps*, 675 F.3d at 322.
77 *Id.* at 323.
78 *Id.*
79 *Id.*
80 *Id.* at 325.
81 *Id.*
breakdown of the lending relationship and repossession of the secured property, and not during the establishment or continuation of a credit relationship, these notice documents were not “credit related.”

Finally, the court rejected the district court’s finding that the savings clause did not apply. In doing so it rejected the argument that the power to collect debts was implied by the power to make loans, to the extent that a restriction on debt collection would disrupt the business of a national bank and interfere with its powers under the federal charter. While accepting the basic premise that the power to make loans includes an implicit right to collect debts, the court nonetheless ruled that the distinct differences in the extension of credit and the collection of debt were pronounced by the regulations, and found that the savings clause of § 7.4008(e) exempted “debt collection” as a state matter. In reaching this determination, the court found significant that there was no comparable federal notice statute that would govern a national bank’s exercise of self-help recollection, but ignored the possible effects that such a decision would have on the business of the national banks and the purpose of the NBA.

IV. AN ANALYSIS OF Epps, THE SHIFTING PREEMPTION STANDARD, AND THE ECONOMIC IMPACT

A. Analysis of the Fourth Circuit’s Holding in Epps

As previously mentioned, case law dealing with the issue of state repossession and notice statutes as applied to national banks is still crucial because the provisions of the Dodd-Frank Act do not apply to loans entered into before July 21, 2011. The significance of the decision in Epps is that it has likely cemented the trend of non-preemption of state repossession and notice statutes for non-real estate loans as applied to national banks. In the months following the Epps decision, a district court in Ohio decided the same issue regarding the Ohio repossession and notice requirements. Citing Epps and the Ninth Circuit with approval, this district court found that the Ohio statutes were not preempted by the 2004 OCC regulations.

82 Id.
83 Id.
84 Id. at 323-24.
85 Id.
86 Id. at 326 (reasoning that under the theory proposed by Chase, any state debt collection would burden the exercise of a national bank’s lending power).
While there are many jurisdictions that have yet to address this issue, with two circuits strongly supporting the non-preemption approach in the non-real estate repossession sphere—another district court endorsing the same approach—the trend seems strong and unlikely to change. This trend is especially worrisome given the damaging implications for the business of national banks. In analyzing the Fourth Circuit’s decision in *Epps*, it becomes clear that the court made several errors that affected the outcome of the case, damaging the business of the national banks.

First, in analyzing the “obstruct, impair, or condition” language formerly contained in §7.4008(d)(1), the court erred in its application of the “condition” standard. The Fourth Circuit in *Epps* held that the Maryland CLEC was not expressly preempted by § 7.4008(d) because it did not “directly condition any power expressly granted to a national bank by Congress.” However, direct conditionality is not the standard. By holding that a state law must “directly condition” the exercise of a national bank’s powers under its federal charter, the *Epps* court foreclosed on the use of the OCC regulations to preempt a state law that surreptitiously places an indirect condition on a national bank’s exercise of its federal powers; placing national banks’ powers at the whims of crafty state law makers.

Second, the *Epps* court erred in determining that a notice is not an “other credit related document,” preempted by § 7.4008(d)(viii). In making its determination, the Fourth Circuit attempted to distinguish a post-repossession notice from other lending documents by holding that a “credit related document” is one that is issued during “the establishment of the lending relationship” and that the CLEC notice requirements only dealt with the collection of the debt. This is ultimately an unsatisfactory distinction. “Related” is a term commonly defined as “a relationship or connection.” Even if there is a breakdown in the lending relationship due to a failure by the debtor to

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88 See generally *Epps*, 675 F.3d at 315; *Aguayo v. U.S. Bank*, 653 F.3d 912 (9th Cir. 2011).
89 See generally *White*, LEXIS 149233.
90 12 C.F.R. § 7.4008(d)(1) (2004) (“Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.”).
91 *Epps*, 675 F.3d at 323.
92 *Id.* at 325.
93 *Id.*
94 *Id.*
make good on her payments, such a notice is still a document “related” to credit. Additionally, Black’s Law Dictionary defines “credit” as
*inter alia*, “the time that a seller gives the buyer to make a payment that is due.” The notice requirements under the Maryland law allow
a creditor to serve a written notice on the debtor 10 days before a repossession and requires one within 5 days after the repossession.

Using the *Epps* court’s rationale, the first of these notices would be a credit related document, but the latter would not. This differential
treatment is unsupported by either the language of the regulation, or the definition of “credit.” Moreover, the notice in this case required
the creditor to disclose the conditions under which the debtor could redeem the property and resume payment. Thus, the notice required
under the CLEC did contain terms as to the re-establishment of the lending relationship, placing it squarely within the Fourth Circuit’s
definition of a “credit related document.” This misinterpretation of
the clear meaning of the statutory language under § 7.4008 directly impacted the court’s finding of non-preemption.

Finally, the most significant shortcoming in the *Epps* decision is the Fourth Circuit’s failure to consider the aggregate impact of such state laws on national banks. In its decision, the Fourth Circuit summarily dismissed Chase’s assertion that the state law placed more than an incidental burden on national banks. It has long been established in Commerce Clause jurisprudence that courts may consider the aggregate impact of economic activity in determining whether Congress has the power to regulate on the issue under its Commerce Clause power. While *Epps* is certainly not a Commerce Clause case, the general principle of considering the aggregate effect of individual and state action is a wise approach, and should nevertheless be employed when addressing issues that impact the national economy. While a single state’s repossession and notice regulations may no more than “incidentally affect” a national bank’s exercise of its powers, the disparate regulations of 50 states will more than “incidentally affect” a national bank seeking to exercise its

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96 BLACK’S LAW DICTIONARY 424 (9th ed. 2009).
97 Compare MD. CODE. ANN., COM. LAW § 12-1021(c) (LexisNexis 2012), with MD. CODE. ANN., COM. LAW § 12-1021(e) (LexisNexis 2012).
98 MD. CODE. ANN., COM. LAW § 12-1021(e) (LexisNexis 2012).
99 Epps v. JP Morgan Chase Bank, N.A., 675 F.3d 315, 325 (4th Cir. 2012) (holding that a credit related document is one that refers to the establishment of a lending relationship).
100 Id. at 325-26.
102 Epps, 675 F.3d at 325.
federally authorized powers. In considering the effect of only one state’s regulations, the Fourth Circuit failed to employ preemption to protect national banks from state regulations that, in the aggregate, will impair their ability to operate under their federal charter – having severe implications for the national economy.

B. Economic Impact of Non-Preemption of State Repossession Statutes on National Banks and the National Economy, a View From 30,000 Feet

The above analysis and background shows that currently under both the old and new preemption schemes, federal statutes and jurisprudence hold that state non-real estate repossession and notice requirements are not preempted by federal law when applied to national banks. This analysis begs the question, what does the shifting preemption standard have to do with the national economy and the business of banking, especially in the context of non-real estate consumer loans? It is axiomatic that what is bad for banks is bad for business. Further, it is likely a common misconception that consumer lending has no effect on business. On the contrary, consumer lending is just as important as other lending activities on business and the economy. Along the same line, excessive and overlapping regulations on the ability of national banks to realize their security interest in non-real estate consumer loans will have an effect on lending practices that will impact the national economy. Even courts have recognized that “[t]he application of multiple, often unpredictable, state or local restrictions and requirements prevents [national banks] from operating in the manner authorized by federal law, is costly and burdensome, interferes with their ability plan their business and manage risk, and subjects them to uncertain liabilities and potential exposure.”

National banks, especially larger banks

103 See Appellee’s Brief, supra note 6, at 22-23.
104 Joseph R. Mason, Robert Kulick, and Hal J. Singer, The Economic Impact of Eliminating Preemption of State Consumer Protection Laws, 12 U. PA. J. BUS. L. 781, 797-98 (2009) (arguing that the promotion of uniform national markets ensures the availability of low cost credit to American consumers, helping to establish the efficient function of securitization which enhances liquidity the area of home loans, car loans, credit cards, and commercial loans. It is extremely difficult to “convert cash flows from disparately-regulated loans into standardized streams that could be securitized, resulting in significant negative implications for the U.S. economy”).
105 Id.
that operate in multiple states, will likely feel the effects of this preemption shift for years to come if Congress does not act quickly.\textsuperscript{107}

As previously alluded to, the effect of the trend towards non-preemption of state non-real estate notice and repossession laws, as applied to national banks, is primarily to place the rules and notice requirements of no fewer than fifty state and local jurisdictions on each national bank. Under such a system, the national bank must ensure that it is in full compliance with every notice requirement in every state in which it is seeking to recover secured property on a valid debt owed to it. Failing to precisely follow such statutes can, as illustrated in \textit{Epps}, have serious economic consequences, resulting in national banks being unable to fully recover the debt owed.\textsuperscript{108} “The imposition of an overlay of 50 [s]tate and an indeterminate number of local government rules on top of Federal requirements has a costly consequence that can materially affect national banks and their ability to serve consumers efficiently and effectively across the nation.”\textsuperscript{109}

Moreover, many states utilize multiple statutes in effecting their guidelines on the collection of non-real estate consumer debts.\textsuperscript{110} For example, Maryland alone has five statutes on this point.\textsuperscript{111} If the same holds true for all fifty states, a national bank operating in every state could be subject to as many as 250 separate state laws with regard to the collection of non-real estate security interests.\textsuperscript{112} This approximation does not even include any local statutes that may apply. It does not require a quantum leap to determine that keeping abreast of individual state repossession and notice regulations will substantially increase operating costs.\textsuperscript{113}

\textsuperscript{107} See Mason, Kulick, and Singer, supra note 104, at 799 (discussing the economic benefits that flow from removing geographic restrictions and regulations and replacing them with uniform standards). \textit{See also} John D. Hawke, Jr., \textit{Condition and Performance of Commercial Banks}, 23 OCC Quarterly Journal 1, at 30 (June 2004) (“When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, and their customers may face higher costs or more limited product offerings—or both—as a result.”).

\textsuperscript{108} See, \textit{e.g.}, Md. Code Ann., Com. Law § 12-1021(j)(3) (LexisNexis 2012); \textit{Id.} at § 12-1018(b).

\textsuperscript{109} ABA Letter, \textit{supra} note 106, at 2.

\textsuperscript{110} See, \textit{e.g.}, Md. Code Ann., Com. Law §§ 9-614, 12-615, 12-624, 12-921, 12-1021 (LexisNexis 2012); \textit{See also} Appellee’s Brief, \textit{supra} note 6, at 22-23.

\textsuperscript{111} \textit{See} Appellee’s Brief, \textit{supra} note 6, at 22-23.

\textsuperscript{112} \textit{Id.} at 22.

\textsuperscript{113} See Courtney Gaughan, Note, \textit{Some More Watters Please: The Dodd-Frank Act’s New Preemption Standards Lighten Consumers’ Wallets}, 63 FLA. L. REV. 1459, 1482 (2011) (“Large, national financial institutions like Wells Fargo, which operates in thirty-nine states with subsidiaries throughout the country, will find the cost of doing business to be much greater after Dodd-Frank.”).
That being said, it is unclear what the exact economic impact on national banks will be if this system remains in place, so much so that scholars and practitioners have declined to quantify the likely economic impact of such disparate regulations.\footnote{See Mason, Kulick, and Singer, \textit{supra} note 104, at 799 (noting that any estimate as to the impact of fifty different state laws on ATM fees on consumer banking services and the national economy would be purely speculative, and declining to elaborate). \textit{See also} Appellee’s Brief, \textit{supra} note 6, at 19-23; ABA Letter, \textit{supra} note 106, at 4.} However, it is not inappropriate to speculate that national banks are sure to incur massive logistical costs to guarantee compliance with the extensive notice and collection requirements of every state.\footnote{See Gaughan, \textit{supra} note 113, at 1481-82.} First, national banks will have to sift through hundreds of state statutes and determine the provisions that apply to them.\footnote{ABA Letter, \textit{supra} note 106, at 4 (“ABA notes that there would be many practical consequences for banks if the existing application of federal preemption did not remain in effect. Banks would face substantially increased upfront and ongoing legal and compliance costs. […] Compliance with any newly applicable state laws would require revision to processes, policies, staff training initiatives, consumer documentation and disclosures […]”).} Additionally, national banks will likely be required to make substantial changes to their lending and collection documents, and tailor them to comply specifically with each state’s individual statutory specifications.\footnote{See Appellee’s Brief, \textit{supra} note 6, at 21.} If that is not enough, these banks will then have to continuously monitor these statutes for any pertinent changes that will affect their consumer non-real estate lending practices. Imposing higher regulatory costs on national banks operating in several states will harm both banks and consumers.\footnote{See Mason, Kulick, and Singer, \textit{supra} note 104, at 799.}

At the risk of stating the obvious, it is unlikely that national banks will absorb these costs themselves. Like any commercial enterprise, national banks will be forced to cope with the increased costs of doing business by passing costs on to consumers and increasing the cost of credit.\footnote{See \textit{id.} (citing a 1997 study which found that once geographic banking restrictions were lifted, loan losses and operating costs fell, resulting in lower loan rates for consumers). \textit{See also} Gaughan, \textit{supra} note 113, at 1480 (“Congress’s solution ignores the fact that many financial consumers will find it difficult to afford pricy mortgages and high risk interest rates resulting from the banks’ attempts to remain profitable.”).} In their review of the economic impact caused by the elimination of federal preemption of state consumer laws, Mason, Kulick, and Singer concluded that the elimination of barriers to bank expansion, such as disparate state banking regulations, increased the number of banking services available to consumers while lowering the

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\footnote{See Mason, Kulick, and Singer, \textit{supra} note 104, at 799 (noting that any estimate as to the impact of fifty different state laws on ATM fees on consumer banking services and the national economy would be purely speculative, and declining to elaborate). \textit{See also} Appellee’s Brief, \textit{supra} note 6, at 19-23; ABA Letter, \textit{supra} note 106, at 4.}
Therefore, it stands to reason that if disparate regulations are imposed on national banks, the opposite will hold true, and the number of banking services will decline, and the costs of those services will increase.

Additionally, imposing too many state notice and repossession regulations on national banks – with their varying penalties for non-compliance – may make lending on non-real estate security too risky for some national banks, and cause an exodus of national banks from certain state markets. Withdraw from certain state markets, while an extreme example of the possible economic impacts, is not improbable. The result, if national banks begin to withdraw lending activities in certain state markets because of the substantial risk of not being able to realize their security interest, would be a serious disruption to the dual-banking system - a result the NBA was enacted to prevent.

C. The Disruption of the Dual-Banking System

It has been a primary argument of those who support the non-preemption standard that allowing each state to enact its own repossession and notice regulations preserves the dual-banking system by controlling the operation of banks within its borders. Nothing is farther from the truth. This argument is fundamentally flawed in that it fails to consider the opposite end of the spectrum.

Abuse of power is never a one-way street. While those who advocate a non-preemption standard cite as justification concern over unwieldy and predatory national banks, they fail to consider that the

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120 See Mason, Kulick, & Singer, supra note 104, at 799.
121 See Adam J. Levitin, Hydraulic Regulation: Regulating Credit Markets Upstream, 26 YALE J. ON REG. 143, 224 (2009) (discussing hydraulic regulations that impose targeted regulatory costs on secondary market purchasers of debt, and the possibility that national banks may opt out of specific state markets to avoid hydraulic regulations).
122 See Wilmarth, supra note 35, at 257 (discussing how Congressional Acts, like the National Bank Act, help preserve the dual banking system by preventing “[...]competitive factors from becoming so ‘lopsided’ in favor of one system that the other system is unable to make adjustments in order to reestablish a competitive equilibrium.”).
123 See generally Wilmarth, supra note 35, at 274.
124 See Hensley, supra note 51, at 193 (suggesting that preemption contributed to a “deterioration in lending standards” that led to the 2008 financial crisis); Mason, Kulick, and Singer, supra note 104, at 791 (“[S]ome critics have attempted to argue that preemption threatens the stability of the dual banking system.”). See generally Wilmarth, supra note 35, at 274-79 (discussing the OCC’s 2004 preemption regulations threat on the dual banking system).
states have an interest in promoting financial institutions chartered under their laws.\textsuperscript{125} The non-preemption standard for state non-real estate repossession laws, like the non-preemption standard for consumer protection laws, significantly hampers the ability of national banks to exercise their powers under their federal charters.\textsuperscript{126} This opens the door for states to engage in protectionism, and act in a manner that promotes the interest of the state banks at the expense of the national banks.\textsuperscript{127}

The Dodd-Frank Act makes some effort to protect national banks from such protectionist activities by preempting state consumer financial laws that would have a “discriminatory effect on national banks.”\textsuperscript{128} However, the Act fails to consider that allowing states to impose their own notice requirements regarding the repossession of non-real estate security interests places state banks at a distinct advantage over national banks. This was the exact situation that the NBA was enacted to prevent.\textsuperscript{129}

While the dual banking system is criticized by some,\textsuperscript{130} many others hail the system as a unique, innovative, and flexible system of banking that allows banks to better finance growth and rebound from financial crises.\textsuperscript{131} Studies show that the dual banking system may be responsible for producing “important macroeconomic benefits” for national economies.\textsuperscript{132} The increased competition between state and national banking entities fosters superior performance in the US banking industry that provides benefits to the national economy and business.\textsuperscript{133} If this is the case, then the destruction of the dual banking system...
system by allowing regulations to list in the favor of one banking system, here the states, should be prevented in order to maintain competition and growth. “As the Supreme Court has recognized [. . .] Congress has followed a ‘policy of equalization’ designed to maintain a basic parity of competitive opportunities between national and state banks.”

V. THE FEDERAL SOLUTION TO THE PREEMPTION PROBLEM

A. Judicial and Administrative Solutions Will be Ineffective in Reversing the Trend of Non-Preemption

With potentially serious national economic implications if the system remains in its current state, it is clear that some action must be taken to return the dual banking system to its ideal equilibrium. Historically, courts and administrative agencies like the OCC have taken active roles in protecting national banks from burdensome regulations. However, as previously mentioned, the clear mandate of congressional intent to limit preemption determinations contained in the recent Dodd-Frank legislation has had a chilling effect on independent judicial and administrative preemption determinations. While it is undoubtedly possible for courts and agencies to reverse the trend through their holdings and rulemaking activities, it is unlikely in the face of these recent barriers.

As previously discussed, the Fourth and Ninth Circuits – the only two circuits to address the issue of federal preemption of state notice and repossession regulations regarding consumer non-real estate lending activities – overturned the formerly unanimous district court consensus that the NBA, by virtue of the OCC regulations, preempted state law on this issue. With such swift opinions that concur on

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134 Id. at 257 (quoting First Nat’l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966)).
135 See Eager & Muckenfuss, supra note 8, at 28; see also National City Bank of Indiana v. Turnbaugh, 463 F.3d 325, 332-33 (4th Cir. 2006) (affirming federal preemption of state mortgage lender law regarding regulatory and visitorial powers of national bank subsidiaries).
137 See generally Epps, 675 F.3d at 315; Aguayo, 653 F.3d at 912.
virtually every substantive point raised, it is difficult to perceive the remaining circuits acting in unison to change the jurisprudence, making a federal solution by judicial determination unlikely.

Conditions are not much better when considering the possibility of agency action to remedy the problem. Under recent changes in the NBA made by the Dodd Frank Act, it is now significantly harder for the OCC to preempt state law that interferes with national banking activities. According to these new regulations, the Comptroller of the Currency can no longer preempt certain classes of state laws that interfere with the activities of national banks, but can only preempt state law on a “case-by-case basis.” This approach would require the OCC to consider each of the fifty states’ non-real estate repossession and notice laws, and conduct an independent inquiry into the impact of each state’s laws on the business of the national banks.

With judicial and administrative outlets unlikely to provide a sufficient remedy, the federal branch most equipped to cure this issue is fittingly the one that is responsible for causing the unrest in the first instance – Congress.

B. Congressional Action for Uniformity in Debt Collection and Repossession for National Banks in Their Non-Real Estate Consumer Lending Capacities

It is important to note that at no time during their arguments for federal preemption did national banks contend that they should not be subject to regulation regarding the repossession of non-real estate security interests. Rather, their argument centered on the need for uniform regulations as applied to their lending and collection

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138 See Epps, 675 F.3d at 324-26 (citing the Ninth Circuit with approval in its determination that the notice requirements were not disclosures or “other credit related documents,” and that the saving clause protected the state laws as they related to the “right to collect debts”).

139 12 U.S.C. § 25b(1)(B) (2012) (showing that the Comptroller of Currency may only preempt state laws on a case-by-case basis as opposed to preempting classes of state laws).

140 Id.

141 See id. Note that there is some language in the legislative history to suggest that the OCC has the power to make a single determination regarding multiple states’ consumer finance laws, provided that the laws are substantially equivalent. See Natter & Wechsler, supra note 15, at 353. However, especially in the context of so many disparate state regulations, as mentioned herein, it is unclear how far such a decision would go.

142 See Appellee’s Brief, supra note 6, at 22.
activities. In this scenario, it seems that Congress is the only branch of government that is capable of adopting effective, uniform regulations for repossession and notice requirements for national banks regarding their non-real estate securities collection activities.

While this area is traditionally one of state regulation, as previously mentioned it is essential to the continuing vitality of the dual banking system to place national banks on the same level as state banks regarding repossession of non-real estate security interests. A uniform federal act that incorporates the same values as those expressed in the various state statutes would not be a difficult and arduous undertaking for Congress. Every state has some variety of regulation governing the notice and repossession procedures in banks’ efforts to collect secured consumer debts. The procedures will likely be somewhat similar – good fundamental principles on which Congress can draw – but as with most things, the devil is in the details.

In adopting an act governing the notice and procedural requirements applied to national banks, Congress can impose similar restrictions and penalties for non-compliance as are present under most state laws, but do so in a way that applies to national banks uniformly throughout the country.

Such an act would provide little substantive advantage for national banks over state banks, in that they will not necessarily have to comply with less stringent regulations. However, it will equalize procedural benefits in giving national banks confidence and security that by complying with the uniform federal regulation they will be able to realize their security interest. This uniform act will expressly preempt disparate state laws as applied to national banks, limit the risk and uncertainty for national banks regarding consumer lending, and provide national banks the assurance they need to lend to consumers, knowing that they will be able to reclaim their investment should the debtor fail to pay.

\footnote{143} Id. at 22-23.
\footnote{144} Aguayo v. U.S. Bank, 653 F.3d 912 (9th Cir. 2011) (“[D]ebt collection, and specifically the right to repossess property that is the subject of a secured transaction, has deep roots in common law and remains a fixture of state, not federal, law.”).
\footnote{145} See Wilmarth, supra note 35, at 263-65.
\footnote{146} See Appellee’s Brief, supra note 6, at 22-23.
\footnote{147} See generally id. (comparing the notice and repossession laws from California, Maryland and Delaware, showing that most require notices to be sent to defaulting debtors, but with substantially different time frame and content requirements).
\footnote{148} The idea behind such a proposal is to provide parity between national and state banks, making it easier for national banks to operate interstate following a uniform system, without providing a competitive disadvantage by including substantially more lenient terms.
VI. CONCLUSION

In the midst of the recent financial crisis the government should favor approaches that will produce stable growth and security to consumers. 149 Numerous disparate state repossession and notice regulations for non-real estate security interests will have a serious dilatory effect on the business of national banks, and inhibit growth from these lending institutions. To prevent such a result, Congress should adopt uniform repossession and notice regulations for non-real estate security interests that allow national banks to operate with the same confidence as their state-chartered partners. Such an act would maintain the essential balance in the dual banking system, and provide security to national banks without an unfair advantage over their state-chartered counterparts. Such a result would help spur more confident and cost-effective consumer lending that will positively impact the business and financial sectors. 150


150 See generally Mason, Kulick, & Singer, supra note 104, at 800-02 (discussing the positive impact of uniform regulatory standards in other U.S. industries).