FEDERAL PREEMPTION OF THE STATE REGULATION OF AGRICULTURAL CREDIT

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I. OVERVIEW OF STATE REGULATION

Credit regulation has historically been a state domain. That state regulation has evolved from a patriarchal strangulation of agricultural credit, based on ancient concepts of exploitation by usury, to a deregulation of most business (in-

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cluding agricultural credit), to a protectionist view of agricultural use credit, then back to a relative deregulation of agricultural credit.[1]

Interstate agricultural lenders are quickly replacing local intrastate agricultural lenders, due to the consolidation of banking into regional and national bank holding company organizations[2] and the Federal Government's role in providing a substantial portion of agricultural credit in the United States.[3] These national and regional lenders, faced with shrinking profit margins and the demand of the financial markets for increased efficiency, find inconsistent state credit price controls and other disparate state laws a barrier to increased efficiency in the delivery of agricultural credit.

Those state law limits include the well established Arkansas usury limit of a rate 5% over the Federal Reserve Board Discount Rate,[4] the Montana 15% interest rate limit,[5] the Nebraska 16% limit,[6] and the limitation of Minnesota law on most agricultural credit to 4.5% over the Federal Reserve commercial paper rate.[7] State law limits on agricultural credit also extend to limits on other charges,[8] special disclosure requirements,[9] and collection practices limitations.[10]

Some lenders have chosen to rely on a contractual provision in their credit agreements that provide that only the law of a certain state will apply to the credit transaction, even if the borrower resides in another state. While these contractual provisions are generally enforced by the courts if they meet certain reasonableness standards,[11] courts and state legislatures have, in some instances, limited or prohibited their enforcement.[12] That refusal to enforce those contractual choice of law provisions is typically based on the precept that usury, and

1. *See generally* John L. Brown, *The State Regulation of Agricultural Credit*, 3 DRAKE J. AGRIC. L. 305 (1998).

2. *See Top 100 Agricultural Banks by Loan Volume*, J. AGRIC. LENDING, Spring 2001, at 4-6.

3. *See* James T. Ryan & Steven R. Koenig, *Lender Market Shares and the Financial Condition of Indebted Farm Operations*, J. AGRIC. LENDING, Spring 2001, at 28-29.

4. ARK. CONST. art. XIX, § 13.

5. MONT. CODE ANN. § 31-1-107 (2001).

6. NEB. REV. STAT. ANN. § 45-101.03 (Michie 2000).

7. MINN. STAT. ANN. § 334.011 (West 1995 & Supp. 2002).

8. *See, e.g.*, N.C. GEN. STAT. § 24-10.1 (2002) (governing lenders' ability to charge late fees).

9. W. VA. CODE ANN. §§ 46A-4-104, 46A-4-105, 46A-4-107, 46A-4-110a(c) (Michie 1999).

10. *See* WIS. STAT. ANN. § 427.104 (West 1998).

11. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 187, 203 (1971 & Supp. 1988).

12. *See* Turner v. Aldens, Inc., 433 A.2d 439, 442 (N.J. Super. Ct. App. Div. 1981); NEB. REV. STAT. ANN. § 45-110 (Michie 2000).

credit regulation as a whole, is a fundamental public policy of the state and cannot be waived by a resident of that state in a credit agreement.[13] In most instances, this protectionist philosophy only applies to consumer credit, and not to business or agricultural credit.[14]

II. THE FEDERAL RESPONSE TO BALKANIZED STATE CREDIT REGULATION

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[15] Therefore, federal legislation, if enacted within Congress's constitutional authority, can nullify conflicting state or local laws.[16]

However, since the early years of the republic, the states have resisted a federal role in providing credit. The United States Supreme Court, starting with the 1819 case of *M'Culloch v. Maryland*,[17] "generally limited federal statutory involvement by construing preemption narrowly."[18]

A. *National Banks*

The first federal preemption of state credit price controls was prompted by the dire financial straits of the Federal Government during the Civil War. The lack of a national currency, caused by the collapse of two earlier attempts to create a national bank,[19] created significant difficulties as the beleaguered Union government attempted to fund a massive war effort. The desperate situation allowed the Federal Government to overcome the almost fanatical historical resistance to any federal role in banking and to pass the National Bank Act.[20]

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13. *See, e.g.*, DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990).
14. *See Turner*, 433 A.2d at 442.
15. U.S. CONST. art. VI, cl. 2.
16. Worm v. Am. Cyanamid Co., 970 F.2d 1301, 1304-05 (4th Cir. 1992).
17. 17 U.S. (4 Wheat.) 316 (1819).
18. Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21, 25 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).
19. *See* JOHN J. KNOX, A HISTORY OF BANKING IN THE UNITED STATES 35-48, 51-71 (Bradford Rhodes & Co. ed., 1903); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 197-226, 369-450 (Princeton Univ. Press 1957).
20. *See* KNOX, *supra* note 19, at 235-69. What we now call the National Bank Act was passed by Congress in 1864, under the title "An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof." Act of

Anticipating state efforts to discriminate against the new nationally chartered banks to protect the established state chartered banks, the law included section 85, which allowed a national bank to charge the highest rate allowed any other lender by the law of the state where the national bank was located and to charge that rate to customers throughout the United States.[21] That law, designed to give national banks equal treatment with state banks,[22] lives on today and is the model for all federal state credit law preemption.

That nationwide lending power and preemption of state law for national banks under section 85 was seldom used, and therefore seldom challenged, for over one hundred years, as most credit was local in nature—small banks lending to customers within fifty miles of the bank's office. But the increased use of credit card lending after World War II and the trend toward larger interstate banking operations precipitated challenges to that law. Section 85, designed as a shield for national banks against state attempts to unfairly limit their charges, evolved into a sword used to cut through state interest rate limits when the lending bank was located in a state which allowed higher interest rates and the borrower lived in a state with lower interest rate ceilings. This situation, effectively giving preferential treatment to out-of-state national banks over local banks, gave rise to the challenge to section 85 in the 1978 case of *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*.[23] In *Marquette,* the United States Supreme Court upheld that use of section 85, setting the stage for additional federal state credit law preemption statutes.[24] In *Smiley v. Citibank (South Dakota), N.A.*, the United States Supreme Court held that national banks could also charge ("export") late charges, bad check fees, over credit limit fees, annual fees and cash advance fees allowed by the law of the state where it was located to all of its U.S. customers.[25] This decision, based on section 85 of the National Bank Act

June 3, 1864, ch. 106, 13 Stat. 99. It substantially repealed and superseded a statute enacted in 1863, under the title, "An Act to provide a national Currency, secured by a Pledge of United States Stocks, and to provide for the Circulation and Redemption thereof." Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. Its title was altered in 1874 to "The National Bank Act." Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123. *See also* Tiffany v. Nat'l Bank of Missouri, 85 U.S. (18 Wall.) 409, 411-13 (1873).

21. 12 U.S.C. § 85 (2000).

22. Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314 (1978).

23. 439 U.S. 299, 301 (1978).

24. *Id.* at 314.

25. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740, 745 (1996).

and an Interpretive Ruling of the Office of the Comptroller of the Currency,[26] the federal regulatory agency with jurisdiction over national banks, ended over a decade of litigation on this issue.[27] There are approximately five thousand rural-headquartered commercial banks in the United States.[28] Commercial banks extend about fifty percent of U.S. agricultural credit.[29]

B. The Federal Farm Credit System

A second instance of significant federal intervention to limit state control of agricultural credit was the creation of the federal Farm Credit System in 1916. Based on historical models of European farmer-owned lending cooperatives,[30] these institutions were given limited power to avoid state regulation.[31] In 1971, this preemptive power was enhanced by the congressional authorization to each Farm Credit System member institution to charge whatever interest rates were authorized by their board of directors.[32] Unlike national banks, this rate was not even limited by the interest rate ceiling of the state where they were located.[33] While the Farm Credit system was given the borrowing power, the lower funding costs[34] of the Federal Government, and a unique general exemption from most taxes,[35] it was also prohibited from charging interest rates lower than competing privately owned lenders.[36] However, the courts have ruled that competing private lenders do not have legal standing to use the courts to enforce that limitation, and

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26. 12 C.F.R. § 7.4001(b) (2002).

27. Jeffrey I. Langer, *The Scope of Exportation: Some Unresolved Issues After* Smiley v. Citibank, 52 BUS. LAW. 1065, 1065 (1997).

28. ECON. RESEARCH SERV., USDA, CREDIT IN RURAL AMERICA 37 (1997).

29. *Id.* at 66.

30. Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers,* 66 N.D. L. Rev. 127, 132 (1990).

31. 12 U.S.C. § 2023 (2000) (originally enacted as 12 U.S.C. § 2055 (1971)).

32. Farm Credit Act of 1971, Pub. L. No. 92-181, § 3.10, 85 Stat. 583, 606.

33. *See id.*

34. ECON. RESEARCH SERV., *supra* note 28, at 26-27.

35. *Hearing on Farm Credit Administration's National Charter Initiative Before the House Comm. on Banking and Fin. Servs.*, 106th Cong. 54-57 (2000) (statement of David Torpey, Independent Community Bankers Association) (as cooperatives, distributions to owners are tax deductible expenses, while private lenders, including banks, pay taxes on earnings passed to their stockholders as dividends).

36. 12 U.S.C. § 2001(c) (2000).

have ruled that only the federal agency created to regulate the Farm Credit system, the Farm Credit Administration, can enforce that requirement.[37]

C. Federal Savings Banks

The 1970s also saw an expansion of the commercial lending powers of another type of federal banking institution, the savings and loan association, now known as federal savings banks. Born in 1933 as part of an initiative to promote home ownership, these institutions grew and prospered until the 1970s, when the combination of low fixed rate long-term housing loans, low state usury limits, and high market rates for funding through deposits created a fatal disintermediation for many savings and loan associations.[38] These struggling institutions demanded, and received, broader lending powers, including the power to make agricultural loans.[39] In 1997, their powers were further expanded to allow unlimited amounts of credit card lending.[40] Building on many of the court challenges to section 85 of the National Bank Act, the federal regulator of these newly renamed federal savings banks, the Office of Thrift Supervision, issued broad regulations preempting most types of state credit controls.[41] These regulations gave the federal savings banks what may be the broadest federal preemption of state credit controls.[42] As of 1994, there were approximately five hundred federal savings banks headquartered in rural areas.[43]

D. Federally Insured State Banks

The high prime rate environment of the late 1970s also created special federal preemption powers for state chartered banks that were insured by the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corporation ("FSLIC").[44] A rising market rate for their funding, borrowing, and deposits, coupled with the refusal of some states to relax histori-

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37. *See* Indep. Bankers Ass'n of Am. v. Nat'l Credit Union Admin., 936 F. Supp. 605, 612 (W.D. Wis. 1996).

38. *See* Home Owners' Loan Act of 1933, Pub. L. No. 43, 48 Stat. 128.

39. 12 U.S.C. § 1464(c)(2)(A)-(B) (2000), *amended by* Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, § 2303, 110 Stat. 3009-424.

40. Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, § 2303(b), 110 Stat. 3009-424 (1996), *amending* 12 U.S.C. § 1464(c)(1).

41. 12 C.F.R. §§ 545.2, 560.2 (2002).

42. Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 154 (1982).

43. ECON. RESEARCH SERV., *supra* note 28, at 39.

44. Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 822 (1st Cir. 1992).

cal ceilings on interest rates, created disintermediation for these banks. To remedy this, and "to level the playing field" between federally chartered and state chartered banks,[45] Congress passed the Depository Institution Deregulation and Monetary Control Act ("DIDMCA"),[46] which purported to give these federally insured institutions the same "most favored lender" status and the same federal preemption of other state's interest rate limits as enjoyed by national banks.[47] The United States, with its unique dual state and federal banking systems, now treated state charted banks engaged in interstate lending the same as competing national banks.[48] However, DIDMCA included an exception not included in section 85 of the National Bank Act; a limited right for states to "opt-out" of that federal preemption of their usury limits.[49] Fifteen states and Puerto Rico chose to exercise that right, and all but one of those states eventually rescinded that election.[50] However, significant legal uncertainty surrounds the DIDMCA preemption of state banks. First, DIDMCA does not address rescission of the state opt-out after the opt-out deadline, leading some to believe that such a rescission is not effective.[51] Second, it raises the questions of whether a state's opt-out applies only to loans made by state chartered banks in that state,[52] whether a state's opt-out applies to all loans by state chartered banks, wherever located, to residents of that

45. *Id.* at 826.

46. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 105, 94 Stat. 132 (codified at 12 U.S.C. § 1735f-7(a)(1) (2000)).

47. First Bank East v. Bobeldyk, 391 N.W.2d 17, 18 (Minn. Ct. App. 1986); VanderWeyst v. First State Bank, 425 N.W.2d 803, 804 (Minn. 1988), *cert. denied*, 488 U.S. 943 (1988).

48. *Greenwood Trust Co.*, 971 F.2d at 822; *VanderWeyst*, 425 N.W.2d at 805; *Bobeldyk*, 391 N.W.2d at 18.

49. Depository Institutions Deregulation and Monetary Control Act of 1980 § 105.

50. *See* COLO. REV. STAT. § 5-13-101 (2001); GA. CODE ANN. § 7-4-20 (Harrison 1998); HAW. REV. STAT. ANN. § 478-9 (Michie 2001); IDAHO CODE § 28-49-105 (Michie 1999); Act of April 30, 1980, Ch. 1156, 1980 Iowa Acts 537, 548; KAN. STAT. ANN. § 16-207a (1995); ME. REV. STAT. ANN. tit. 9A, § 1-110(1) (West 1997); Act of June 4, 1981, ch. 231, § 2, 1981 Mass. Acts 201; MINN. STAT. ANN. § 47.203 (West 1988); NEB. REV. STAT. ANN. § 45-1, 104 (Michie 2000); Act of June 14, 1981, ch. 668, § 11, 1981 Nev. Stat. 1592, 1596; N.C. GEN. STAT. § 24-2.3 (2002); Act of March 2, 1981, No. 6, § 3, 1981 S.C. Acts 5, 6; S.D. CODIFIED LAWS § 54-3-15 (Michie 1990); Act of Oct. 31, 1981, ch. 45, § 50, 1981 Wisc. Laws 571, 586; 10 P.R. LAWS ANN. §§ 998.l, 998.1(b) (Michie 1997). Iowa has not rescinded.

51. Marc J. Lifset & Kathryn J. Sheingold, *The Law of DIDA Section 501*, 54 CONSUMER FIN. L. Q. REP. 122, 127 (2000).

52. *Interest Rate on Loans to Customers Residing in States that Have Rejected the Federal Preemption Provision,* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,013, at 55,115 (Oct. 20, 1983) [hereinafter *Interest Rate on Loans*].

state,[53] or whether a state's opt-out applies to all loans made by a bank chartered in that state to a resident of any state.[54]

The First Circuit in *Greenwood Trust Company v. Commonwealth of Massachusetts*, established that the preemptive power of DIDMCA for credit card loans paralleled that of the National Bank Act, regarding interest rates charged to out-of-state customers.[55] While the federal regulator for those state chartered federally insured banks has opined that the preemptive power of those banks parallels those of national banks regarding other charges and other credit controls,[56] that premise has not been tested in the courts.

In 1999, Congress eliminated the competitive disadvantage of Arkansas banks, whose interest rates were limited by the low usury limit in that state's constitution.[57] It enacted 12 U.S.C. section 1831u(f) to give Arkansas FDIC insured banks preemption equality—the ability to charge any rate of interest that could be charged by an out-of-state bank with a branch office in Arkansas.[58]

E. The Temporary Agricultural Credit Preemption of 1979-1983

The Federal Government also granted limited state law preemption for agricultural loans made by almost any lender in the early 1980s.[59] In response to a dramatic rise in prevailing interest rates well in excess of many state law interest rate ceilings, Congress passed Public Law 96-161, effective December 28, 1979 and effective until March 31, 1980, which provided for temporary federal preemption of state usury ceilings on some business and agricultural loans.[60] Upon its expiration, the law was replaced by section 511 of the DIDMCA, effective October 8, 1980, which provided that business and agricultural loans made on and after April 1, 1980 and prior to April 1, 1983 could be made at an interest rate up to five percent over the 90-day commercial paper rate in effect at the re-

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53. *See Relationship of State Usury Preemption Laws,* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110 (June 29, 1988).

54. *See* Flannick v. First Union Home Equity Bank, 134 F. Supp. 2d 389, 393 (E.D. Pa. 2001).

55. Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992).

56. *See Interest Rate on Loans*, *supra* note 52.

57. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 731, 113 Stat. 1338, 1477 (1999); *see also* Johnson v. Bank of Bentonville, 269 F.3d 894, 895 (8th Cir. 2001).

58. Gramm-Leach-Bliley Act § 731, 113 Stat. at 1477*; see also Bank of Bentonville*, 269 F.3d at 895.

59. Act of Dec. 28, 1979, Pub. L. No. 96-161, § 202, 93 Stat. 1233, 1235.

60. *Id.*

gional Federal Reserve Bank.[61] This statute preempted any state constitution or statute which imposed a lower interest rate ceiling on those loans.[62] This allowed most agricultural lenders, whose cost of funds generally was slightly higher than that of the commercial paper rate, to again profitably make agricultural loans.[63] Section 511 also allowed states to "opt-out" of this temporary preemption by adopting a statute or passing a voter referendum rejecting this federal preemption after April 1, 1980.[64] DIDMCA also established limited federal preemption for certain first mortgage loans on residential real estate and loans secured by manufactured homes. Nine states elected to adopt such an opt-out, preserving their state law limits on those loans. [65]

F. The Removal of Federal Rate Limits on the Farm Credit System

The limited preemption on first mortgage home loans is similar to the preemption of state law interest rate limits granted to lending institutions that are part of the federal Farm Credit System ("FCS"), except states cannot "opt-out" of that federal preemption of their laws.[66] The FCS was created by Congress in 1916 to address the problem of high interest rates, unfavorable repayment terms, and aggressive foreclosures of agricultural credit.[67] The federal Farm Credit System is

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61. *See* Depository Institutions Deregulation and Monetary Control Act of 1980 Pub. L. No. 96-221 § 511(a), 94 Stat. 132 (codified at 12 U.S.C. § 1735f -7(a)(1) (2000)). Congress had federal usury limits on business and agricultural loans over $25,000. Act of Oct. 29, 1974, Pub. L. No. 93-501, § 202, 88 Stat. 1557, 1558. That legislation expired in 1977. It was reenacted from 1979 to 1981. Act of Nov. 5, 1979, Pub. L. No. 96-104, 102, 93 Stat. 789. Business and agricultural loans were again temporarily governed by federal law as part of DIDMCA. That legislation expired in April of 1983. Depository Institutions Deregulation and Monetary Control Act of 1980 § 512, 94 Stat. at 164.

62. *See* Depository Institutions Deregulation and Monetary Control Act of 1980 § 511(a), 94 Stat. at 164.

63. *Application of Business or Agricultural Loan Provision of the Depository Institutions Deregulation and Monetary Control Act of 1980*, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,413 (Aug. 20, 1982). *See also* ARK. OP. ATT'Y GEN. no. 81-42 (Feb. 23, 1981).

64. Depository Institutions Deregulation and Monetary Control Act of 1980 §§ 511, 512, *amended by* Pub. L. No. 96-399, § 324(b), 94 Stat. 1614, 1648 (1980).

65. *See* COLO. REV. STAT. § 5-13-101 (2001); GA. CODE ANN. § 7-4-20(2) (Harrison 1998); HAW. REV. STAT. § 478-9 (Michie 2001); Act of April 30, 1980, Ch. 1156, 1980 Iowa Acts 537, 548; Act of June 4, 1981, ch. 231, § 2, 1981 Mass. Acts 201; NEB. REV. STAT. ANN. § 45-1, 104 (Michie 2000); Act of June 14, 1981, ch. 668, § 11, 1981 Nev. Stat. 1592, 1596; Act of March 2, 1981, No. 6, § 3, 1981 S.C. Acts 5, 6; S.D. CODIFIED LAWS § 54-3-15 (Michie 1990); 10 P.R. LAWS ANN. §§ 998.l, 998.1(b) (Michie 1997).

66. *See* 12 U.S.C. § 1831d (2000).

67. 11 NEIL HARL, AGRICULTURAL LAW § 100.3, 100-23 n.4 (2002).

the oldest government sponsored lender[68] and is the only government sponsored lending enterprise allowed to compete directly with private lenders by making loans directly to borrowers.[69] It also enjoys certain unique tax exemptions.[70] It currently consists of about 165 institutions[71] that make about twenty-eight percent of U.S. agricultural loans.[72]

FCS institutions are "federally chartered instrumentalities of the United States."[73] This gives Congress the authority to determine the extent to which state law is preempted with respect to their activities.[74] Prior to those 1971 amendments to the Farm Credit Act, FCS institutions could not charge farmers and ranchers more than six percent annual interest.[75] The Farm Credit System federal preemption, like that on home loans, is not tied to a "most favored lender" authority of the state where the lender is located; it merely allows any agreed interest rate to be charged, with no specified interest rate ceiling.[76] The FCS preemption is also similar to the preemption available on certain home loans in that the preemption has not been expressly extended by statute, regulation, or federal agency published opinion beyond the rate of interest to include other loan charges or the applicability of state licensing. However, variable rate loans are authorized.[77] The terms and conditions of loans made by Farm Credit Banks[78] and

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68. Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are "Too Big to Fail": Balancing Public and Private Interests,* 44 HASTINGS L.J. 991, 1000 (1993).

69. ECON. RESEARCH SERV., *supra* note 28, at 43.

70. *See The Farm Credit Administration's Proposed Rule Providing for the Issuance of National Charters for the Farm Credit System: Hearing Before the Comm. on Agric.*, 107th Cong. 44 (2001) (statement of Phillip Burns, representing the American Bankers Association), *available at* http://commdocs.house.gov/committees/ag/hag1073.000/hag1073_0.htm.

71. The Farm Credit System consists of interrelated federal intermediate credit banks, production credit associations, and federal land banks that extend credit to farmers, those supplying certain services to farmers and for rural housing. They are funded by the Farm Credit System Capital Corporation, to which the Secretary of the Treasury has authority to provide financial assistance. These lenders are regulated by an independent regulatory agency, the Farm Credit Administration. *See generally* Kelley & Hoekstra, *supra* note 30, at 131-150.

72. JEROME STAM ET AL., ECON. RESEARCH SERV., USDA AGRICULTURAL INCOME AND FINANCE 6 (2002).

73. 12 U.S.C. § 2011 (2000).

74. Mo. Pac. R.R. Co. v. Ault, 256 U.S. 554, 563-64 (1921); *In re* Charter Executive Ctr., Ltd., 34 B.R. 131, 135 (Bankr. M.D. Fla. 1983).

75. 12 U.S.C. § 743 (1970), *repealed by* Pub. L. No. 92-181, § 5.26(a), 85 Stat. 583, 624 (1971).

76. *See* 12 U.S.C. §§ 2016, 2075(c), 2131 (2000); 12 C.F.R. § 614.4155 (2002).

77. 12 C.F.R. § 614.4160 (2002).

78. 12 U.S.C. § 2016(a) (2000).

Production Credit Associations ("PCAs") are not limited by state law.[79] PCA loans are not limited by state laws relating to collateral taken for the loan.[80] Therefore, it appears that, except as noted above, FCS institutions are subject to state law limitations and requirements for loan terms and lending operations. The Farm Credit Administration has acted to preempt state laws regarding the determination of what real estate is in a flood zone, relating to compliance with the Federal Flood Disaster Protection Act,[81] but unlike the federal banking agencies, it has not clarified the scope of the federal preemption available to FCS institutions by adopting other regulations.

Historically, other factors have limited the use of federal preemption of state law. These factors are being eliminated, though, allowing more aggressive use of that preemption by FCS institutions. The limitation on lenders of Farm Credit Banks and PCAs to farmers and ranchers has been broadened to include any person furnishing farm-related services.[82] It is proposed that certain FCS institutions will no longer be restricted to their historical lending area, typically all or part of a few states, and be allowed to make loans throughout the United States.[83] Others have questioned the willingness of the Farm Credit Administration,[84] the federal agency with regulatory authority over FCS institutions, to enforce the statutory lending limitations.[85] Whether all the benefit of the government sponsored enterprise status of the Farm Credit System is being conveyed to

79. *Id.* § 2075(c).

80. *Id.* §§ 2016, 2128.

81. 12 C.F.R. § 614.4950 (2002).

82. 12 U.S.C. §§ 2019, 2075 (2000).

83. In July of 1998, the Farm Credit Administration ("FCA") adopted a policy statement on competition between Farm Credit System ("FCS") lenders that may lead to significant changes in their structure and operations. *Farm Credit Administration Policy Statement on Intra-System Competition*, *in* FCA HANDBOOK § FAC-PS-73 (1998), *available at* http://www.fca.gov. In November of 1998, the FCA published a proposed "customer choice" rule to allow eligible borrowers to obtain credit from FCS lenders of their choice, regardless of the location of their residence or place of business. This would effectively eliminate the current territorial restrictions on FCS lenders (today FCS lenders are restricted to one of eight regions, with some subsidiaries restricted to certain territories within those regions). After an extended comment period, and strong opposition from commercial banks, the FCA postponed action on the proposed rule in January 2000 and later withdrew it. In May of 2000, the FCA issued a booklet on this national charter issue and contended that this could be authorized by them without formal rulemaking. The General Accounting Office disagreed, and the FCA again pursued a formal rulemaking process. The U.S. Treasury submitted a comment in that process, opposing the change. The FCA then withdrew the proposed rule.

84. Comment of American Bankers Association to the FCA Customer Choice proposal in 63 Fed.Reg. 60,219 (Nov. 9, 1998) (on file with the Drake Journal of Agricultural Law).

85. FCA, FCA EXAMINATION MANUAL, at EM-445 (2000), *available at* http://www.fca.gov/examman.nsf (last visited Sept. 17, 2002).

its farmer borrowers has also been questioned.[86] During the Depression, the Farm Credit System was a lender to farmers that could not obtain credit elsewhere, and the Farm Credit System did not compete with private lenders.[87] It has been proposed that the Farm Credit System return to that mission.[88]

G. Farmer Mac

The Federal Government also created the Federal Agricultural Credit Corporation ("Farmer Mac") in 1988 to develop and operate a secondary market for the purchase of high quality agricultural and rural real estate mortgages.[89] As part of the Farm Credit System, its share of agricultural credit is less than three percent.[90] Loans sold to Farmer Mac were subject to the Farm Credit System's federal preemption of state law interest rate limits,[91] but that preemption statute has been repealed.[92]

H. The Farm Service Agency

The Farm Service Agency ("FSA") of the United States Department of Agriculture makes or guarantees loans to farmers and ranchers who are unable to obtain credit from other lenders.[93] Although this lending is a relatively small portion of the total agricultural lending (less than five percent), it serves predomi-

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86. ECON. RESEARCH SERV., *supra* note 28, at 96-97; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-02-304, FARM CREDIT ADMINISTRATION REPORT TO RANKING MINORITY MEMBER: OVERSIGHT OF SPECIAL MISSION TO SERVE YOUNG, BEGINNING AND SMALL FARMERS NEEDS TO BE IMPROVED 20 (2002), *available at* http://www.gao.gov (located under "Find GAO Reports" link); AM. BANKERS ASS'N, WHO FINANCES AMERICA'S FAMILY FARMERS? 7 (2002) *available at* http://www.aba.com (located under "Ag & Rural Credit" link).

87. *See* ECON. RESEARCH SERV., *supra* note 28, at 56.

88. BEN SUNBURY, THE FALL OF THE FARM CREDIT EMPIRE 239 (1990) (quoting a 1986 statement of John Kenneth Galbraith).

89. *See* Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 8, 101 Stat. 1568, 1686-1709 (1988) (codified at 12 U.S.C. § 2279aa-1 (2000)).

90. ECON. RESEARCH SERV., USDA, LENDERS AND FINANCIAL MARKETS: FARMER MAC, *available at* http://www.ers.usda.gov/briefing/financialmarkets/Lendersfarmermac.htm (last visited Sept. 17, 2002).

91. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Shirley, 96 F.3d 1108, 1110 (8th Cir. 1996).

92. *See* 12 U.S.C. §§ 2016, 2075(c), 2131 (2000); 12 C.F.R. § 614.4155 (2002).

93. ECON. RESEARCH SERV., USDA, LENDERS AND FINANCIAL MARKETS: FARM SERVICE AGENCY, *available at* http://www.ers.usda.gov/briefing/Financialmarkets/LendersFSA.htm (last visited Sept. 17, 2002).

nately smaller-sized family farms.[94] FSA loans bear interest at a rate set by the Secretary of Agriculture under federal law.[95]

III. THE FEDERAL PREEMPTION ANALYSIS

The analysis of the scope of any alleged federal preemption is a difficult and uncertain process, but was perhaps best summarized by the Supreme Court of North Dakota in *Federal Land Bank of St. Paul v. Lillehaugen*.[96] In *Lillehaugen*, the court noted that first, a federal statute that expresses a clear intent to preempt state law will be enforced.[97] Second, where there is an outright conflict between state and federal law, federal law will prevail.[98] Third, where compliance with both state and federal law is impossible, federal law will be enforced.[99] Fourth, if it is implicit in the federal law that state regulation is barred, federal law will control.[100] Fifth, where federal law is comprehensive, occupying an entire field of regulation, state law will not apply.[101] Sixth, if state law is an obstacle to accomplishing the objectives of the federal law, state law will not apply.[102] Seventh, regulations of a federal agency which is given the authority by federal statute to issue those regulations may preempt state law.[103] Finally, preemption of state law by federal law or regulation is not favored, as any preemption analysis begins "with the basic assumption that Congress did not intend to displace state law."[104] Therefore, absent clear express federal intent to displace state law, the party claiming federal preemption has the burden of persuasion.[105]

In *Lillehaugen*, the court noted that the lack of express or implied preemption of state mortgage foreclosure defenses, and certain Farm Credit Administration regulations acknowledging the applicability of state law, along with express federal preemption of different types of state law (taxation and interest

94. *Id., available at* http://www.ers.usda.gov/briefing/Financialmarkets/LendersFSA.htm.
95. *See* 7 U.S.C. § 1946 (2000).
96. 404 N.W.2d 452 (N.D. 1987).
97. *Id.* at 455 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986)).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (citing Application of Otter Tail Power Co., 354 N.W.2d 701, 705 (N.D. 1984)).
105. *Id*.

rates), all allowed state law to be applied to an FCS institution loan.[106] While other court decisions have upheld the interest rate[107] and variable interest rates[108] preemption for FCS institutions, state laws relating to employee discharge and director responsibilities have been determined to not be preempted by federal law, as the Farm Credit Act does not "occupy the field" so as to preempt all state law.[109]

IV. The Price of Federal Preemption

The ability to use federal law to avoid state credit controls can be seen as part of a social contract between certain lenders and the Federal Government. For example, banks are granted the power to take deposits, are given access to limited governmental deposit insurance, and are granted certain limited federal preemption of state law, but they are required in return to meet significant community development goals. The credit needs of the communities in which each bank is located must be served by that institution, with regards to community development lending, investment, and services. Each bank is examined annually by a federal banking agency and their compliance with those requirements is rated. Poor compliance can preclude the bank from opening additional branch office locations and making other operational expansions, and can also result in the imposition and enforcement of corrective action requirements. In addition, interested parties can object to proposed new branch offices or chartering of affiliated new banks, based on the community development record of the bank.[110] Significant expenditures may be required to address concerns raised in those objections.[111]

These community reinvestment obligations are not imposed on all lenders who enjoy limited federal preemption of state law. The federal goal of pro-

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106. *Id.* at 457-58.

107. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Shirley, 96 F.3d 1108, 1111-12 (8th Cir. 1996); Fed. Land Bank of St. Louis v. Wilson, 719 F.2d 1367, 1372 (8th Cir. 1983); Fed. Land Bank of St. Paul v. Bosch, 432 N.W.2d 855, 857-58 (N.D. 1988); Beatrice Prod. Credit Ass'n v. Vieselmeyer, 376 F. Supp. 1391, 1392 (D. Neb. 1973).

108. *See, e.g.*,Columbus Prod. Credit Ass'n v. Weeks, 561 N.E.2d 984, 987-88 (Ohio Ct. App. 1988).

109. *See* Bishop v. Fed. Intermediate Credit Bank, 908 F.2d 658, 660 (10th Cir. 1990); Fed. Land Bank v. Fed. Intermediate Credit Bank, 727 F. Supp. 1055, 1060 (S.D. Miss. 1989); State *ex rel*. Farm Credit Bank of Spokane v. Dist. Court, 881 P.2d 594, 604-05 (Mont. 1994).

110. *See* 12 C.F.R. §§ 25, 228, 345, 563e, *implementing* 12 U.S.C. §§ 2901-2907 (2000).

111. Comment of Consumer Bankers of America to Comment Request in 64 Fed. Reg. 29,083 (May 28, 1999) (on file with author).

moting home ownership is the reason behind the grant of federal preemption to lenders making certain types of housing loans, and no attendant community reinvestment obligation is imposed.

The federal Farm Credit System institutions are also exempt from those community development obligations,[112] despite the higher poverty rates and more entrenched poverty in rural areas.[113] The obligations imposed on those institutions by federal law, such as the requirement that their interest rates not be below competitive market rates for similar loans made by private lenders,[114] cannot be enforced by objecting private citizens (and competitors), as the courts have ruled that the private citizens have no standing to enforce those federal laws.[115] Such rights are given only to the Farm Credit Administration.[116] Farm Credit System lenders and interest earned by investors who fund them are also exempt from most state and some federal taxes[117] which are imposed on competing private lenders. The tax exemptions for FCS lenders, coupled with the de facto guarantee of the debt of those institutions by the Federal Government,[118] give the FCS lenders a significant federal subsidy.[119] This subsidy and other federal payments

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112. *Hearing on Farm Credit Administration's National Charter Initiative Before the House Committee on Banking and Financial Services,* 106th Cong. 54-57 (2000) (statement of David Torpey, Independent Community Bankers Association).

113. *See generally* Christopher Holden, *Rural Poverty: Treading Water as the Economy Booms*, RURAL VOICES, Winter 2000-2001, at 15; Leslie Whitener et al., *Reforming Welfare: Implications for Rural America,* RURAL AMERICA, Fall 2001, at 2.

114. *See* 12 U.S.C. § 2001(c) (2000).

115. Selland v. United States, 966 F.2d 346, 347 (8th Cir. 1992); Indep. Bankers Ass'n of Am. v. Nat'l Credit Union Admin., 936 F. Supp. 605, 611-12 (N.D. Wis. 1996). *But see* James W. Bowen, *Farm Credit: Is There a Private Right of Action Under the Agricultural Credit Act of 1987?,* 43 OKLA. L. REV. 723 (1990) (examining a farmer-borrower's right to sue to enforce the Agricultural Credit Act of 1987).

116. *Indep. Bankers Ass'n of Am.,* 936 F. Supp. at 612-613.

117. In 1987, this subsidy was estimated to be $350 million. Bert Ely, *FCS Breaks Totaled $430 Million in 1997*, FARM CREDIT WATCH, Sept. 1998 (on file with author).

118. The Agricultural Credit Act of 1987 authorized up to $4 billion in government guaranteed 15-year bonds to save a Farm Credit System then in serious financial difficulty. *See* 12 U.S.C. § 2278b-6(a) (2000).

119. *See The Farm Credit Administration's Proposed Rule Providing for the Issuance of National Charters for the Farm Credit System: Hearing Before the House Comm. on Agric.,* 107th Cong. 44 (2001) (statement of Philip Burns, representing the American Bankers Association), *available at* http://commdocs.house.gov/committees/ag/hag1073.000/hag1073_0.htm (estimating the value of this annual subsidy at $1 billion); ECON. RESEARCH SERV., *supra* note 28, at 27 (estimating the cost advantage of Farm Credit System lenders over private lenders at 100 basis points (1%)); AM. BANKERS ASS'N, POSITIONING AGRICULTURE AND RURAL AMERICA FOR THE 21ST CENTURY 12 (1999) (estimating the cost at 150 basis points (1.5%), equaling an annual subsidy of approximately $700 million).

to farmers reflect the national policy of making more credit and income available to farmers than the free market would otherwise provide. This is similar to the federal support of owner-occupied housing, which also uses the combination of debt guarantees, federal preemption grants to lenders, transfer payments, and tax exemptions to increase the percentage of citizens who own their own homes—above the level that would occur in a free market.[120]

V. THE SCOPE OF FEDERAL PREEMPTION

About seventy-five percent of all farm operator debt is subject to some federal preemption of state law limits.[121] The scope of the current federal preemption granted to those agricultural/rural lenders can be summarized in the following table:[122]

120. *See generally* National Housing Act, 12 U.S.C. §§ 1701-1750g (2000).

121. STAM ET AL., *supra* note 72, at 7.

122. *See* Robert A. Cook & Sharon Johnson Bangert, *Federal Preemptions of State Usury Laws in Consumer Credit Transactions*, MD. B. J., Jan.-Feb. 2001 at 34; Langer, *supra* note 27.

State requirement or limit	**National Banks**	**State banks and loan companies with FDIC insurance**	**Farm Credit System**	**Federal Savings Banks (“Thrifts”)**	**Other lenders**
Interest rate ceilings	Can charge rates authorized for “most favored lender” (“MFL”), of state where located.[123]	Can charge MFL rates of state where loan is “made.”[124] Also possibly subject to state “opt-out.”[125]	Can charge any rate set by the lender’s board of directors.[126]	Can charge MFL rates of state where located.[127]	Can charge any rate on certain first mortgage and manufactured housing (“MH”) loans.

123. *See* 12 U.S.C. § 85 (2000); Marquette Nat’l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299, 308 (1978).

124. 12 U.S.C. § 1831d(a) (2000); Federal Deposit Insurance Corporation, 63 Fed. Reg. 27,282 (May 18, 1998); *Relationship of State Usury Preemption Laws*, [1988-1989 Transfer Binder] Fed. Banking L. Rep (CCH) ¶ 81,110, at 55,234 (June 29, 1988). *See also* VanderWeyst v. First State Bank, 425 N.W.2d 803, 805 (Minn. 1988).

125. *See generally Interest Rate on Loans to Customers Residing in States that Have Rejected the Federal Preemption Provision*, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,013, at 55,115 (Oct. 20, 1983).

126. 12 U.S.C. §§ 2016, 2075(c), 2131 (2000) (stating that Farm Credit Banks and Production Credit Associations can make loans at any rate authorized by their Board of Directors, regardless of state limits); *see also* Fed. Land Bank v. Heiser, 36 Pa. D. & C.3d 115, 118, 1985 WL 5454 (Ct. Com. Pl. Cumberland County 1985) (holding interest after judgment on FSC loans may be limited by state law).

127. 12 C.F.R. § 560.110(a) (2002); *see also* Cappalli v. Nordstrom F.S.B., 155 F. Supp. 2d 339, 343 (E.D. Pa. 2001).

State requirement or limit	**National Banks**	**State banks and loan companies with FDIC insurance**	**Farm Credit System**	**Federal Savings Banks (“Thrifts”)**	**Other lenders**
Late charges limit	Can take MFL charge of state where located.[128]	Can take MFL charge of state where loan is made.[129] Also possibly subject to state “opt-out.”[130]	No express preemption.	Can take MFL charge of state where located.[131]	No preemption. MH loans must also comply with additional federal limits.
Bad check fee limit	Can take MFL charge of state where located.	No express preemption.[132]	No express preemption.	Can take MFL charge of state where located.[133]	No preemption.

128. 12 C.F.R. § 7.4001(a) (2002); Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 747 (1996).

129. Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 829 (1st Cir. 1992).

130. *Interest Rate on Loans to Customers Residing in States that Have Rejected the Federal Preemption Provision*, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,013, at 55,115 (Oct. 20, 1983).

131. 12 C.F.R. § 560.110(a) (2002).

132. *Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 Authorizes State-Chartered FDIC-Insured Banks to Export the Same Fees and Charges on Interstate Loans that National Banks May Charge Under 12 U.S.C. § 85*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534, at 55,731 (July 8, 1992).

133. 12 C.F.R. § 560.110(a) (2002).

State requirement or limit	National Banks	State banks and loan companies with FDIC insurance	Farm Credit System	Federal Savings Banks ("Thrifts")	Other lenders
Limits on other loan-related fees (e.g., initial charges, prepayment penalties, servicing fees, and overlimit fees).	Can take prepayment fees,[134] annual fees and overlimit fees[135] of MFL of state where located, but not charges reimbursing lender costs of making the loan.[136]	Can take charges material to the determination of interest authorized by the state where located.[137]	No express preemption.	Can take MFL charge of state where located for overlimit, cash advance, and annual fees.[138]	No preemption.

134. *Prepayment Fees Levied in Conjunction with Home Equity Loans Constituted "Interest" for Purposes of 12 U.S.C. § 85,* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,109, at 90,245 (Aug. 21, 1996).

135. *Certain Credit Card Charges Assessed by a National Bank at a Rate Which Complies with the Governing State Law Constitute "Interest,"*[1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618, at 71,836, 71,838 (Feb. 17, 1995).

136. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 743 (1996).

137. *See FDIA Section 27 Preempts State Common Law Restrictions on Credit Card Loans*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,635, at 55,838 (July 12, 1993).

138. 12 C.F.R. § 560.110(a) (2002).

State requirement or limit	**National Banks**	**State banks and loan companies with FDIC insurance**	**Farm Credit System**	**Federal Savings Banks ("Thrifts")**	**Other lenders**
Limits on security interests in collateral	Subject only to restrictions to MFL in state where located.[139]	No express preemption.	No provision for Farm Credit Banks. Production Credit Associations can take loan security as authorized by their Board of Directors.[140]	Subject only to restrictions on MFL in state where located.	No preemption.
Requirements and limits on the terms of credit (e.g. amortization, deferral and capitalization of interest, adjustments to the interest rate, balance, payments due, or term to maturity of the loan)	Can use loan terms allowed to MFL in state where located.[141]	No express preemption.	Terms and conditions set by the lender's Board of Directors.[142]	Preempted.	No preemption.

139. Att'y Gen. of Md. v. Equitable Trust Co., 450 A.2d 1273, 1287 (Md. 1982).

140. 12 U.S.C. §§ 2016(a), 2075(c)(1) (2000).

141. *Equitable Trust Co.*, 450 A.2d at 1287.

142. 12 U.S.C. §§ 2016, 2075(c) (2000). Farm Credit Banks and Production Credit Associations can make loans under the terms and conditions authorized by their Board of Directors, regardless of state limits.

State requirement or limit	**National Banks**	**State banks and loan companies with FDIC insurance**	**Farm Credit System**	**Federal Savings Banks ("Thrifts")**	**Other lenders**
State licensing, registration, filings and reports	Yes[143]	Unclear[144]	No express preemption.[145]	Preempted.[146]	No preemption.
Access to and use of credit reports	Yes[147]	No express preemption.	No express preemption.	Preempted.[148]	No preemption.

143. *See generally* 12 U.S.C. § 484 (2000); Ass'n of Banks in Ins., Inc. v. Duryee, 55 F. Supp. 2d 799, 801 (S.D. Ohio 1999); 12 C.F.R. § 7.4000 (2002); Preemption Determination, 66 Fed. Reg. 28,593 (Office of the Comptroller of the Currency, May 23, 2001); *Statutory Provisions from Three States that Purport to Impose Requirements on Lenders (Nat'l Banks) that Issue Credit Cards to Customers in those States*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,454 (Jan. 15, 1993).

144. *See, e.g.*, Settlement Memorandum, Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., No. 029-17028 (Dist. Court Polk County, Iowa 1988; *dismissed* per stipulation of June 8, 1990); United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa 1988; *dismissed* per stipulation June 8, 1990); Complaint of Vermont Attorney General, Vermont v. Skywave, Inc., Dow Elec., Inc. and Am. Gen. Fin. Ctr., No. 383-97 CNC (Sup. Ct. Chittendon County, Vt. filed April 1997). (Court documents on file with author)

145. *See* WIS. STAT. ANN. § 421.203 (West 1998) (explaining that Wisconsin has asserted the power to license or regulate Farm Credit System institutions); *see also* S.B. 585, 77th Leg. (Tex. 2001), *available at* http://www.capitol.state.tx.us (exempting Farm Credit Institutions from the Mortgage Broker License Act). *But see* Farm Credit Bank v. Schwarm, 622 N.E.2d 97, 100 (Ill. Ct. App. 1993); *see also* Kolb v. Naylor, 658 F. Supp. 520, 526 (N.D. Iowa 1987) (holding that a state certificate of authority to do business is not required for FCS institutions).

146. *Maryland Laws on Licensing, Activities of Operating Subsidiaries Preempted*, [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,307, at 94,224 (July 29, 1999); *Preemption of Virgin Islands Regulation of Federal Savings Associations*, [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,253, at 94,207 (Sept. 2, 1997); *As Applied to Federal Savings Associations, a Provision of State Law Purporting to Require All Financial Institutions that Accept Deposits in the State to File Detailed Annual Reports Was Preempted by the Home Owners' Loan Act*, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,019, at 94,261 (Jan. 18, 1996); *Federal Preemption of State Restrictions of Foreign Financial Institutions*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,712, at 62,127 (Apr. 13, 1993); *Federal Preemption of State Law Regulating Credit Cards and Most Favored Lender Status*, [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,592, at 61,849 (Apr. 2, 1992).

147. 12 C.F.R. § 7.4002 (2002).

148. *A State Law Purporting to Give Consumers the Right to Receive a Copy of Their Credit Reports Was Preempted by Federal Law with Regard to Federal Savings Association*, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,855, at 62,416 (Oct. 18, 1994).

State requirement or limit	**National Banks**	**State banks and loan companies with FDIC insurance**	**Farm Credit System**	**Federal Savings Banks ("Thrifts")**	**Other lenders**
Disclosure and advertising	No[149]	No express preemption.	No express preemption.	Preempted.[150]	No preemption
Due-on-sale clauses	No express preemption.	No express preemption.	No express preemption.	Preempted.[151]	No preemption.

VI. THE FUTURE OF FEDERAL PREEMPTION

The inherent tension created by the de facto federal deregulation of interstate credit delivery and the perceived state needs to protect its citizens from overreaching lenders will not soon subside. State usury laws, seen as reflecting a fundamental public policy of the state,[152] are overridden by the powers of a federal banking chartering/deposit insurance system created to prevent state discrimination against those federally chartered or insured banks.[153] This means that pressure on Congress to curtail the preemptive power of the federal banking agencies[154] and continued attempts by state courts to creatively limit that preemption[155] will continue. But the irreversible trend is the evolution of nationwide and

149. *Applicability of State Interest Laws on National Bank First Lien, Non-Purchase Money Variable-Rate Mortgage Loan*, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,503, at 77,785 (March 20, 1985).

150. *Federal Law Did Not Preempt a State Law Prohibition on Fraudulent and Deceptive Loan Practices, But Preempted State Provisions Pertaining to Disclosure and Loan-Related Charges*, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,200, at 94,225 (Dec. 24, 1996); *Disclosure Requirements for Reverse Annuity Mortgages*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,629, at 61,962 (July 6, 1992); *see* American Bankers Association v. Lockyer, No. Civ. S-02-1138 FCD JFM (E.D. Cal. Dec. 2002), *available at* http://www.caed.uscourts.gov/caed/DOCUMENTS/Opinions/Damrell/Bankers_v_Lockyer2.pdf (last visited Mar. 27, 2003).

151. 12 C.F.R. § 591.5 (2002).

152. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 (Tex. 1990).

153. *See* Pinchot v. Charter One Bank, F.S.B., No. CV-389250, 2002 WL 568400, at *3 (Ohio Ct. App. Apr. 11, 2002) (stating that the Office of Thrift Supervision preempts state law affecting federal savings associations).

154. *See* Riegel-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 43(a) (1994) (requiring public notice and comment before certain state law preemption opinions can be issued by federal banking agencies).

155. *See* Konynenbelt v. Flagstar Bank, 617 N.W.2d 706, 710 (Mich. Ct. App. 2000); *Pinchot*, 2002 WL 568400, at *2.

global creditors displacing previously locally based lenders, and those national and multinational lenders need preemption of state law to maintain and improve operating efficiencies and to further promote the free flow of capital.

For agricultural lending, the continued support for the Farm Credit System national charter initiative, which will allow certain member institutions to lend nationwide if adopted,[156] will demand increased operating efficiencies from competing private lenders. With a higher borrowing cost than the AAA rated government sponsored enterprises,[157] a higher relative tax burden,[158] and expensive community reinvestment obligations, bank agricultural lenders will demand further relief from piecemeal state regulation and a more level playing field on which to compete with the Farm Credit System lenders. This may be in the form of the creation of greater operating efficiencies through preemption of state agricultural loan mediation programs and other consumer protection laws. It could also include statutorily mandated Farm Credit Administration regulatory enforcement, disclosure of the competitor rate surveys on which Farm Credit System lenders base their rates, or allowing private enforcement of the current requirement that Farm Credit System institutions not provide credit at rates below that offered by competing private lenders.[159]

156. *See* Loan Policies and Operations; Participations, 65 Fed. Reg. 24,101, 24,101 (Apr. 25, 2000) (to be codified at 12 C.F.R. pt. 614); *see also* Notice and Request for Comment, 65 Fed. Reg. 45,066, 45,067 (July 20, 2000).

157. Even after the Farm Credit System reported losses of $4.6 billion in 1985 and 1986, its securities retained the highest AAA rating, as investors correctly determined that the federal government would not allow the Farm Credit System to fail and would, if necessary, pay its debts. The value of the debt funding cost advantage over private lenders has been estimated at 50 to 80 basis points. In 1987, a $4 billion line of credit was provided to the Farm Credit System by the United States Government and $1.2 billion of that was used by those lenders. *See* ROBERT N. COLLENDER & AUDRAE ERICKSON, ECON. RESEARCH SERV., USDA, FARM CREDIT SYSTEM SAFETY AND SOUNDNESS 2-4 (1996).

158. The reduced taxation of exempt Farm Credit System Institutions has an estimated value of 50 to 80 basis points. ECON. RESEARCH SERV., *supra* note 28, at 27.

159. Proposals include requiring FCS Institutions to maintain a public file documenting their compliance with this requirement, similar to the Community Reinvestment Act compliance public file requirement applicable to commercial banks, required public disclosure of FCA examinations of FCS institution's compliance with this requirement and a periodic third party report on compliance with this requirement, similar to the Federal Reserve Board and General Accounting Office reports that are periodically required.