

“Responsible Banking”—Or Irresponsible Legislating?

By David L. Glass

Introduction

In a strongly worded 71 page opinion, on August 7, 2015 Judge Katherine Polk Failla of the United States District Court for the Southern District of New York struck down New York City Local Law 38 of 2012, the so-called “Responsible Banking Act” (“RBA”), holding that it was preempted by both federal and New York State law regulating the business of banking.¹ The RBA sought to compel those banks that serve as depositories of City funds to provide granular and confidential financial information, literally on a neighborhood by neighborhood basis, aimed at determining whether they were meeting certain specified political objectives in areas such as lending to small business and modifying mortgages in lieu of foreclosure. The law called for, among other things, an annual report that would identify banks by name, presumably with the intent to “shame” the miscreants whose definition of “responsible banking”—driven by pervasive federal and State regulation—differed from that of local politicians. And it encouraged, but ostensibly did not require, the City to take this information into account in selecting the banks in which it would deposit its funds (“Deposit Banks”).

In enacting the law, the New York City Council (the “City Council”) contended that the RBA was no more than an exercise of the City’s “proprietary” authority to set the terms for contracts with private parties. Then-Mayor Michael Bloomberg and his administration strongly disagreed. The Mayor saw the law as being regulatory rather than proprietary in intent, and opposed it both because the City lacked the resources and expertise to be a bank regulator, and because the legislation likely was preempted under both federal and state law—not to mention that the City’s power to direct in which banks it deposits its funds has always been aimed at ensuring that the City’s funds are safe and that it gets the best terms from its banks, not at furthering local political objectives. The New York State Department of Financial Services (“DFS”) also opposed the legislation, on the grounds that it interfered and conflicted with the DFS’s authority to regulate the State’s banks. But the City Council went forward, overwhelmingly enacting the RBA and then reenacting it over the Mayor’s veto.²

The New York Bankers Association (“NYBA”), the primary trade group for banking institutions in the State of New York, initially brought suit in federal district court for the Southern District of New York in October of 2013; however, at the time the Bloomberg administration was refusing to implement the law, by the simple expedient of declining to appoint members of the Community Investment Advisory Board (“CIAB”) created thereunder.³ The court held, therefore, that the NYBA lacked standing

to sue since none of its members had, in fact, sustained injury.⁴ But the election of new Mayor Bill de Blasio in November 2013 jump-started the law, as the new Mayor quickly moved to implement it. In May of 2015, with the deadline looming for Deposit Banks, and would-be Deposit Banks, to comply, the NYBA again sued, and the parties cross-moved for summary judgment. Judge Failla’s decision, rendered with remarkable rapidity,⁵ makes clear that the RBA is void in its entirety, because it is preempted by both federal and State law as an impermissible attempt to regulate the banking business. The City was granted 30 days to file an appeal, but made no attempt to do so.

Thus came to a close the latest attempt by the City Council to intrude itself into the bank regulation field, notwithstanding the already pervasive regulation of banks by four different federal regulators—the Federal Deposit Insurance Corporation (“FDIC”), the Board of Governors of the Federal Reserve System (the “Fed”), the Office of the Comptroller of the Currency (“OCC”), and the Consumer Financial Protection Bureau (“CFPB”), created in 2010 under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)⁶—as well as the DFS, which has plenary authority under State law to regulate State-chartered banking institutions. The intent of the laws creating these agencies is clear and unambiguous: they are charged with regulating the business of banking, and to do so in a way that balances safety and soundness considerations with the needs of individual customers and the national economy as a whole, free of interference by localities and their parochial concerns.

This article begins by reviewing the provisions of the RBA, why they were enacted and what they were intended to achieve, and how they were ostensibly crafted to avoid the very preemption issues that ultimately defeated the law. The article next reviews the relevant provisions of federal and State law and shows why, despite the City Council’s efforts to cast the banks’ compliance with the RBA as “voluntary,” its provisions inevitably and fundamentally clash with the structure and intent of both federal and State regulation of the banking industry. Finally, the author shares his thoughts as to why, beyond the legal issues it presents, local legislation of this type is fundamentally a bad idea, one that can only redound to the detriment of the very people it purports to help.

Enactment of the RBA

The RBA was enacted against the backdrop of the global financial crisis of 2008-2009. A principal cause of the crisis, as has been well documented, was the indiscriminate making of subprime residential mortgage loans,

which were then packaged into securitization pools and sold to institutional investors, thereby separating risk from reward and giving lenders no incentive to exercise traditional credit judgment.⁷ A predictable result was to create a “bubble” in housing, financed by cheap and plentiful credit, and to saddle some lower and middle income consumers with levels of debt that proved unmanageable. In turn, this led to calls for lenders to undertake to modify or restructure loans to help borrowers avoid forfeiting their homes in foreclosure.

Thus, a prime focus of the early discussions leading to the RBA was to determine which banks were, and were not, achieving the objective of modifying residential mortgage loans to assist distressed borrowers.⁸ Additional objectives were to promote further lending to small business, and investment in local community development projects.⁹ Another objective—not expressly stated in the legislation, but clearly apparent in the debate leading up to it—was to extract tit-for-tat from the banking industry, which was perceived (incorrectly) as having been “bailed out” by ordinary people during the crisis.

As one of the law’s two principal sponsors put it, “[j]ust as we bailed out the banks through public dollars and now we can’t even find out from these banks what they’re doing in our communities, when they used our tax dollars to become whole.”¹⁰ In reality, the funds invested in a handful of the largest banks and some community banks scattered across the country—all but a few of which were not Deposit Banks—under the Troubled Asset Relief Program (TARP) enacted by the Congress during the financial crisis were repaid in full, at a substantial profit to the Treasury.¹¹

The RBA was not the City Council’s first foray into designating itself a bank regulator. In 2002 the Council enacted Local Law 36, a “predatory lending” law, again over the objections, and ultimately the veto, of Mayor Bloomberg. The law purported to prohibit the City from doing business with, including making deposits in, banks engaged in “predatory lending,” defined to mean residential mortgage loans priced at an interest rate of more than 6 percent over the prime rate, or with fees totaling more than four percent of the loan amount. These standards were stricter than—and thus inconsistent with—those contained in the New York State predatory lending law that was enacted the same year.¹²

In 2003 Mayor Bloomberg took the extraordinary step of suing the City Council in State Supreme Court, seeking to overturn Local Law 36. The Mayor’s suit contended that the law’s requirements would drive banks to refuse to do business with the City, causing “irreparable harm from the loss of potential low bidders” and more generally “cause chaos and confusion in the area of municipal contracts, bond issues, and deposits of city funds.”¹³ In 2004 the Mayor prevailed, as Judge Michael Stallman ruled that Local Law 36 conflicted with both federal and

state law and was preempted in its entirety.¹⁴ In so ruling, Judge Stallman noted among other things that, by specifying matters such as permissible interest rates and fees, the law amounted to an attempt to regulate the banking business, in violation of the plenary authority of federal and State regulators to regulate such matters.

Though bloodied, the City Council remained unbowed. In crafting the RBA, the one lesson it apparently took away from the Local Law 36 debacle was to attempt to structure the new legislation in such a way as to make compliance with its requirements appear voluntary in nature, thereby presumably negating the inference that the law was regulatory. Thus, the law provided that banks were not obligated to furnish the required information (albeit that banks that chose not to comply would be barred from serving as Deposit Banks), but also that the City Banking Commission (consisting of the Mayor, the City Comptroller, and the City Commissioner of Finance), which under the City Charter has the sole authority to decide in which banks to deposit the City’s funds, was not obligated to take this information into account in so deciding. As Judge Failla was to recognize in her decision, these attempts to make the RBA appear to be something other than regulatory were disingenuous at best.

What the Law Provided

The RBA established an eight-member Community Investment Advisory Board (“CIAB”), whose primary function was to collect data, at the census-tract level, from the 21 Deposit Banks currently eligible to receive some of the City’s approximately \$150 billion in annual deposits. As noted, the three-person Banking Commission, established in the nineteenth century, has the sole authority to direct the deposits of City funds, by approving banks as NYC Designated Banks, which then are the only banks authorized to receive City deposits.¹⁵ The CIAB, by contrast, would have eight members—the three members of the Banking Commission (the Mayor and Comptroller could each appoint a designee in their stead), along with the Council Speaker or her designee; the Commissioner of the Department of Housing Preservation and Development; a member of a community-based organization, designated by the Speaker, whose “principal purpose is community and/or economic development, or consumer protection”; a representative, also designated by the Speaker, of an organization or association that represents small business; and finally, a lone representative of the City banking industry designated by the Mayor.¹⁶

Apparently mindful that the “predatory lending” law had been struck down as an impermissible attempt to regulate the banking industry, the legislation was careful to couch the function of the CIAB as being “advisory,” since under the City charter only the Banking Commission can actually decide where to deposit the City’s funds. In exercising this authority, the Banking Commission’s

“fundamental purpose...is to limit City deposits to institutions that are best equipped to secure taxpayer money while offering competitive pricing and services.”¹⁷ But the structure and language of the RBA made clear that, in “advising” the Commission (all three of whose members, of course, also were to sit on the CIAB) on the discharge of its duties, the CIAB was intended to entirely disregard what has always been the Commission’s “fundamental purpose”—to assure the City’s funds are safe, and to obtain the most favorable terms for depositing its funds—in favor of pressuring the Commission to make decisions based upon completely unrelated criteria.

Thus, the CIAB was assigned three primary functions. First, it was to complete a written assessment of the “credit, financial and banking services needs throughout the City with a particular emphasis on low and moderate income individuals and communities” (the “Needs Assessment”); second, it was to use the information gathered for the Needs Assessment to “establish benchmarks, best practices, and recommendations for meeting the identified needs”; and third, it was mandated to compile and publish an annual report of its findings, which among other things would specifically identify the banks that submitted information and how well they ostensibly measured up to the law’s criteria.¹⁸

In developing the Needs Assessment, the CIAB was to hold hearings in each borough of the City and obtain comments from the public. Most important, it was to collect, from each Deposit Bank, information—at the census tract level—relating to the bank’s efforts to i) address the “key credit and financial services needs of small businesses”; ii) develop and offer financial products and services “most needed by low and moderate income individuals and communities” as well as to provide physical branch locations in these communities; iii) provide funding for “affordable housing and economic development” in these communities; iv) address “serious material and health and safety deficiencies” in foreclosed and bank-owned properties; v) “conduct consumer outreach, settlement conferences, and similar actions related to mortgage assistance and foreclosure prevention”; vi) “partner in the community development efforts of the city”; vii) “positively impact” the City through, among other things, “philanthropic work and charitable giving”; and viii) “plan for and articulate how the bank will respond to the credit, financial and banking service needs” identified in the Needs Assessment. This information was to be published on the Department of Finance’s website, and the RBA mandated that such publication “specifically identify any Deposit Bank’s failure to provide information....”¹⁹

The Annual Report required by the RBA was to evaluate and report on the performance of each Deposit Bank relative to the “benchmarks and best practices” developed by the CIAB; identify areas of improvement from past evaluations; specifically identify Deposit Banks that

failed to provide the information demanded; summarize written comments received; and summarize in tabular form the data collected from the Deposit Banks.²⁰ Perhaps recognizing its own overreach in demanding information from the banks that exceeds what they are required by law to furnish to their federal and state regulators, the RBA grudgingly allowed that information deemed confidential or proprietary by the bank need not be disclosed. And finally, in a manifest effort to avoid the pitfall that doomed the “predatory lending” law eight years earlier, the RBA provided that the Banking Commission “may”—not “must” or “shall”—consider the CIAB report in determining in which Deposit Banks to place City funds.

Preemption Under Federal Law

The doctrine of preemption derives from the Supremacy Clause of the United States Constitution, which provides that federal law shall be supreme over that of the states (and, by extension, local governments within states).²¹ In general, preemption will be found where i) Congress expressly preempts state law; ii) federal law conflicts with the state law in question; or iii) Congress has legislated so comprehensively on a subject as to occupy an entire field of regulation, leaving no room for state law.²²

The United States has a “dual” banking system, whereby a bank can be chartered by either the federal government or the state in which it is located. The OCC charters national banks—which today include the great majority of the large banks that operate interstate—and federal thrift institutions, including federal savings and loan associations and federal savings banks (collectively “federal thrifts”), and is the exclusive regulator of the institutions it charters. In addition to being chartered under and subject to state law, because they take deposits from the public and are insured by the FDIC, state banks and thrifts are pervasively regulated at the federal level as well.

Thus, federal law does not “occupy the field” to the extent of preempting state laws regulating banking. To the contrary, for much of the nation’s history, banking was a state-regulated function; while establishing the national bank system, the NBA did not purport to interfere with the parallel authority of the states to charter and regulate banks.

Nonetheless, the RBA raised significant federal preemption issues in two specific areas: first, with respect to national banks and federal thrifts, whether it intruded on the exclusive “visitorial” authority of the OCC under the National Bank Act (“NBA”)²³ and the Home Owners Loan Act (“HOLA”),²⁴ respectively, which encompasses obtaining information from them as well as on-premises inspection; and second, with respect to all FDIC-insured banks and thrifts, whether federal or state-chartered,

whether it conflicted with the federal Community Reinvestment Act (“CRA”), under which all FDIC-insured institutions are mandated to serve their local communities according to criteria specified by their federal regulators.

Preemption Under the NBA and HOLA

The NBA²⁵ was the brainchild of President Lincoln’s Treasury Secretary, Salmon P. Chase, and was enacted at the height of the Civil War. At the time, circulating currency consisted of notes issued by state-chartered banks, which varied widely in their value and the degree of acceptance they enjoyed as money. By creating nationally chartered banks subject to more stringent standards and regulation, Chase and Lincoln sought to establish a more stable currency and to give the federal government a means to finance the war effort.²⁶ The NBA empowered the OCC to charter national banks within states regardless of whether the states consented. Accordingly, Lincoln and Chase recognized the importance of using the power of Congress to preempt state laws, under the Constitution’s Supremacy Clause, to prevent the states (and by extension, local governments) from interfering in any way with the operation of the new national banks or the way they were regulated by the OCC.

Thus, the NBA expressly provides that “no national bank shall be subject to any visitorial powers except as authorized by Federal law...”²⁷ As the agency charged with interpreting and enforcing the NBA, the OCC has defined “visitorial powers” to include “inspecting or requiring the production of books or records of national banks...examination of a bank...regulation and supervision of activities authorized or permitted pursuant to federal banking law...[and] enforcing compliance with any applicable federal or state laws concerning those activities.”²⁸ The Dodd-Frank Act of 2010, in transferring authority to regulate federal thrifts to the OCC from the Office of Thrift Supervision (which was abolished under Dodd-Frank), expressly provided that the NBA provisions regarding visitorial authority would apply to federal thrifts to the same extent as if they were national banks.²⁹

Against this backdrop, the NYBA argued that “the direct conflict between [the RBA] and the NBA could not be clearer.”³⁰ The Needs Assessment and the Annual Report both specifically provide for an “examination” of the Deposit Banks, which include national banks. More generally, the RBA calls for the CIAB to “require the production of books and records,” and mandates that Deposit Banks “plan for and articulate how they will respond to the credit, banking and financial services needs” of City residents as determined by the CIAB.³¹ Thus, in the NYBA’s view the power of the CIAB to require national banks and federal thrifts to offer certain services, and to subjectively evaluate how they do so, amounts to impermissible “regulation and supervision of activities authorized or permitted pursuant to federal banking law.”³²

Two recent Supreme Court cases have dealt with state intrusion into the OCC’s exclusive “visitorial” and regulatory powers. In the first case, the Court held that a state could not inspect a mortgage lending subsidiary of a national bank, notwithstanding that the subsidiary was a corporation organized under state law, since it was engaged in activities authorized for the national bank by the OCC.³³ The Court’s decision was legislatively overruled by Congress in the Dodd-Frank Act—i.e., Congress clarified that the OCC’s exclusive “visitorial” powers over a bank do not extend to its non-bank subsidiary. But Congress left intact the OCC’s exclusive authority as applied to the bank itself. The RBA, of course, sought information directly from the bank.

In the second case, New York’s Attorney General sought to subpoena the records of a national bank to determine its compliance with state “fair lending” laws. The Court held, 5-4, that the subpoena was enforceable, notwithstanding the OCC’s exclusive “visitorial” powers. Writing for the majority Justice Scalia reasoned, in effect, that the buffer of requiring a judicial subpoena protected against the State’s unwarranted intrusion into the affairs of a national bank.³⁴ The RBA, of course, purports to authorize the CIAB to demand this information directly, not through a judicial subpoena.

More generally, as the NYBA argued, it is not possible to interpret the RBA in a way that avoids conflict with the NBA and implementing OCC regulations.³⁵ The NBA and the OCC regulations expressly authorize, and govern, powers such as branching, deposit-taking, residential mortgage lending, and others directly implicated by the RBA. Furthermore, many of these powers are expressly authorized without regard to state (and by extension, local) law. Thus, in mandating that banks “develop and offer financial services and products that are most needed by low and moderate income individuals and communities throughout the city and provide physical branches,” the RBA intrudes directly on the exclusive power of the OCC to determine how national banks and federal thrifts offer their services.³⁶

Preemption Under the Community Reinvestment Act

Enacted in 1977, the CRA³⁷ was aimed at combatting “redlining”—the process by which banks allegedly discriminate against minority and lower income areas by drawing a “red line” around such areas on a map and not making loans within the redlined areas.³⁸ Toward this end, the law generally mandates that a bank serve the entire community from which it derives its deposits. CRA is thus tied to deposit-taking; lenders that are not insured by the FDIC and do not take deposits from the public, such as mortgage bankers, are not subject to the CRA. While aimed at encouraging banks to serve their communities, CRA does not require them to make any particular type of

loan, or to make loans that might jeopardize their financial stability. To the contrary, the CRA specifically provides that all CRA-related activities must be conducted in a way that is consistent with the safe and sound operation of the bank.

Each bank is subject to being examined for CRA compliance by its federal regulator—the OCC for national banks and federal thrifts, the Fed for State-chartered banks that are Fed members, and the FDIC for all other depository institutions insured by the FDIC. The exam results in one of four ratings—Outstanding, Satisfactory, Needs Improvement, or Substantial Noncompliance. In conducting the CRA examination, the regulator is instructed to “assess the institution’s record of meeting the credit needs of its entire community, including low and moderate-income neighborhoods, consistent with [its] safe and sound operation.”³⁹ Unlike traditional bank examinations, which are focused on safety and soundness and by law may not be publicly disclosed (in order to guard against triggering a run on a bank that has an adverse rating),⁴⁰ the results of CRA examinations are made public.⁴¹

CRA mandates that the regulators take the exam ratings into account “in [their] evaluation of an application for a deposit facility.”⁴² In practice, banks that are not rated Outstanding or Satisfactory generally will be barred from opening branches or engaging in other expansionary activities such as mergers. Furthermore, their parent holding company (if any) will be barred from engaging in a broad range of financial activities that would otherwise be allowed for qualifying holding companies under the Gramm-Leach-Bliley Act of 1999.⁴³

The CRA imposes a “continuing and affirmative obligation” on every bank to “help meet the credit needs of the local communities.”⁴⁴ It thus has an “inherently local focus” that regulators must consider in assessing a bank’s CRA performance. Members of local communities, including local public officials, can and do submit their views regarding a bank’s CRA performance.⁴⁵

Thus, NYBA argued in effect that the RBA conflicts, and thus is preempted by, the CRA in three basic ways.⁴⁶ First, while CRA requires banks to develop information for their assessment area as a whole, RBA purports to require information at the census tract level. That this imposes a substantial burden well beyond the data banks are required to provide under CRA is apparent; New York City has some 2,168 census tracts, each of which covers a mere 90 acres and has about 3,000-4,000 people on average.⁴⁷ Second, by threatening to withhold business from banks deemed non-compliant, RBA introduces a penalty beyond those authorized by the Congress.⁴⁸ And third, by mandating disclosure of certain community investment activities beyond those required by CRA, the RBA violates the limitations imposed by Congress as to which activities of an FDIC-insured bank should be disclosed to

the public. In sum, therefore, the NYBA argued that RBA conflicts with Congress’ purpose under CRA, to achieve a “careful balance of disclosures and incentives” in promoting community investment activities by FDIC-insured banks.⁴⁹

Preemption Under State Law

In addition to being subject to federal regulation such as the CRA, banks and thrifts that are chartered under New York State law are subject to a comprehensive scheme of regulation by the DFS. The DFS has exclusive authority to issue State charters to those banks and thrifts located in New York that choose to operate under a State, rather than federal, charter. Because the statutory scheme for chartering and regulating banks is plenary, banks cannot be established under, and are not subject to, general state corporation laws such as the New York Business Corporation Law.⁵⁰ Similarly to the doctrine of federal preemption, New York courts have held local laws to be preempted where there is a direct conflict with State law, or where “the State has evidenced its intention to occupy the field.”⁵¹

Thus, the NYBA argued that the RBA was preempted under State law in two ways: first, because it directly conflicts with New York’s own CRA law, which largely mirrors the federal CRA (while applying, of course, only to State-chartered institutions)⁵²; and second, because New York Banking Law manifestly occupies the field of banking regulation as applied to State banks, in areas including branching, deposit-taking, mortgage lending, and others implicated by the RBA.⁵³

The Court Decides

Confronted by NYBA’s preemption arguments, the court recognized that the threshold issue was whether the RBA was in fact regulatory in nature, as NYBA argued, or rather, whether it was merely “proprietary,” as the City asserted. The court had little difficulty in concluding that it was regulatory.

The court began by noting that there are two key questions in determining whether any particular enactment is proprietary or regulatory:

First, does the challenged action essentially reflect the [City’s] own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?⁵⁴

Essentially the same analysis applies to state preemption of a local ordinance. Thus, in a recent case in which Mayor Bloomberg challenged yet another City Council ordinance (unrelated to banking), the New York Court of Appeals held that the ordinance was regulatory, rather than proprietary, given that the Council “[did] not seriously assert that the purpose and likely effect of the law was to make the City’s contracts cheaper or their performance more efficient.”⁵⁵

Still, the City asserted that the RBA nonetheless was not regulatory, in that it was intended to serve a “purely informational” purpose; the decision whether or not to award deposit business to a particular bank still resided with the independent Banking Commission; and none of its requirements were compulsory.⁵⁶ The court had no trouble making short shrift of these points.

First, on its face the RBA says its purpose is to assess “the credit, financial and banking services throughout the City with a particular emphasis on low and moderate income individuals and communities,” and the law sets forth only one purpose for this assessment: “it may be considered by the Banking Commission” in determining which banks to designate as Deposit Banks. “These aims,” said the court, “however commendable, evince a regulatory purpose.”⁵⁷

Second, the court dismissed the City’s “incantation of ‘transparency’ as an end in and of itself.” By applying its information requirement only to Deposit Banks, and not to all banks, it was evident that the “RBA places its premium on leverage to advance policy objectives rather than on information *qua* information. It is not lost on the Court that the RFIs [requests for information] were addressed to individuals responsible for maintaining each Deposit Bank’s depository status with the City, rather than individuals charged with gathering Federal CRA information.”⁵⁸

Third, the court found that the purpose of the RBA manifestly was not “proprietary”: “nowhere in the text of the RBA or the legislative history cited by the parties is there even a suggestion that the City’s role as proprietor drove this law.”⁵⁹ The Banking Commission’s function is to place the City’s funds with consideration to safety and to maximizing the City’s economic benefit. But the RBA says nothing about protecting the City’s money; and contrary to promoting the City’s economic benefit as proprietor, “the RBA will cost the City more than \$500,000 per year, but will yield the City—as banking customer—no discernable financial benefits.”⁶⁰

Finally, the court disposed of the City’s argument that the RBA was not regulatory because it did not compel the Banking Commission to choose Deposit Banks based on the CIAB’s findings, noting that “a legislature’s grant of discretion in the enforcement of laws is unremarkable; it is, in most circumstances, presumed.” Thus, if enforcement was required before a law could be deemed “regula-

tory” in nature, “even the Federal CRA would not qualify, because it does not *require* federal regulators to penalize banks for poor ratings...under [the City’s] theory local legislatures could immunize legislation that otherwise would be preempted simply by changing the words ‘shall’ and ‘must’ to ‘may’ (emphasis in original).”⁶¹

Why Localized Bank Regulation Is a Bad Idea

The bank robber Willie Sutton, when asked why he robbed banks, famously said “because that’s where the money is.” The RBA is just the latest example of “creeping Willie Sutton-ism” at the local legislature level. In 1993, as general counsel of the NYBA, the author was called upon to testify before the Suffolk County Legislature regarding a proposed local ATM safety ordinance, modeled on one recently adopted by New York City. The NYBA’s position was to support the legislation, but to request modification of a provision the NYBA’s members—most of which were, and are, smaller community banks—had determined would be costly to implement and would not enhance safety. The same modification had already been agreed to by the legislatures of Nassau and Westchester Counties in enacting similar ordinances. The author was asked by a member of the Suffolk legislature what the provision would cost. He replied that it would cost an estimated \$15,000 per branch location to install, apart from ongoing maintenance costs. The legislator replied, “Well, that doesn’t sound like much to me. Those banks have all the money in the world.”

The money banks “have,” of course, is not theirs. It is money entrusted to them by their depositors, and which the FDIC, backed as necessary by the American taxpayer, is obligated to repay if it is lost. This, of course, is why banks are so pervasively regulated at the federal and state level, and why local legislation that conflicts with that regulation in favor of pursuing a parochial political agenda is antithetical to the objectives of such regulation. It is astonishing that some legislators apparently do not, or choose not to, understand this. But it is evident that “creeping Willie Sutton-ism” was the motivation of at least some of the RBA’s proponents.

Thus, one Councilwoman spoke about making banks “give back to the community in regards to maybe home equity lines of credit, credit cards...you’ve got to start thinking about people coming back from incarceration... let’s get them credit cards of \$200 [and] make sure everyone gets their fair share”⁶²—as if responsible banking entails the giving of credit on the basis of someone’s sense of fairness, rather than on the basis of whether it can be repaid. Another Council member demanded that “we must address the locations of banks in my district.”⁶³ It is precisely because such parochial concerns come to the fore that banking regulation should not be conducted at the local level.

The Bloomberg administration, in opposing the RBA, nonetheless took pains to acknowledge that it was well intentioned.⁶⁴ While this no doubt was an effort at diplomacy, the author would respectfully disagree. It is too easy for politicians to hide behind their own purportedly good intentions in passing bad laws; as the saying goes, “The road to Hell is paved with good intentions.” The author does not believe it is “well-intentioned” for a local legislature to pass a law aimed at furthering parochial objectives that is manifestly in conflict with longstanding, and carefully thought out, federal and state legislation on the same subject. As Mayor Bloomberg’s Commissioner of Finance aptly noted in testifying against the RBA,

neither the Department of Finance nor any other City entity has the expertise, resources or legal authority to step into [a bank regulatory role]. This is not surprising since bank regulation should be and currently is a matter of primarily national interest and secondarily state interest. Interposing yet another level of regulation at a municipal level threatens not only the overarching federal scheme but practically places the City at a competitive disadvantage to retain private banking functions and the tax revenues and jobs that come with them.⁶⁵

Indeed, as the court observed, “a certain regulatory braggadocio permeates the legislative history of the RBA.”⁶⁶ The record is replete with examples of this. For instance, the court noted that City Council members expressed concern that federal and State regulatory regimes “did not go far enough in obtaining information or influencing bank conduct, thereby necessitating action by the City.”⁶⁷—in effect, arrogating to the City Council a presumptively greater knowledge of appropriate bank conduct than that of the federal and State agencies whose full-time job it is to regulate bank conduct.

Similarly, several Council members and their allies purported to have perfect knowledge of what constitutes “irresponsible” banking and how it should be remedied. Thus, the bill’s chief sponsor stated that “[t]o do nothing is [to] support irresponsible banking and we’ve seen too many examples of that in the past few years.”⁶⁸ A consultant hired by the CIAB to help implement the law stated that he would be gathering information from the Deposit Banks to establish “how they could do things differently and better (emphasis supplied).”⁶⁹ And a lobbyist for a community investment group testified that “it’s really important that banks are acting responsibly. We know what happens when they don’t.”⁷⁰

Again, the underlying assumption is that the federal and State regulators charged with enforcing the CRA cannot be trusted to ensure that banks live up to their community reinvestment responsibilities, so this function

must be taken over by the City Council. Actually, however, they have it backwards: recent history makes clear that the primary “irresponsibility” of the banking industry that led to the crisis was the indiscriminate making of loans to people who could ill afford them.

Conclusion

In the *NYBA* case, Judge Failla clearly and emphatically rejected the latest attempt by the City Council to regulate the banking business. In rejecting the Council’s flimsy attempt to preserve the law by claiming it was nothing more than an exercise of the City’s “proprietary” right to set the terms for its contracts with third parties, she held that the RBA is preempted in its entirety by both federal and State law as an unwarranted intrusion by a local government into banking regulation. As such, the decision serves notice on those municipalities that may be contemplating similar legislation that, at the least, it will have to be carefully and narrowly drawn to avoid having the effect of regulating how banks conduct their business, in order to withstand judicial scrutiny.

In this regard, it should be noted that New York City is not the first, or only, municipality to enact a “responsible banking” ordinance. Cleveland, Ohio has had one in place since 1991, and in more recent years has been followed by Philadelphia, San Jose, Seattle, Pittsburgh, Los Angeles, Portland (Oregon) and San Diego.⁷¹ It does not appear that any of these ordinances has been subject to legal challenge to date. The author has not reviewed these ordinances in depth and expresses no view as to whether any of them would withstand an attack based on preemption or otherwise. The San Diego ordinance, for example, appears to rely primarily on the bank’s federal CRA rating, coupled with some additional local data-gathering, and thus appears less intrusive—and less “regulatory”—than New York’s.

While the *NYBA* decision addressed itself primarily, and properly, to the preemption of the RBA under federal and State law, the author has argued that enactments of this type are troubling on a policy level as well. They rest upon the basic, and faulty, assumption that local politicians are better qualified than the banks themselves, their state and federal regulators, and the extensive body of federal and state law that governs them, to determine what constitutes the “responsible” investment by banks of the funds entrusted to them by their depositors and insured by the FDIC. And by seeking to penalize banks that do not toe the line, without regard to whether the desired behavior is consistent with the requirements of federal and state legislation, a law of this type can only undermine the objectives of bank regulation.

Furthermore, the RBA—like other City Council efforts before it—manifested a fundamental hostility to the banking industry and its critical role in meeting the financial needs of society—a hostility that is particularly damag-

ing here, given the historic role of New York City as the financial capital of the world. To cite one example, the NYBA recently fought, but failed to defeat, another City Council enactment that restricts the size of storefront banks can occupy, in the trendy upper West Side neighborhood of the enactment's chief sponsor, to an unworkable 25 feet—while allowing all other businesses to have more footage.⁷² The result, and apparent intent, will be to preclude banks from opening new branches in that area in the future—even as the RBA purported to compel them to open branches in other parts of the City.

The banking industry provides employment to more than 200,000 New Yorkers. But contrary to the assertion of one City Council member that the “banks are not going to run away from New York City,”⁷³ modern law and technology increasingly make it possible for banks to conduct business, and provide jobs, in locations far from where they are headquartered. The City Council's periodic attempts to meddle in bank regulation can only send the message that it is prudent for banks to locate as many of these jobs as they can far away from the City. In any event, Judge Failla's thorough and well-reasoned decision should serve notice: to the extent that a local ordinance is regulatory in nature, it will not withstand scrutiny under a federal and State preemption analysis. And its pernicious effect cannot be disguised by the simple expedient of using the word “may” rather than “must” with respect to its enforcement.

Endnotes

1. New York Bankers Ass'n, Inc. v. City of New York, ___ F.3d ___, slip op., 2015 WL 4726880 (SDNY Aug. 7, 2015) (“NYBA”).
2. The Council is comprised of 51 members representing discrete districts. At present, there are 47 Democrats, 3 Republicans, and one vacancy. See <http://council.nyc.gov/html/members/members.shtml> (last visited Dec. 1, 2015). There is, thus, little difficulty in marshaling a veto-proof majority. In fact, the vote to override Mayor Bloomberg's veto was 46 to 5. NYBA at 21.
3. This was not mere benign neglect. Then-Speaker Christine Quinn of the Council wrote to the Mayor asking him to make his appointments so the CIAB could get up and running; the Mayor replied that he believed the law was not proprietary in nature and was preempted, and thus that he refused to make the appointments. NYBA at 25-6.
4. New York Bankers Ass'n, Inc. v. City of New York, 2014 WL 4435427 (SDNY Sept. 9, 2014).
5. The parties' reply briefs were due July 29, 2015, and oral argument was scheduled for August 5. See *The New York Bankers Association, Inc. v. The City of New York*, Scheduling Order, June 8, 2015. Nonetheless, Judge Failla rendered her Opinion and Order on August 7.
6. Pub.L. No. 111-203 (July 21, 2010).
7. See *The Big Short: Inside the Doomsday Machine* by Michael Lewis (W.W. Norton 2010) for a particularly readable explanation of how this happened.
8. See, e.g., NYBA at 11, quoting remarks of Albert Vann, Chairman of the City Council Committee on Community Development (“A lot of homeowners are losing their homes because of lack of support from our banks by modifying their loans and so forth.”)
9. *Id.* at 19.
10. NYBA at 13 (remarks of Councilman Vann).
11. See “U.S. ends TARP with \$15.3 billion profit,” CNNMoney, Dec. 19, 2014, available at money.cnn.com/2014/12/19/.../government-bailouts-end/ (last visited Dec. 5, 2015). The article notes that the Treasury lost about \$9.6 billion on the auto industry bailout, implying that the profit on the bank bailout was in excess of \$25 billion.
12. New York Banking Law §6-I.
13. “City Tries to 86 Local Law 36,” p.a. at <http://citylimits.org/2003/04/15/city-tries-to-86-local-law-36/> (last visited Dec. 1, 2015).
14. *Mayor of City of N.Y. v. Council of City of N.Y.*, 4 Misc. 3d 151, 780 N.Y. Supp. 2d 266 (Sup. Ct. N.Y. Cty 2004).
15. See <http://www1.nyc.gov/site/finance/about/banking-commission.page> (last visited Dec. 1, 2015).
16. NYBA at 22-3. No doubt indicative of Mayor de Blasio's mindset, not to mention the one-sided nature of the legislation, the Mayor's appointment to represent the banking industry was an official of a minority-owned savings & loan that was not a designated City Deposit Bank and was not seeking to become one. Thus, those banks directly affected—the Deposit Banks—were not represented at all.
17. NYBA at 19 (quoting testimony of Department of Finance Commissioner Frankel at the hearings for the bill before the City Council).
18. NYBA at 23-5.
19. *Id.* at 23-4.
20. *Id.* at 25.
21. US CONST., ART. VI, cl. 2.
22. See, e.g., *Pac. Capital Bank N.A. v. Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008).
23. 12 U.S.C. §§1 *et seq.*
24. 12 U.S.C. §§1461 *et seq.*
25. 12 U.S.C. §§1 *et seq.*
26. See generally Lowenstein, R., *America's Bank*, Ch. 1 (Penguin Press 2015) for a discussion of the origins and purpose of the NBA.
27. 12 U.S.C. §484(a).
28. 12 C.F.R. 7.4000(a)(2).
29. 12 U.S.C. §1465(c). Accordingly, for simplicity the HOLA will not be referred to further herein as the OCC's authority over federal thrifts thereunder is coextensive with its authority over national banks under the NBA.
30. *The New York Bankers Association, Inc. v. The City of New York*, Complaint of the New York Bankers Association, May 26, 2015, ¶115 (“Complaint”).
31. Complaint at ¶¶117-118.
32. 12 C.F.R. 7.4000(a)(2).
33. *Watters v. Wachovia Bank N.A.*, 550 U.S. 1 (2007).
34. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009).
35. Complaint ¶¶118-119.
36. Complaint ¶¶120-121.
37. Codified at 12 U.S.C. §§2901 *et seq.*
38. See generally Office of the Comptroller of the Currency, Community Developments Fact Sheet on the Community Reinvestment Act, March 2014 (p.a. at <http://www.occ.treas.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-cra-reinvestment-act.pdf> (last visited Dec. 1, 2015).
39. 12 U.S.C. §2901.
40. For this reason, under the federal Freedom of Information Act (“FOIA”), bank examination records in the hands of federal

- agencies are automatically exempt from disclosure to the public. 5 U.S.C. §552(b)(8).
41. 12 U.S.C. §2908.
 42. 12 U.S.C. §2903(a)(2).
 43. 12 U.S.C. §1843(l)(1). To engage in the broader range of activities, the holding company must elect to be designated a “financial holding company” by the Fed. However, such election is not effective if any of its subsidiary depository institutions does not have at least a Satisfactory rating under CRA. 12 U.S.C. §2901(c)(3)(A).
 44. 12 U.S.C. §2901(c).
 45. Complaint ¶¶137, 139.
 46. See Complaint ¶¶140-143.
 47. New York City Census Fact Finder, as cited in NYBA fn. 5.
 48. “Congress has plainly spoken on the question of what enforcement tools are available to agencies under the CRA. The CRA provides for enforcement only in the application context....” Memorandum from Walter Dellinger, Asst. Att’y General, to Eugene Ludwig, Comptroller of the Currency, Dec. 15, 1994, as cited in Complaint ¶141.
 49. Complaint ¶143.
 50. McKinney’s New York Business Corporation Law §103(a).
 51. NYBA at 45 and cases cited therein.
 52. McKinney’s New York Banking Law §28-b.
 53. Complaint ¶149.
 54. Healthcare Ass’n of New York State v. Pataki, 471 F.3d 87, 109 (2d Cir. 2006).
 55. Matter of Council of City of New York v. Bloomberg, 6 NY 3d 380, 392.
 56. NYBA at 47.
 57. *Id.* at 48.
 58. *Id.* at 49.
 59. *Id.* at 52.
 60. *Id.* at 54. This cost related both to hiring several full-time staff members and to paying for a consulting study by an outside firm, whose stated purpose was to “narrate...how each [Deposit Bank] is meeting the needs identified” by the CIAB. *Id.* at 28.
 61. *Id.* at 58 (emphasis in original).
 62. NYBA at 30 (remarks of Council Member Darlene Mealy).
 63. *Id.* at 31 (remarks of Council Member Deborah Rose).
 64. See NYBA at 3 (“thoughtful but misguided”), 10 (“very good intentions”).
 65. NYBA at 17 (remarks of Department of Finance Commissioner Frankel).
 66. *Id.* at 48.
 67. *Id.* at 15.
 68. *Id.* at 19 (remarks of Councilman Vann).
 69. *Id.* at 28.
 70. *Id.* at 31 (remarks of Jamie Weisberg, Association for Neighborhood Housing and Development, Inc.).
 71. National Community Reinvestment Coalition, Summary of Local Responsible Banking Ordinances, July 2012 (p.a. at http://www.ncrc.org/images/stories/pdf/research/summary_responsiblebank.pdf (last visited Dec. 2, 2015).
 72. See “City Council Changes Zoning to Limit Sprawl of Banks on Upper West Side,” NY Times, July 28, 2012, available at <http://www.nytimes.com/2012/06/29/nyregion/city-council-limits-size-of-banks-on-upper-west-side.html> (last visited Dec. 10, 2015).
 73. NYBA at 22 (remarks of Council member Albert Vann).

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