Texas Department of Banking
Testimony

Testimony to the Senate Business and Commerce Subcommittee Federal Preemption: Reporting, Fees, and Disclosures

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I. Federal Preemption of State Law

In general, state laws apply to the operations of national banks. As far back as 1869 and as recently as 1997, the United States Supreme Court affirmed that national banks. . . are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law.

National Bank v. Commonwealth, 76 U.S. 353, 362 (1869), quoted in Atherton v. FDIC, 117 S. Ct. 666, 672 (1997). While federal regulatory control over banking has expanded over time, the Supreme Court noted in Atherton that historically its decisions have "held that federally chartered banks are subject to state law." Atherton at 672. Courts have also recognized the dual system of bank regulation and the substantial role preserved for the states:

Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863. . . . [A]s in other businesses, federal presence in the banking field has grown in recent times. But congressional support remains for dual regulation. In only a few instances has Congress explicitly preempted state regulation of national banks.

National State Bank v. Long, 630 F. 2d 981, 985 (3rd Cir. 1980).

However, a state law is preempted, and does not apply to national banks, if it creates a direct conflict with a federal law, discriminates against national banks, or significantly interferes with or places an undue burden on the authorized activities of national banks. Under the Supremacy Clause of the United States Constitution, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. See e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819). Although the nature and degree of inconsistency necessary to require preemption has been expressed in a variety of ways, the controlling issue has been summarized as whether, under the circumstances of a particular case, the state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Barnett, which provides the standard for determining whether the National Bank Act preempts a state law, establishes a two-part test for preemption. First, preemption will "normally" occur if a state law "forbid[s], or ? impair[s] significantly, the exercise of a power that Congress explicitly granted." Id. at 33. (emphasis supplied). Second, if no conflict with an express power exists, state law will be upheld as long as it "does not prevent or significantly interfere with the national bank's exercise of its powers." Id. (emphasis supplied). Thus, the resolution of an alleged conflict between a state statute and a power expressly granted to national banks should be based primarily on the degree to which the state law impairs the ability of national banks to exercise that particular power. In contrast, the resolution of an alleged conflict between a state statute and an implied power of national banks should be based on whether the state law undermines the ability of national banks to exercise their general powers. Nevertheless, because banking is an area in which the states have traditionally played a major regulatory role, the courts should initially presume that state laws do not conflict with, and therefore are not preempted by, federal banking law.

In recent years, the greatest potential for preemption of state banking law has arisen not from acts of Congress, but from regulations issued by the Office of the Comptroller of the Currency (OCC). The Office of Thrift Supervision has been similarly active in the area of savings associations, thrifts, and trusts. As a general rule, federal regulations preempt inconsistent state laws if the federal agency has authority under its enabling statutes to adopt the regulations. Moreover, the agency is not required to show that Congress specifically intended to authorize the agency to preempt state law.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act) establishes specific rules to govern the applicability of certain types of state laws to the interstate operations of national banks and out-of-state banks. Under 12 U.S.C. 36(f)(1), the laws of a host state concerning community reinvestment, consumer protection, fair lending and the establishment of intrastate branches apply to each host state branch of an out-of-state national bank "to the same extent as such State laws apply to a branch of a bank chartered by that State." The same rule applies to out-of-state state banks under 12 U.S.C. 1831a(j). The only exceptions arise when federal law preempts the application of such state laws to a national bank or the OCC determines that such state laws would have a discriminatory effect on national banks compared to their effect on state banks. 12 U.S.C. 36(f)(1)(A).

The 1994 Riegle-Neal Conference Report criticizes the OCC for its aggressive use of preemption and, indeed, the Riegle-Neal Act establishes specific procedures that the OCC must follow before it may determine that state law is preempted. Under the Riegle-Neal Act, the OCC may not issue a preemption opinion without first publishing notice in the Federal Register that describes each state law at issue, giving interested parties at least 30 days to submit written comments, and considering any comments received in developing the final opinion letter or interpretive rule. The law requires publication of the final opinion in the Federal Register. Notwithstanding the 1994 Riegle-Neal Conference Report's specific recognition of a state's interest in the activities and operations of all depository institutions within its jurisdictions, and acknowledgment that national banks are subject to State law in many significant respects, the OCC has continued to take an aggressive approach toward preemption of state banking laws. For example, the OCC has begun to issue letters supporting preemption on behalf of national banks in particular cases without specifically preempting state law, thereby avoiding the new notice and comment procedure.

The federal courts have also considered the degree of deference due to the administrative interpretations of federal law by a federal agency, such as the OCC. In fact, an evolving body of case law addresses the extent of deference due these administrative determinations. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), the Supreme Court held that when a court reviews an agency's construction of a statute, and the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court must decide whether the agency's interpretation is based on a permissible construction of the statute. This holding is commonly known as "Chevron deference." In United States v. Mead Corp., 121 S. Ct. 2164 (2001), the Supreme Court made it clear that Chevron deference will be granted only to agency interpretations that are based on explicit or implicit congressional delegations of interpretive authority. In the absence of such authority, agency interpretations of federal statutes will receive a lesser degree of deference. When Congress intentionally leaves a gap for an agency to fill, it is considered to expressly delegate authority to the agency to clarify a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. In a case of implicit delegation, the court must follow the analysis under Chevron.

The OCC is the agency responsible for ensuring, through examinations and administrative enforcement proceedings, that national banks comply with federal and state laws. **Unless expressly authorized by federal law, states do not have authority to examine national banks or to take administrative actions for the purpose of enforcing state law against national banks.** However, it is clear that authorized state officials may bring judicial actions (e.g., actions for declaratory or injunctive relief) to enforce their laws against national banks. See, e.g., First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924); First Union National Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999).

II. Community Reinvestment and Reporting Requirements

The Riegle-Neal Act requires branches of interstate national banks that are located in states (host states) other than the bank's home state to comply with the laws of the host state regarding community reinvestment, except when federal law preempts the application of such state laws to national banks. The same standard applies to interstate state banks pursuant to 12 U.S.C. 1831a(j). National banks may also be subject to community reinvestment laws of their home states unless such laws are preempted. The Riegle-Neal Act provides that any applicable state community reinvestment law, to which a branch of an out of state national bank is subject, is enforced with respect to national banks by the OCC.

Several states, including Connecticut, Massachusetts, New York, Rhode Island, Washington, West Virginia, and the District of Columbia, have passed laws relating to community reinvestment. No issue has been raised with the OCC as to whether those laws are preempted by any federal law. In Advisory Letter 99-1 (January 26, 1999), the OCC indicated that during its Community Reinvestment Act (CRA) evaluation of national banks it would solicit input from local banking commissioners regarding the national banks' record of performance under applicable state community reinvestment laws. **A review of these states' community reinvestment laws reveals that they do not generally require banks to provide additional or different information from the federal CRA, 12 U.S.C. §2901 et seq.** The state statutes variously require public entities to use federal CRA evaluations in determining the placement of deposits of state funds, require banks to use federal CRA factors and criteria in the consideration of applications and in examinations of banks, and/or require banks to post or publish CRA results. Similarly, in evaluating an acquisition of a Texas bank holding company or a Texas bank, the Texas Finance Code §202.001(C) requires the Department to consider whether the proposed transaction complies with the CRA. Department rule 7 TAC §15.42(e) requires consideration of the ability of the applicant for a branch office to meet the credit needs of its entire community pursuant to the CRA. Department rules also require an applicant for a conversion, merger, or purchase or sale of assets to provide certain CRA related information if the proposed transaction alters the applicant's current CRA delineated community.

The OCC has relied heavily on the visitorial powers section of the National Bank Act, 12 USC 484(a) to determine that state laws requiring reporting by national banks are preempted. Federal preemption has not been limited strictly to state licensing statutes, but has been extended to any significant regulatory condition a state law places upon the exercise of a national bank's power.
The issue of the imposition of state reporting requirements on national banks was considered in National State Bank, et al. v. Long, 630 F.2d 981 (3rd Cir. 1980). While the court held certain reporting requirements to be preempted, it determined that the National Bank Act (and other federal laws including the federal CRA) did not preempt the anti-redlining portions of the New Jersey's statute. The court also held that only the OCC had authority to bring administrative enforcement actions against national banks to enforce the New Jersey law. The exclusive authority of the OCC to bring administrative enforcement actions against national banks under its "visitorial powers" was also upheld in First Union National Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999). These decisions, however, do not definitively determine the authority of states to adopt reporting requirements applicable to national banks.

In Waite v. Dowley, 94 U.S. 527 (1876), the Supreme Court upheld a state law requiring national banks to provide lists of their stockholders to local officials so that the officials could assess the stockholders a state tax on bank shares. In Anderson National Bank v. Luckett, 321 U.S. 233, 252-53 (1944), the Court upheld a Kentucky law requiring national banks to provide the state with a list of their dormant accounts. The Court held that this reporting requirement was a legitimate component of the state's constitutional program of taking possession of dormant bank accounts for the purpose of determining whether those accounts had been abandoned and should be escheated to the state. In 1982, however, Congress enacted 12 U.S.C. 484(b) which specifically allows state officials to "review [the] records" of national banks in order to determine whether they are in compliance with state unclaimed property and escheat laws. This exception is obviously based on the Luckett case, and it could be argued that Congress didn't intend to allow the states to impose reporting requirements in any other area. It should also be noted that Section 484(a) permits state officials to obtain national bank records through lawful judicial subpoenas. First Union National Bank v. Burke, supra, clearly recognizes that, under

Section 484(a), authorized judicial proceedings do not conflict with the exclusive "visitorial powers" of the OCC.

The OCC, however, has issued several interpretive letters finding various state reporting requirements as applied to national banks to be preempted. The conclusions of the interpretive letters discussed here were not challenged by the states through court action. OCC Unpublished Interpretive Letter (May 6, 1993) opined that the reporting and fee requirements of the Idaho Consumer Credit Code as applied to a national bank was preempted as a matter of Federal banking law. The national bank had its home office in Idaho and made loans to consumers within the state of Idaho. The applicable Idaho statute provided rules governing extensions of consumer credit by any person within the State of Idaho. The Bank received an annual notification from the Idaho Department of Finance requesting detailed information on the Bank's consumer loan portfolio and payment of a processing fee. The OCC letter determined the reporting and fee requirement to be within the exclusive scope of the OCC for national banks.

OCC Unpublished Interpretive Letter (September 5, 1989) opined that federal banking law preempted a Wisconsin law requiring notice and the payment of fees by a person offering consumer credit above a legally specified interest rate. The Wisconsin law required a person offering consumer credit loans at an annual rate above that specified in Wisconsin's separate usury statute to file notice providing information about its activities in Wisconsin, including volume, manner of solicitation, and types of consumer credit activities, and to pay an annual administrative fee. The OCC letter determined that this requirement conflicted with a national bank's power to engage in credit card activities under federal law. The OCC stated: "Allowing states to collect regulatory fees and information from national banks would seriously undermine the objective of unitary regulation by the OCC. Quite simply, there is no room for state regulation imposed by the [Wisconsin statute] in the presence of a comprehensive regulatory scheme like the National Bank Act." The OCC also determined the Wisconsin statute to be preempted by the vesting of the "exclusive power of visitation of national banks in the OCC." See also 12 C.F.R. 7.4000(a) providing state officials "may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."

In OCC Interpretive Letter No. 616 (February 26, 1993) the OCC opined that a Massachusetts statute that required the quarterly reporting by credit card issuers of the finance charge rate and other fees charged to Massachusetts cardholders as well as the conditions under which a finance charge may be imposed could not be applied to national banks. The OCC found the Massachusetts statute's requirements to be preempted because they constituted a form of visitation by state officials upon national banks. Similar types of state disclosure requirements have been addressed by OCC staff interpretive letters in the past. These letters also concluded that, while such provisions were preempted by federal law and not applicable to national banks, national banks could voluntarily comply. See, e.g., Letter from Mitchell G. Stern, Senior Attorney, Central District (June 26, 1989) (unpublished) (Wisconsin law requiring national banks to submit information regarding the total amount of consumer credit that the banks finance constitutes a visitation under 12 U.S.C. §484); Letter from John G. Heimann, Comptroller of the Currency (Dec. 11, 1978) (unpublished) (Michigan statute requiring periodic reporting of lending practices preempted by 12 U.S.C. §484 and the Home Mortgage Disclosure Act of 1975); Letter from John E. Shockey, Acting Chief Counsel (July 14, 1976) (unpublished) (Massachusetts law requiring mortgagees, who under state law must pay interest on mortgage escrow accounts, to report annually to the Commissioner of Banks the amount of net profit or loss from the investment of such accounts is inapplicable to national banks based on 12 U.S.C. §484); Letter from Robert Bloom, Chief Counsel (May 16, 1975) (unpublished) (Proposed Florida legislation requiring financial institutions to report the interest rate charged by them to state officials for the purpose of setting an interest rate ceiling would likely not be applicable to national banks pursuant to 12 U.S.C. §484).

As noted above, the OCC reported in Advisory Letter 99-1 that no preemption issues had been raised in regard to the several state community reinvestment acts. Further research, including contacting the state banking departments' general counsels, has revealed no preemption issue regarding state community reinvestment acts since 1999. However, these state laws require no additional reporting, but instead focus on the use and application of CRA data related to matters clearly within the states' banking jurisdiction. There are no reported cases or instances of states attempting to apply reporting requirements above and beyond that of the federal CRA to national banks.

III. Consumer Protection and Fees

The OCC and federal courts have addressed two types of fee restrictions placed on national banks by state or local law: ATM fees and on-us check cashing fees. Banks and the OCC have challenged these laws by arguing that the National Bank Act and OCC regulations preempt the state's attempted regulation of a national bank's setting and charging a fee. Among other arguments, the state and local governments have responded that they are acting under their power to provide consumer protection to their citizens. **As discussed below, the federal courts have, to date, agreed with the national banks and OCC and held the state restrictions on fees to be preempted.**

A. ATM Fees

State laws attempting to regulate the ATM activity of national banks or prohibit the charging of a fee to non-account holders for ATM usage have been struck down as preempted by federal banking law. The OCC has taken the position in these cases that the National Bank Act and OCC regulations implementing the Act authorize national banks to provide ATM services, to charge fees for those services, and to set the rate for those fees and that, under the Supremacy Clause, state or local restrictions that obstruct the exercise of national bank powers are preempted by federal law. The primary regulation relied on by the OCC in fee cases is 12 C.F.R. 7.4002 (a) and (b) which provide, respectively, that "a national bank may charge its customers non-interest charges and fees" and that a national bank is free to establish its own fees in accordance with sound banking judgment and safe and sound banking principles. The national bank may consider the cost incurred by the bank to provide a service plus a profit margin. None of these state or local restrictions on national bank ATM operations has survived legal challenge, notwithstanding their consumer protection purpose. See <u>Bank One, Utah v. Guttau</u>, 190 F.3d 844 (8th Cir. 1999) (cert. denied sub nom. <u>Foster v. Bank One, Utah</u>, 120 S.Ct.1718 (2000) (Iowa location, registration, and advertising restriction on national bank ATMs preempted); <u>Bank of America v.</u>

City and County of San Francisco, et al., (permanent injunction entered against ordinance prohibiting ATM "surcharges.") 2000 U.S. Dist. LEXIS 12587 (N.D. Cal. June 29, 2000).
In the very recent case of Metrobank v. Foster, 2002 U.S. Dist. LEXIS 5508 (March 6, 2002) the federal district court followed Eighth Circuit precedent in Guttau and preempted state law prohibiting national banks from charging fees to ATM users who did not maintain any accounts with the banks that operated the machines. The court found that the National Bank Act permitted national banks to charge ATM fees to users who were not account holders, while Iowa law prohibited the activity. The Iowa law was found to be an obstacle to the exercise of rights given national banks by OCC regulations authorizing the charging of non-interest charges and fees and was, thus, preempted. The court issued a permanent injunction based on the preemption and its finding that the banks would suffer irreparable economic harm if they were not able to charge such fees.

B. Texas On-Us Check Cashing Fee Case–Wells Fargo Bank Texas, NA, et al. v. James
Texas Business and Commerce Code §4.112 effective September 1, 2001 requires a payor bank to pay a check drawn against an account held at the bank with a sufficient balance at face (par) value without regard to whether the payee holds an account at the bank. The Texas law effectively prohibits a bank from charging a fee to a non-account holder for cashing a check drawn on that bank. Five banks filed suit in federal court to prevent the Banking Commissioner from enforcing the law, asserting preemption under the National Bank Act, 12 U.S.C. §21 et seq., and 12 C.F.R. §7.4002(a). On December 3, 2001, the United States District Court, Western District of Texas, Austin Division, permanently enjoined the commissioner from enforcing the provisions of §4.112.

The court found that the National Bank Act grants broad power to national banks "[t]o exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt . . . ." 12 U.S.C. §24(Seventh). The OCC, under its rulemaking authority, adopted 12 C.F.R. §7.4002(a), which expressly provides that a "national bank may charge its customers non-interest charges and fees, including deposit account service charges." The court, in ruling that the §4.112 was preempted, found that the OCC's interpretation that federal banking laws permit banks to charge fees to non-account holders for cashing checks, as stated in 12 C.F.R. §7.4002(a), was not unreasonable and thus could not be overruled by the Court.

The court further found that the permanent injunction should apply equally to national banks, out of state banks with branches in Texas, and Texas-chartered banks under the parity provisions of the Texas Constitution. Article 16, §16(C) of the Texas Constitution states that "[a] state bank . . . has the same rights and privileges that are or may be granted to national banks of the United States domiciled in this State." The application of §4.112 to Texas-chartered banks, but not to national banks and to out of state banks with branches in Texas, would violate Article 16, §16(c).

The Department has appealed the court's decision arguing:

1. The Supreme Court and Congress have consistently upheld the application of state law to national banks unless those laws create an impermissible conflict with the National Bank Act.

- No impermissible conflict exists because the National Bank Act does not explicitly authorize national banks to charge fees for their services.
- Texas' par value statute neither prevents nor significantly interferes with the authorized powers of national banks.
- There is a presumption against preemption for state laws of general applicability, including negotiable instrument laws.

2. The OCC's claim that national banks can impose check-cashing fees in Texas is contrary to Congressional intent and, therefore, is not entitled to judicial deference. The OCC by §7.4002 has granted national banks broad discretion to charge service fees without prior supervisory approval. Whenever a conflict arises between a fee and state law, the OCC first issues a ruling that the National Bank Act (NBA) authorizes national banks to charge the fee, and, if litigation ensues, files amicus briefs asserting that the NBA--as interpreted by the OCC-- preempts the state law. In so doing, the OCC is trying to resurrect its earlier and now repealed rule (12 C.F.R. §7.8000) preempting all state laws regulating fees--a rule that the House-Senate conferees on the Riegle-Neal Act condemned in 1994.

IV. Fee Disclosures

While the OCC has acted aggressively to preempt state laws that regulate national bank fees, there is little in the way of OCC interpretations on the requirement of disclosure of fees. Generally, federal statutes that require various types of disclosure specifically address the relationship of federal and state law. These federal laws generally provide that a state law is not preempted if it is not inconsistent with the federal law and, further, that the state law will not be considered inconsistent if it provides greater protection to the consumer. For example, 15 USC §1694q of the Electronic Funds Transfer Act, which requires certain disclosures in electronic funds transactions including ATM transactions, provides in pertinent part:

This subchapter does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

Similarly, except for state laws relating to disclosures concerning credit and charge cards applications, solicitations, or renewal notices which are generally preempted, the Truth in Lending Act (TILA) at 15 USC §1610 provides that TILA does not alter or affect state laws relating to the disclosure of information in connection with credit transactions except to the extent they are inconsistent with TILA, and then only to the extent of the inconsistency. See also 12 C..F.R. §226.28; Mason v. General Finance Corp., 542 F. 2d 1226 (4th Cir. 1976). State law is not inconsistent merely because it requires more information than federal law or requires disclosures in transactions where federal law requires none. See Federal Reserve System, Truth in Lending Determinations of Effect on Miss., N.J., Okla., and S.C. State Laws, 48 Fed. Reg. 43672. The courts have held, therefore, that TILA does not preempt the authority of states to impose supplemental requirements that do not conflict with TILA's disclosure rules and are intended to protect consumers from oppressive, deceptive or fraudulent conduct. See, e.g., Williams v. First Government Mortgage and Investors Corp., 176 F.3d 497, 499-500 (D.C. Cir.

1999); Heastie v. Community Bank, 690 F. Supp. 716, 720-21 (N.D. Ill. 1988); Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 936-939, 112 Cal. Rptr. 2d 445, 460-62 (2001).

The Truth in Savings Act (TISA) at 12 USC §4312 provides that TISA does not supercede state law relating to disclosure of yields payable or terms for accounts “except to the extent that those laws are inconsistent with the provisions of [TISA] and then only to the extent of the inconsistency.” The recent consumer privacy disclosure requirements established by the Gramm-Leach-Bliley Act likewise preserve state privacy disclosure requirements that accord greater protection than federal law. See 15 USC §6807.

One case that addressed the application of state disclosure requirements to national banks supports the proposition that state laws requiring fair disclosure to consumers in financial transactions apply to national banks and are not preempted unless they conflict with a specific federal statute. In Perdue v. Crocker National Bank, 702 P.2d 503 (Cal. 1985), appeal dism'd, 475 U.S. 1001 (1986), the California Supreme Court held that the California Code provision barring the enforcement of unconscionable contracts applied to deposit contracts between national banks located in California and their customers and was not preempted by federal law. The plaintiff alleged that the defendant national bank's signature cards did not give fair notice of the fees assessed by the bank for checks written against insufficient funds and was, therefore, unconscionable. The court pointed out that a finding of "procedural unconscionability" typically depends on several factors in a contractual relationship, including "[t]he absence of equality of bargaining power, open negotiations, full disclosure, and a contract which fairly sets out the rights and duties of each party." Id. at 513-14. The court further held that the California law of unconscionability did not conflict with any provision of the National Bank Act or any other federal statute. Accordingly, the court concluded that the California law of unconscionability (including its disclosure elements) was binding on national banks and was not preempted by federal law.

The OCC has issued an interpretive letter that also supports the foregoing proposition. In OCC Interpretive Letter 674, June 9, 1995, the OCC determined that a Texas statute (then Art. 342-917 of the Banking Code) and regulation (then 7 TAC §3.92) governing the naming and advertising of branch facilities applied to national banks and was not preempted by federal law. The Texas statute and rule prohibited banks located in Texas from naming or advertising a branch in a way suggesting that the branch was separate from the parent bank. The Texas statute and regulation were intended to prevent banks from misleading customers and thereby causing customers to deposit funds in excess of federal deposit limits, based on the mistaken impression that they were dealing with two separate banks instead of one bank with multiple branches.

The OCC noted that Congress amended the National Bank Act in 1982 to delete the requirement that the OCC give prior approval for all national bank names. According to the Senate Report that accompanied the amendment, the naming of national banks would be subject to state unfair competition laws and also the federal trademark statute (the Lanham Act, which was not implicated by the Texas statute and rule). The following statement in the OCC opinion is particularly relevant:

The national banking laws do not prevent state measures aimed at preventing misleading advertising, as long as the state regulations do not put national banks at a competitive disadvantage relative to state financial institutions.

The OCC concluded that the Texas statute and rule did not conflict with any federal statute and, because they applied equally to all banks located in Texas, did not unduly burden national banks. (It should be noted that the Office of Thrift Supervision refused to adopt the OCC’s conclusion and that Art. 342-917 was repealed by the Texas Legislature in 1995 with the OCC aware of the repeal at the time it issued its opinion. The rule was subsequently repealed effective January 5, 1996.)