Office of the Comptroller of the Currency
Docket Control
250 E St SW
Washington, DC 20219

RE: Docket # 01-01 RIN 1557 AB94, FR Vol 66 #20, 30 Jan 01, pages 8178-8184.

SUMMARY: U.S. PIRG opposes the proposed revision to Revised §7.4002 (National Bank Non-Interest Charges). The proposal violates the intent of the Riegle-Neal Act to construe preemption of state consumer laws narrowly. The notion that this rule change is mere "simplification" is subterfuge; OCC is engaged in a litigation ploy designed first to undercut the appeal by the Cities of San Francisco and Santa Monica to reinstate their bans on ATM surcharging and ultimately to prevent any state or city from ever protecting its consumers from unfair financial industry practices, even when Congress and the OCC have failed to do so themselves.

The lawsuit over the cities' right to enforce ATM surcharge bans raises important and broad issues over the right of cities and states to enforce consumer protection laws that protect their citizens against unfair fees or otherwise regulate national banks, especially when no contrary federal law exists. In this case, the Electronic Funds Transfer Act clearly grants states and cities the right to enact stronger laws. In its zeal to convince the courts to ignore the plain language of EFTA, the proposed change to 7.4002 can only be seen as one more part of the OCC's attempt to find statutory authority in the National Bank Act where none exists. The agency cloaks its proposal under the guise of "simplification," yet its intent is much more significant.

OCC's intent goes further than preventing the cities from ever enforcing their surcharge bans. If OCC assists its patron banks in winning the California litigation, the decision will have a chilling effect on all state and local efforts to ban other unfair fees, all their efforts to require national banks to offer affordable bank accounts, all their efforts to prohibit banks from engaging in predatory payday or mortgage lending, or, indeed, will chill any state and local efforts to take any action to protect consumers even when the Congress and OCC have failed to do so. Such an outcome is clearly against Congressional intent, contrary to the National Bank Act and contrary to sound public policy.

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The proposal is oddly parallel to the OCC's 1985 litigation ploy to aid Crocker National Bank's defense against a consumer's claim that its fees were unconscionable. In the middle of that litigation, without notice and comment and too late to be briefed, OCC enacted 7.4002's predecessor rule, 7.8000. [*Perdue v. Crocker Nat'l Bank,* 38 Cal.3d at 938, 941]

That previous regulation purported to preempt all state laws that would limit or regulate national banks' fees. The California Supreme Court found this regulation "unreasonable" in Crocker. The regulation was ultimately eliminated and replaced it with 7.4002 after Congress, in 1994, found it part of the agency's pattern and practice of "inappropriately aggressive" preemption rulings.

Then, and now, the OCC's proposed rule change could only be considered a crude and heavy-handed litigation ploy, since in both circumstances, filings were made outside of statutory authority and after court deadlines for opponents to raise the issue in litigation.

DISCUSSION

(1) The National Bank Act does not give national banks any authority to charge fees. Only this regulation does so: 12 C.F.R. §7.4002. Section (d) of the regulation provides that the OCC will address preemption of state fee laws "on a case-by-case basis." The amendment would delete the case-by-case language.

(2) The proposal to delete "case-by-case" preemption language in §7.4002(d) goes against the intent of Congress to construe preemption of state consumer and other laws narrowly in the conference report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and should not go forward.

(3) The proposed changes to 7.4002 cite the ATM litigation, and propose to "simplify" §7.4002(d) by eliminating the "case-by-case-analysis" language. Although section (d) deals with preemption issues, OCC's description of the amendment claims that the "case-by-case" language "simply underscores that a national bank's establishment of fees is governed by the preceding paragraphs." This is clearly wrong, as the language of the rule shows. As the OCC well knows, throughout this litigation, the cities and the consumer group amici (including U.S. PIRG and CALPIRG) have argued that the "case-by-case-analysis" language in §7.4002(d) directly contradicts the banks' position in this case, which is that the regulation preempts all state or local laws that would limit a national bank fee. This is a litigation ploy, not simplification.

(4) In that 1994 conference report, in a section on "inappropriately aggressive" bank agency rulings, the conferees referred specifically to 12 CFR 7.8000, the predecessor Interpretative Rule to Revised §7.4002. The conferees stated:

> "The Conferees have similar concerns regarding the scope of the OCC interpretive rule that appears at 12 C.F.R. 7.8000, which broadly asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that attempts to prohibit, limit, or restrict deposit account service charges. In light of the Conferees' views regarding the proper application of recognized preemption standards discussed above, the Conferees urge the OCC to review Interpretive Ruling 7.8000 to determine if it should be

> withdrawn or revised." [Statement of managers filed with the conference report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Congressional Record Page S10532, 3 August 1994]

(5) Shortly following enactment of Riegle-Neal, the OCC withdrew 7.8000 and replaced it with 7.4002, yet now, in the midst of ongoing litigation over the right of states and cities to enforce stronger consumer protection laws against national banks, the OCC has proposed revising the provision to undercut their appeal.

(6) This proposal to amend 7.4002 came after briefs had already been filed in the appeal by San Francisco and Santa Monica to the U.S. Ninth Circuit Court of Appeals to reinstate their ATM surcharge bans. Because the amendment was proposed after the parties filed their briefs, the cities cannot address the amendment. This is not surprising. In 1985, the OCC filed 7.8000 as a contrary ruling, overturning a previous anti-preemptive opinion letter, immediately before oral argument in the California Supreme Court in Crocker. The interpretative rule was filed without notice and without an opportunity for comment from the public.

(7) In the current litigation over ATM surcharges, the agency has also routinely sought to have the court grant its informal opinion letters deference, even though Congress clearly has stated in the Riegle-Neal amendments to the National Bank Act that the agency must hold a notice and comment period before preempting state laws. *See* 12 U.S.C.§ 43. The NBA now requires the OCC to publish any "opinion" finding that national banks do not have to follow state law in the federal Register, conduct a 30 day notice and comment period and publish the final rule or decision in the Federal Register. In the current ATM surcharge litigation, the OCC failed to comply with the very law (the NBA) that it is urging this Court to find dispositive in this case. Instead, it opted to issue interpretative letters in time to support the banks' litigation position. [See amicus brief of CALPIRG et al in support of defendant-appellants Santa Monica and San Francisco vs. Bank of America; Wells Fargo Bank; and California Bankers Association, No 00-16355, Appeal from the United States District Court for the Northern District of California, Case No. CV 99-48170.]

(8) As consumer groups have pointed out in our brief in the California cities' appeal to the Ninth Circuit to reinstate their ATM surcharge bans:

> The District Court wrongly relied on 12 C.F.R. § 7.4002 in finding the Ordinances were preempted. The regulation states, in relevant part:
>
> > "(a) *Customer Charges and Fees.* A national bank may charge its customers non-interest charges and fees, including deposit account service charges. For example, a national bank may impose deposit account service charges that its board of directors determines to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit. 12 C.F.R. §7.4002(a)"

An intent to preempt ATM fees by Congress cannot be gleaned from a regulation interpreting a silent NBA that merely states an obvious general authority of banks to charge customers fees,

particularly in light of the legislative history of this regulation. The OCC is trying to read into the regulation their interpretation of a prior regulation, 12 C.F.R.§7.8000, that was discredited and withdrawn. Expressing concern that former section 7.8000 represented an "inappropriately aggressive" preemption interpretation by the OCC, Congress in 1994 urged the OCC to revisit the regulation under proper application of recognized preemption standards in the Conference Report on the Riegle-Neal Act H.R. Conf. Rep. No. 651, 103 rd Cong., 2nd Sess. 54 (1994)(Riegle-Neal Conf.Rep.) *See also, Perdue v. Crocker Nat'l Bank, supra,* 38 Cal.3d at 938, 941 (finding section 7.8000 was not a valid preemption determination). The OCC in 1996 withdrew section 7.8000 and replaced it with section 7.4002(a), which does not include the preemption language. [See amicus brief of CALPIRG et al in support of defendant-appellants Santa Monica and San Francisco vs. Bank of America; Wells Fargo Bank; and California Bankers Association, No 00-16355, Appeal from the United States District Court for the Northern District of California, Case No. CV 99-48170.]

(9) Since OCC has correctly realized that 7.4002 does not aid its thin case that the National Bank Act trumps the Electronic Funds Transfer Act in the California litigation, it now seeks to roll back 7.4002 to make it more compatible with the discredited 7.8000. Congress has already explicitly rejected the agency's intent in 7.8000. The conferees on Riegle-Neal could not have been more clear when they stated that state laws apply to national banks in circumstances where no federal law conflicts and [as noted above] that Rule 7.8000 was an example of abuse.

> "Under well-established judicial principles, national banks are subject to State law in many significant respects. The laws of the State in which a national bank is situated will apply to the national bank unless those State laws are preempted by Federal law. Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law…The Conferees have similar concerns regarding the scope of the OCC interpretive rule that appears at 12 C.F.R. 7.8000, which broadly asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that attempts to prohibit, limit, or restrict deposit account service charges." [Statement of managers filed with the conference report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Congressional Record Page S10532, 3 August 1994]

The OCC's proposal today moves the Congressionally-acceptable 7.4002 back to the intent of the failed, withdrawn and "unreasonable" 7.8000 and should be rejected.

CONCLUSION

In conclusion, as noted above, the change to 7.4002 is neither symbolic nor simplification. Rather, elimination of the case-by-case preemption provisions enacted in response to Congressional findings of "inappropriately aggressive" preemptive behavior is an attempt by the agency to subvert the will of Congress. The agency's goal is more sweeping than to prevent the cities of San Francisco and Santa Monica from defending their citizens from predatory banking fees. The agency seeks to re-write Congressional intent and long-standing judicial precedent. AS consumer groups noted in our aforementioned brief:

> The National Bank Act 12 U.S.C. § 21 et seq ("NBA") and the Electronic Funds Transfer Act 15 U.S.C. § 1693 ("EFTA") do not preempt local governments from enacting consumer protection laws, but rather, invite and encourage such action. Since the passage of the NBA in 1863, the banking regulatory structure has been a dual federal-state system, allowing states to identify and address local problems.

Changing these rules has great implications and should not be done lightly. First, the agency is defying Congress. Second, profits from double ATM surcharges will change the banking system, aiding large national banks, which penalize customers with high fees, as the Federal Reserve's Annual Reports To Congress on bank fees show. Third, changing this rule will have a chilling effect on laudable efforts by states, and now localities, to rein in all manner of unfair banking industry practices that neither the OCC nor the Congress have been able to resolve. The result: higher bank fees, more un-banked consumers outside the regulated marketplace, and more predatory lending by banks.

Sincerely yours,

Edmund Mierzwinski
Consumer Program Director