Approved: 2-12-96
Date

MINUTES OF THE HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by Chairperson Bill Bryant at 3:30 p.m. on February 7, 1996 in Room 514S-of the Capitol.

All members were present except: Representative Tom Sawyer
Representative Phill Kline
Representative Delbert Crabb

Committee staff present: Bill Wolff, Legislative Research Department
Bruce Kinzie, Revisor of Statutes
Nikki Feuerborn, Committee Secretary

Conferees appearing before the committee: Gary Haulmark, Kansas Psychological Association
Gordon Green, Bank IV, Wichita
Joe Morris, First Bank of Kansas, Johnson County
Stephen Redman, Mitchell County Bank, Simpson
Frank Suellentrop, President, State Bank of Colwich
Clark Young, CBA, Hugoton
Larry Stutz, CBA, Alma
Jim Maag, KBA, Topeka

Gary Haulmark, representing the Kansas Psychological Association, the Mental Health Coalition, the Kansas Dental Association , the Kansas Occupational Therapy Association, the Kansas Optometric Association, the Kansas Podiatric Medical Association, the Kansas Society of Anesthesiologists, the Kansas State Nurses' Association, and the Kansas Pharmacists Association, requested the introduction of a bill. This legislation would provide that any person could visit a doctor or provider outside their HMO or PPO network. The out of network provider would be reimbursed at the rate of 70% of reasonable costs. This bill would introduce an element of choice to managed care and not have to cost anymore.

Representative Correll moved for the introduction of the proposal as a committee bill. The motion was seconded by Representative Vickery. Motion carried.

Hearing on HB 2670 - Opt in Riegle-Neal branch banking, prohibiting denovo interstate branching

After a briefing on the bill by Bill Wolff of Legislative Research, Gordon Greer, Bank IV, N.A., appeared before the Committee as a proponent of the bill (Attachment 1). His basis was that branch banking, due to its efficiency, will lead to even better, lower cost services, more products, more consumers alternatives and lower prices. Branching will allow banks to compete with institutions who have no limitations on branching such as savings and loans, credit union, brokerage houses, mutual funds, money market funds and insurance companies. Included in his testimony was a memorandum prepared by John Heasley, General Counsel to the Texas Bankers Association, who was involved in finalizing provisions of the Riegle-Neal Act. Mr. Greer suggested that no legislation be passed until an interim study was made of the impact of the Act on Kansas and that the subject be addressed during the 1997 Legislative Session. Mr. Greer indicated that due to our global society, interstate branch banking should be allowed in order to give customers better and expanded services. Texas has opted out due to their bad experiences with out of state banks during the recession in the 1980's. Their opt out legislation sunsets in 1999. Kansas and Missouri are working on a three-prong tool to figure privilege tax.

Joe Morris, First Bank Kansas, spoke in defense of opting in as a method to help Kansas attract and retain businesses rather than appearing restrictive and forcing Kansas businesses to seek financing outside the state (Attachment 2). Opt in legislation would:

1. Allow all Kansas banks to engage in fair competition with the non-banking institutions such as finance companies, insurance companies, mutual funds, brokerage houses, etc., who operate with uch regulations. Kansas banks held 50% of the market share 20 years ago and have now been reduced to 23% of the market.

2. Produce efficient competition for Kansas businesses and customers. A market place may be developed which will allow customers to choose between higher personalized service at a higher rate and less personal service at a lower rate. Costs will be decreased by not having bank accounts in different states.

3. Allow national banks headquartered in Kansas to branch into other states. Legislation will be required for chartered banks in Kansas to have this option.

4. Allow out of state banks to convert Kansas bank branches into branches of their national banking network, thereby becoming more efficient which could increase the franchise value of many Kansas banks by eliminating overhead.

Stephen Redman, President and CEO of Mitchell County Bank in Simpson, Kansas (the smallest bank in Kansas), presented testimony in support of the bill (Attachment 3). Opt in legislation would provide lower loan rates, higher deposit rates and better facilities. It would also offer the increased possibility of continued existence for small banks (branches) in small communities. Regulatory responsibilities and economic conditions are making it extremely difficult for small banks to operate in the rural areas. These small banks are an integral part of the community and are often responsible for their continued survival.

Frank Suellentrop, President of the State Bank of Colwich, questioned whether increasing competition among financial institutions would create more and better choices of products and services for consumers (Attachment 4). Interstate banking operations can offer customers additional services without interstate branching by maintaining a state bank charter in Kansas. Regulatory control of financial institutions is important due to fiduciary responsibilities regarding customers' deposits and to the communities served. By requiring banks to maintain one Kansas charter we will be assured that all banks doing business in the state will pay their share of tax on the income they generate in Kansas. Regulatory control will be transferred out of the state by banks based in other states if the opt in proposal is adopted.

Clark P. Young, President of the Citizens State Bank in Hugoton and President of the Community Bankers Association, reviewed the survey completed by its members in which there was 2 to 1 support to opt out of the interstate banking proposal (Attachment 5). The CBA position is that no one is closing the borders to out of state banks; they are asking that they be taxed under the same formula and regulated in the same manner. The general public is not interested in having out of state banks supply their initial requirements.

Larry Stutz, President and CEO of the First National Bank in Alma and President of L.O.O.K. (Let's Opt Out Kansas), offered reasons to reject the opt in proposed legislation (Attachment 6). The Regional Interstate Banking Bill passed in 1992 has benefitted less than one percent of all the banks in Kansas as they have acquired a minimal amount of assets outside the boundaries of Kansas. Bank IV has become the vehicle for Missouri banks to enter the Kansas market. Both Nebraska and Missouri banks have purchased 43 Kansas banks with total assets of $9,817,365,000 or one-third of all Kansas banking assets which has definitely not helped Kansas based banks. Florida has experienced 400 banks being bought by out-of-state banks after passing interstate banking legislation. The benefits derived from the cost savings of consolidation will be realized by the out-of-state banks, not by Kansas consumers who will pay higher service fees, receive lower savings rates, and pay higher rates on loans than their in-state counterparts. The Federal Reserve reports that in most cases average fees charged by out-of-state banks were higher than those charged by in-state banks. Recent merger activity is a problem because consolidation means there will be fewer institutions and the biggest banks charge the highest fees. The adoption of interstate branching will cost the banking industry over 450,000 jobs over the next five year. Regarding taxation, only one system assures that out-of-state banks pay on the same basis and that is by making them keep a charter in Kansas. Opting out would require all Kansas banks to maintain a charter in the state, be under the same tax rules, assure that each bank maintains a Board of Directors within the state, provide for examinations of the bank within Kansas b y either state or federal examiners including a full CRA examination which branches do not receive at this time.

Kansas Farm Bureau presented written testimony only (Attachment 7).

John Peterson, representing Bank IV, entered a newspaper article from the Wallstreet Journal on the planned branching of Bank America Corp. via a computer on-line service (Attachment 8).

Jim Maag, Kansas Bankers Association presented copies of a document from the Congressional Record relating to the ability of states to opt in at a later date after initially opting out (Attachment 9). Also included was a synopsis of federal reserve reports regarding results of interstate banking. Mr. Maag recommended further discussion of the bill in relation to **SB 448** which is attempting to address the tax implications of interstate banking.

Representative Correll moved for the adoption of the minutes of February 6. Motion was seconded by Representative Cox. Motion carried.

The meeting adjourned at 5:15 p.m. The next meeting is scheduled for February 12, 1996.

HOUSE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE GUEST LIST

DATE: Feb. 7, 1996

NAME	REPRESENTING
Roger Franzke	FFC
Stephen Redman	Mitchell Co. Bank
Aletha Vaughn	KID
Jim Maag	KBA
Gordon Green	BANK IV
Bill Rainey	BANK IV
Frank Bullenkamp	State Bank of Kansas
[illegible]	First National Bank in Alma
Bette Fowles	First State Bank Burlingame
Bill Conant	STATE BANK COMM.
Kathy Taylor	KBA
Kenneth L. Glemon	STATE BANKING DEPT.
Joe Morris	FIRST BANK KANSAS
[illegible] Jorsch	Lt. GOV
Chad D. Tenpenny	Sec of State
Charles Coad	BANK IV
David Wheeler	BANK IV
Jerry Holloway	KANSAS BAR ASSN.
Doug Woodruff	Boatmen's

HOUSE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE GUEST LIST

DATE: February 7, 1996

NAME	REPRESENTING
Danielle Noe	KCUA
Matthew Goddard	Heartland Community Bankers
[illegible]	Ks State Bank Overbrook
Jon Hylton	1st Sec. Bank Overbrook
Eugene C. Hegarty	Farmers & Merchants Bk, Effingham
Ken Alexander	BANK IV
Edwin Fields	Intern
Ramon Anderson	Citizen
CLARK P. YOUNG	CITIZENS STATE BANK, HUGOTON
Susie Hoffman	CBA
Pete McGill	CBA
David Fowler	1st State Bank - Burlington

Testimony of K. Gordon Greer
BANK IV, N.A.
House Committee on Financial Institutions and Insurance
House Bill 2670
February 7, 1996

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. MY NAME IS GORDON GREER. I'M EXECUTIVE VICE PRESIDENT OF BANK IV, N.A. AND I THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU IN SUPPORT OF HOUSE BILL 2670.

I BEGAN MY BANKING CAREER IN BEGGS, OKLAHOMA, A SMALL COMMUNITY OF 850 PEOPLE. I'VE SEEN BOTH SIDES OF THIS ISSUE, AND I CAN TELL YOU THAT BANKING AND BANKING LAWS HAVE COME A LONG WAY SINCE I STARTED IN THIS BUSINESS 40 YEARS AGO. TIME AND TIME AGAIN, THOSE OPPOSED TO NEW BANKING LEGISLATION HAVE SAID IT WOULD BE DETRIMENTAL TO CONSUMERS, THAT IT WOULD CURTAIL LOCAL LENDING, THAT SMALL BANKS WOULD BE DRIVEN OUT OF BUSINESS, THAT IT WOULD DECIMATE OUR ECONOMY, WHEN IN FACT, THE OPPOSITE HAS PROVEN TO BE TRUE. IN FACT TODAY INDIVIDUALS AND BUSINESSES IN KANSAS HAVE MORE CHOICES, MORE CONVENIENCES, MORE SERVICES AND MORE COMPETITIVE PRICING THAN EVER BEFORE.

House FI&I
Attachment 1
Feb. 7, 1996

BRANCH BANKING, BECAUSE IT IS MORE EFFICIENT WILL LEAD TO EVEN BETTER, LOWER COST SERVICES, MORE PRODUCTS, MORE CONSUMER ALTERNATIVES AND LOWER PRICES. IT WILL LET BANKS COMPETE WITH THE REAL COMPETITION THEY FACE TODAY--NOT OTHER BANKS--BUT THE VAST ARRAY OF INSTITUTIONS THAT HAVE NO LIMITATIONS ON THEIR ABILITY TO OPERATE BRANCHES ANYWHERE THEY CHOOSE. THEY INCLUDE NOT ONLY SAVINGS AND LOANS AND CREDIT UNIONS, BUT BROKERAGE HOUSES, MUTUAL FUNDS, MONEY MARKET FUNDS AND INSURANCE COMPANIES. IT IS THIS COMPETITION WHICH HAS CAUSED THE BANKING INDUSTRY TO SEE ITS MARKET SHARE DECLINE OVER THE PAST 20 YEARS FROM 40% TO 24%. IT IS THIS COMPETITION WITH WHICH BANKS MUST BE ABLE TO COMPETE ON A LEVEL PLAYING FIELD.

HOUSE BILL 2670 FIRST CLARIFIES AND REITERATES THAT KANSAS LAW WILL CONTINUE TO PROHIBIT DE NOVO BRANCHING, WHERE A BANK COULD SET UP A BRANCH WITHOUT INVESTING CAPITAL IN KANSAS.

SECOND, TI ALLOWS BRANCHING FOLLOWING AN ACQUISITION AND MERGER AS OF JULY 1ST OF THIS YEAR, 11 MONTHS EARLY. KANSAS WOULD THEREBY JOIN THE 22 STATES WHICH HAVE OPTED IN, 15 OF WHICH HAVE OPTED IN WITH AN EARLIER EFFECTIVE DATE THAN 1997. PROBABLY A DOZEN OTHER STATES HAVE REJECTED "OPT OUT" PROPOSALS AND WILL THEREFORE AUTOMATICALLY OPT IN ON JUNE 1, 1997. IN FACT, NOT A SINGLE STATE IN THE UNITED STATES HAS ADOPTED THAT WHICH WAS PROPOSED YESTERDAY IN HOUSE BILL 2716. ONLY ONE STATE, TEXAS, HAS TAKEN ACTION WHICH WILL DELAY THEIR OPTING IN FOR A PERIOD OF TWO YEARS.

HB 2670 PROVIDES NUMEROUS CONSUMER AND COMMUNITY PROTECTIONS. RIEGLE-NEAL PROVISIONS, AS REITERATED IN HB 2670, SPECIFICALLY REQUIRE THAT A BRANCH CANNOT BE USED JUST TO GENERATE DEPOSITS, THAT IT MUST DEMONSTRATE ITS WILLINGNESS TO MEET LOCAL LENDING NEEDS. IN FACT IT MUST MEET A SET LOAN TO DEPOSIT RATIO OR LOSE THAT INSTITUTION. FURTHER, THERE ARE TO BE SEPARATE COMMUNITY REINVESTMENT ACT REPORTS GENERATED FOR KANSAS BRANCHES AND SEPARATE REPORTS WITHIN KANSAS FOR METROPOLITAN AND NON METROPOLITAN AREAS.

PLEASE KEEP IN MIND THE OPT OUT LEGISLATION CONTAINS NONE OF THESE PROTECTIONS OR REQUIREMENTS, EITHER FOR FREESTANDING BANKS IN KANSAS, BRANCHES, AGENCY RELATIONSHIP SERVICES OR BANKS THAT ARE PART OF AN INTERSTATE HOLDING COMPANY. DO WE REALLY THINK THAT ANY OF THE GROUPS WHO HAVE TAKEN A STAND IN SUPPORT OF "OPT OUT" WERE TOLD ABOUT THE STATUTORY REQUIREMENTS AND PROTECTIONS OR ARE AWARE OF THE SPECIFIC REQUIREMENTS FOR MEETING LOCAL LENDING NEEDS AND FOR REACHING A SPECIFIC LOAN TO DEPOSIT RATIO? I THINK WE KNOW THE ANSWER. IF YOU DO DECIDE TO OPT OUT, PERHAPS YOU SHOULD REQUIRE THESE SAME STANDARDS BOTH OF ALL KANSAS BANK SAND OF BRANCHES THAT WILL BE OPERATING IN KANSAS EVEN UNDER OPT OUT.

FURTHERMORE HB 2716, WHICH YOU HEARD YESTERDAY, WILL PROHIBIT KANSAS BANKS FROM BRANCHING INTO NEIGHBORING STATES. WHEN YOU TRY TO BUILD AN ECONOMIC WALL AROUND OUR STATE, IT INHIBITS MOVEMENT IN BOTH DIRECTIONS.

YESTERDAY, YOU HEARD THAT OUT OF STATE BANKS OPERATING BRANCHES MAY NOT PAY THEIR FAIR SHARE OF TAXES TO KANSAS. KANSAS DOES HAVE AN ANTIQUATED TAX SYSTEM FOR FINANCIAL INSTITUTIONS, ONE THAT NEEDS TO BE CHANGED BUT IT NEEDS TO BE CHANGED EVEN IF YOU WERE TO OPT OUT. BANK IV FOR SEVERAL YEARS HAS ENCOURAGED THE ADOPTION OF AN APPORTIONMENT SYSTEM FOR THE DETERMINATION OF PRIVILEGE TAXES, SIMILAR TO THE WAY WE DETERMINE THE SHARE OF TAXES OWED BY OTHER CORPORATIONS DOING BUSINESS IN MORE THAN ONE STATE. LAST YEAR THE MULTI STATE TAX COMMISSION ADOPTED AND RECOMMENDED SUCH A SYSTEM. THE KANSAS DEPARTMENT OF REVENUE HAS INTRODUCED THAT PROPOSAL IN THE SENATE TAX COMMITTEE AS SB 448. THAT MEASURE CNA AND SHOULD BE ENACTED BY THIS LEGISLATURE TO ASSURE THAT EXISTING AND FUTURE INTERSTATE ACTIVITY PAYS A FAIR AND EQUITABLE SHARE OF TAXES TO OUR STATE.

FINALLY, I AM AT A LOSS TO UNDERSTAND THE DESIRE TO RUSH TO JUDGMENT ON BEHALF OF THOSE WHO WANT TO OPT OUT. WHAT ARE THE IMPLICATIONS OF OPTING OUT THIS YEAR? DO WE KNOW FOR SURE WHAT IMMEDIATE IMPACT IT MIGHT HAVE ON THE 97 KANSAS BANKS WITHIN 30 MILES OF ANOTHER STATE? DO WE KNOW FOR SURE WHETHER WE COULD LATER OPT IN? WOULD WE NOT BENEFIT FROM HAVING ANOTHER YEAR TO SEE WHAT OTHER STATE DO AND BENEFIT FROM THEIR EXPERIENCE?

WE WOULD URGE YOU NOT TO MAKE KANSAS AN ECONOMIC ISLAND, NOT TO MAKE US THE ONLY STATE IN THE NATION TO TAKE THIS ACTION.

INSTEAD WE WOULD URGE YOU TO ENCOURAGE COMPETITION--TO INCREASE FINANCIAL SERVICE CHOICES FOR KANSANS AT LOWER COSTS. WE WOULD URGE YOU TO SUPPORT HB 2670.

This memorandum was prepared by John Heasley, General Counsel to the Texas Bankers Association. He served as Counsel for the Minority (the Republicans) to the Financial Institutions Subcommittee of the House Banking Committee during the development of the Riegle-Neal Act. As such, he was directly, personally involved in finalizing provisions of the Act and is most knowledgeable about legislative history pertaining to it.

Memorandum

To: TBA Government Relations Council

From: John Heasley

Date: January 24, 1995

Subject: The revocability of a state opt-out decision; i.e., can a state opt back into the federal statute?

During the consideration of the interstate bill in Congress, I believed that the intent of the House members and the conferees was to facilitate interstate branching as soon as possible. A small bone was thrown to state's rights advocates to allow states a small window to opt-out of branching. The revocability or irrevocability of an opt out decision was never discussed. If it had been brought up I believe that members would have said that a state can opt back in at any time.

However, under well established case law, if the intent of a statute is plain on its face, there is no need to consult any other sources to determine Congressional intent. Section 44(a)(2) is clear–if a state opts out within the designated time frame no interstate mergers can be approved. There is no redemption clause.

There is little case law directly supporting the irrevocability of an opt-out decision. The Oklahoma opinion cites bankruptcy and tax cases of little precedential value in federal district court. One federal case that they footnoted, Greenwood Trust Company v. Mass., upheld the validity of Massachusetts decision to opt back into the federal interest rate deregulation law of 1980. However, the state opt out authorization in the 1980 federal law did not have a time frame or a specific activity prohibition.

Therefore, I believe that if Texas opts out before June 1, 1997 and subsequently opts in, any interstate merger or consolidation could be challenged in federal court as a transaction in violation of section 44(a) of the interstate act.

The pertinent portion of H.R. 3841, dealing with the states' ability to opt out of the federal law relating to interstate branching, provides as follows:

"Section 102. Interstate Bank Mergers.

(a) Approval of Interstate Merger Transactions Authorized.–

44. Interstate Bank Mergers.

(a) Approval of Interstate Merger Transactions Authorized.–

(1) In General.–Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.

(2) State Election to Prohibit Interstate Merger Transactions.–

(a) In General–*Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home State of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997, that–*

(i) applies equally to all out-of-State banks; and

(ii) expressly prohibits merger transactions involving out-of-State banks ..."

H.R. 3841 (emphasis added).

The language of the statute is clear and unambiguous. The plain language of H.R. 3841 requires a finding that Congress intended the provisions of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 to be given preemptive effect unless, within the narrow window of opportunity provided by the statute, a state elects, or opts out of, such provisions. A state having once made such an election, may not later "change its mind" and elect to come back within the preemptive effects of H.R. 3841. That such is the case may be inferred by the literal language of

H.R. 3841, which indicates that section 44(a)(1) (the section of the Federal Deposit Insurance Act added by the enactment of H.R. 3841 which permits merger transactions between interstate banks) *is no longer applicable* with respect to merger transactions if the transaction involves a bank the home State of which has enacted a law *after* the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and *before* June 1, 1997, that opts out of section 44(a)(1). By its express provisions, H.R. 3841 seemingly makes *irrevocable* a state's election to opt out of section 44(a)(1), since it provides no relief whereby a state may elect to come back within the preemptive effect of such statute. In fact, the plain language of the statute would indicate that, once the statutorily prescribed action has been taken, i.e., the state has enacted "opt out" legislation, section 44(a)(1) *is no longer applicable*, regardless of any action subsequently taken with respect thereto.

We note that, in the one reported case which directly addresses a state's ability to repeal previously enacted "opt out" legislation[3], the court's decision, while reaching a seemingly anomalous conclusion, can be seen as properly applying these same statutory rules of construction. Although the case is from a federal bankruptcy court and consequently of no precedential value, it is nonetheless useful to review the court's application of such rules.

In In Re Criswell, a creditor in a chapter 7 bankruptcy case brought in the United States Bankruptcy Court for the Eastern District of Arkansas challenged the debtor's claim of certain personal property as exempt under 11 U.S.C. §522(d). Although Arkansas in 1981 had opted out of the federal statute pursuant to the express provisions permitting opting out, in 1991 the Arkansas legislature repealed the original opt-out statute. The creditor, who objected to the debtor's listing of any exemptions other than those provided for by Arkansas' constitution (which presumably were less generous than the federal exemptions provided by 11 U.S.C. §522(d)), argued in part that the state's original decision to opt-out of the federal exemption scheme under §522(b)[4] was irrevocable.

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3 In Re Criswell, 152 BR 264 (Bkrtcy. E.D. Ark. 1992).

4 11U.S.C.§522(b) provides as follows:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection .. Such property is

In holding that the "opt out" of the federal exemption scheme was *not* irrevocable, the federal bankruptcy judge reasoned that the plain language of 11 U.S.C. §522(b) did not place any limitation on the states' ability to opt in or out of the federal exemption:

> The plain language of the 11 U.S.C. §522(b) gives states the option of allowing or disallowing the federal exemptions, without limitation. Congress could have inserted language making the opt-out irrevocable, as it has in other statutes. For example, an election to relinquish the carryback period of net operating losses is irrevocable. 26 U.S.C. §172(b)(3) (1988 & Supp. 1990). 11 U.S.C. §522 contains no language suggesting that a state's decision to opt-out of the federal exemption scheme is irrevocable.
>
> 152 B.R. 264 at 266.

Were the Criswell court to review the language of H.R. 3841, it would almost certainly reach an entirely different conclusion from its holding in Criswell, based upon a literal reading of the language in H.R. 3841. Literally, section 44(a)(2) states that the provisions of section 44(a)(1) are *no longer applicable* with respect to merger transactions if the transaction involves a bank the home State of which has enacted a law *after* the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and *before* June 1, 1997, that opts out of section 44(a)(1). This language, which is plain and unambiguous, does not permit a construction which would allow a state enacting such an opt out statute to cause section 44(a)(1) to be once again applicable. Once a state elects to opt out, the operative language of section 44(a)(2) permits no possibility of repeal.

> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable ...

11 U.S.C. §522(b) (1988).

Although this result may seem anomalous to the decision in Criswell, it actually is in harmony with the principle enunciated therein, that a statute be given its plain and literal meaning. Certainly, if Congress had chosen to draft the opt out election contained in H.R. 3841 in a manner similar to 11 U.S.C §522(b), it could have done so.

Other than the Criswell case, we have found no other reported cases directly on point.[5] *Consequently, given the explicit language of H.R. 3841 contained in section 44(a)(2), we are of the opinion that the express provisions thereof, given their literal meaning, should operate to make ineffective a state's attempt to repeal legislation enacted pursuant to section 44(a)(2).*

The opinion herein is directed solely to the addressee above. This opinion is issued only with respect to the present status of federal law and law in the State of Oklahoma and we undertake no obligation or responsibility to update or supplement this opinion in response to subsequent changes in the law or future events affecting the matters contemplated herein.

Very truly yours,

Bruce W. Day
For the Firm

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[5] There is at least one other case, Greenwood Trust Company v. Commonwealth of Massachusetts, 971 F.2d 818 (1st Cir. 1992), which assumes the validity, for purposes of the decision reached, of a state's repeal of its earlier opt out election. At least one commentator, however, has stated that the effect of such a purported repeal is, at best, unclear. See "A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks," Jeffrey I. Langer and Jeffrey B. Wood (1985, Practising Law Institute), which discusses the uncertainty caused by a literal reading of the federal opt out statute, similar to that found in H.R. 3841.

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MARILYN FOSS
SHERRY MILLS MOORE

January 12, 1995

North Dakota Bankers Association
120 North Third Street
Bismarck, North Dakota 58501

Gentlemen and Ladies:

You have asked me to give you my opinion about the effect of a repeal of legislation by which a state elects to "opt-out" of the federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("the Riegle-Neal Act" or "the Act"). I understand your interest to be the power of a future state legislative assembly to authorize North Dakota state and national banks to branch interstate if "opt-out" legislation is passed by the 1995 legislative assembly, if the "opt-out" legislation is subsequently repealed, and the Riegle-Neal Act is not amended.

It is my opinion that North Dakota may not "opt-out" of the Riegle-Neal Act provisions and at some later date empower its state and national banks to branch interstate as provided in the Act either by repealing an "opt-out" law or by enacting affirmative legislation to authorize interstate branching by banks whose home state is North Dakota.

In arriving at this conclusion, I have reviewed the opinion of Day, Edwards, Federman, Propestar & Cristensen, P.C. to the Oklahoma Bankers Association. I have also reviewed the memorandum by John Heasley to the Texas Bankers Association. It is my view that those documents are well-reasoned and support the views stated. There is a wide range of federal and state case-law which holds courts may [illegible] conforming the statute to the "legislative intent", change the statute which is express terms in the absence of clear evidence that the statutory language is contrary to legislative intent. U.S. v. Talley, 16F 3d 1430; (8th Cir.) (1994), A.F.L.-C.I.O. v. F.C.C., 11F 3d 1430; North Dakota v. U.S., 460 U.S. 300, 312; 103 S.Ct. 1095, 1102, 75 L.Ed. 2d 77 (1983). Yet, it is precisely this type of judicial conduct which would be required in order for a revocability feature to be read into the "opt-out" provisions of the Act.

Because of the time constraints and clarity of the statutory language, I have not thoroughly researched the legislative history of the Act.

For the purposes of this opinion, I am assuming that Congress intended for the Act to pre-empt certain existing state inter-state banking and branching laws and to encourage the speedy development of a nationwide interstate banking and branching network. It may be that Congress would have included provisions in the Act which would have permitted a state to first "opt-out" and later "opt-in" had that been proposed. I understand that it was not. In view of this silence, the conclusion that an "opt-out" and later "opt-in" provision would have been included is pure speculation, for the simple reason that a clear Congressional intent was to strongly encourage the prompt development of nation-wide interstate banking and branching systems. What better way to encourage that end than by making the consequences of an "opt-out" decision irrevocable and so potentially onerous to a state's banking industry that no state will choose to "opt-out"? Congress commonly enacts federal legislation which purports to give a state the "option" to decline to participate in a particular federal program or to follow particular federal policies and then proceeds to encourage state participation by imposing enormous, negative, economic consequences upon any state which chooses to "opt-out" under federal law.[1] Accordingly, I think that it can be more persuasively argued that the Act as it is written mirrors Congressional intent than it can be persuasively argued that a late "opt-in" provision was left out by mistake or should be read into the law.

My conclusion is derived from the language and structure of the relevant provisions of the Act. These provisions define the authority of a federal banking agency to approve applications by national and state banks to branch. As every national and state bank which is located in North Dakota must obtain the approval of a federal banking agency to branch (either interstate or intrastate) 12 U.S.C. Sec. 36, 12 U.S.C. Sec. 321, 12 U.S.C. Sec 1828(d), a limit upon the federal agency's power to approve a branching application is a limit upon the power of the applicant bank to branch, irrespective of state law on the point.

Presently there are several sections of federal law which restrict the power of the federal banking agencies to authorize bank branching applications and which define the conditions which must exist for branching approval to be given. See, for example, Section 36 of the National Bank Act (12 U.S.C. Sec. 36); Sections 6, 13(f), 13(k), and 18(d) of the Federal Deposit Insurance Act ("the FDI Act"), (12 U.S.C.Sec. 1816, 1823(f), 1823(k), and 1828(d)), and Section 3 of the Federal Reserve Act (12 U.S.C. Sec.

[1]For example, states which failed to adopt the 55 m.p.h. federal speed limit risked the loss of federal funds for highways.

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321). Before the effective date of the Riegle-Neal Act (and with a few exceptions not relevant to this discussion), under federal law, a federal banking agency does not have the power to approve an application for a branch which is not permitted for a state bank under state law. Upon the effective date of the Act, a federal banking agency is deprived of the power to approve an interstate branching application for a bank which is domiciled in a state which adopts opt-out legislation prior to June 1, 1997. The Act states in relevant part:

SEC. 102 INTERSTATE BANK MERGERS.

(a) IN GENERAL.-- The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended by adding at the end the following new section:

"SEC. 44. INTERSTATE BANK MERGERS.

"APPROVAL OF INTERSTATE MERGER TRANSACTIONS AUTHORIZED.--

"(1) IN GENERAL.--Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.

"(2) STATE ELECTION TO PROHIBIT INTERSTATE MERGER TRANSACTIONS.--

"(A) IN GENERAL.-- Notwithstanding paragraph (1), a merger transaction <u>may not be approved</u> pursuant to paragraph (1) if the transaction involves a bank the home state of which has <u>enacted a law</u> after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1997 and before June 1, 1997, that--

"(i) applies equally to all out-of-State banks; and

"(ii) expressly prohibits merger transactions involving out-of-State bank . . . . (emphasis supplied)."

After its effective date, under Sec. 102(b)(1), Sec. 102(a) will be the exclusive source of a federal agency's authority to approve ordinary applications for the establishment of intrastate branches by a healthy national or state bank. Permission or state law will no longer be a factor to consider. Section 102(a)(2) could hardly be clearer or less flexible about the inability of the federal agencies to approve branching applications for banks which are domiciled in States which <u>enact</u> opt-out legislation prior to June 1, 1997, rather than the inability to approve application from banks which are domiciled in states which have opt-out legislation in place at the time a branching application is made.

1-15

When Congress intends for states to have the on-going flexibility to affect the powers of federal agencies and banks by providing that state law, as it may change from time to time, will be operative and controlling, Congress may give that ability to the state. Independent Community Bankers Association of South Dakota v. Board of Governors, 820 F.2d 428. (D.C.Cir., 1987). Congress also knows how to provide for that contingency. Afterall, that is the situation for interstate banking and branching as it existed prior to the amendment of the National Bank Act, the FDI Act, and the Bank Holding Company Act by the Riegle-Neal Act. The Riegle-Neal Act is intended to effectuate change, not merely to continue the status quo of state power in the area of interstate bank branching by using different language than that which is contained in pre-Act law.

If Section 102 of the Act is interpreted as permitting a state to "opt-in" by repealing "opt-out" legislation in contravention of its plain language, a state legislative assembly would, in effect, have the authority to grant to a federal agency power which the Congress has expressly denied. That interpretation would, in essence, make state law rather than federal law the source of the federal agencies' power in violation of the Supremacy Clause of the U.S. Constitution.

Congress has taken its position about the desirability of interstate banking and branching by ending its legislative debate over the matter and coming down firmly in favor of the prompt development of a nationwide, interstate banking and branching system. As a result of Section 101 of the Act, states no longer have the ability to prohibit interstate banking. As a result of Section 102 of the Act, states must affirmatively conclude that interstate bank branching is undesirable and enact legislation to prohibit it. Nothing in the Riegle Neal Act indicates that Congress intended anything other than the end of the period of state flexibility and experimentation which began in earnest in the 1980's to end and for states to draw their final conclusions before June 1, 1997.

Accordingly it is my opinion that, barring a change in the Riegle-Neal Act, a bank which is domiciled in a state which enacts opt-out legislation before June 1, 1997, will not be able to obtain federal approval to branch interstate, even if the opt-out legislation is repealed or affirmative state legislation to permit interstate branching is adopted.[2]

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[2]This assumes the state will continue to require that state-chartered banks obtain F.D.I.C. insurance under Sec. 6-03-67.1 N.D. Century Code and, thus, will continue to be subject to the F.D.I.

North Dakota Bankers Association
January 12, 1995
Page 5

This opinion is as of the date written. Subsequent changes to federal or state law may alter its conclusions.

Sincerely Yours,

FOSS AND MOORE

Marilyn Foss

By Marilyn Foss

MF/rd
cc: Gerald Willer

Act.

1-17

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LEONARD J. RUBIN
PARTNER
202 828 5834

MEMORANDUM

TO: [redacted]

FROM: Leonard J. Rubin
Ellen Starr Bailey

DATE: January 17, 1995

RE: The Riegle-Neal Interstate Banking & Branching Efficiency Act

You have asked us to review the provisions of the Riegle-Neal Interstate Banking & Branching Efficiency Act ("Interstate Act") to determine whether it contains any prohibition against the State of [redacted] adopting legislation prohibiting interstate bank mergers (the so-called "opt-out" provision of the Interstate Act) and subsequently repealing such legislation in order to then permit such transactions pursuant to the Act.

SUMMARY OF CONCLUSION

Based on our review of the Interstate Act, the legislative history of relevant provisions thereof and judicial interpretations of similar bank structure legislation,[1] it is our view that the Interstate Act contains no prohibition against such action. Section 102 of the Act expressly gives states the option to avoid the Act's provisions permitting interstate mergers. That option is not made irrevocable. Had Congress intended that result, it would have stated it clearly. Indeed, the legislative history of Section 102 supports the opposite result and demonstrates Congressional intent to maintain the historic federal deference to state law on the issue of state banking structure.

[1] As you know, Mr. Rubin is a senior banking partner and Ms. Bailey is a senior banking associate at Bracewell & Patterson which is counsel to the Independent Bankers Association of America (IBAA). Mr. Rubin is a frequent author and lecturer on bank regulatory issues and has over 20 years of advisory and litigation experience dealing with interpretations of federal and state bank structure laws.

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We also reviewed the January 13, 1995 contrary opinion of Foss and Moore which you provided us. We disagree with the reasoning and conclusions expressed therein.[2]

DISCUSSION

The relevant provision of the Interstate Act is Section 102, Pub. L. No. 103-328, § 102, 108 Stat. 2343-52 (to be codified at 12 U.S.C. § 1831u), which provides:

> (a) APPROVAL OF INTERSTATE MERGER TRANSACTIONS AUTHORIZED.-
>
> "(1) IN GENERAL.- Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.
>
> "(2) STATE ELECTION TO PROHIBIT INTERSTATE MERGER TRANSACTIONS.-
>
> "(A) IN GENERAL.-**Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home State of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997, that-**
>
> "(i) **applies equally to all out-of-State banks; and**
>
> "(ii) **expressly prohibits merger transactions involving out-of-State banks.**
>
> "(B) NO EFFECT ON PRIOR APPROVALS OF MERGER TRANSACTIONS.- A law enacted by a State pursuant to subparagraph (a) shall have no effect on merger transactions that were approved before the effective date of such law.

The plain language of Section 102 authorizes federal banking agencies to approve interstate merger transactions after June 1, 1997, except in those states which, prior to that date, adopt opt-out legislation expressly prohibiting such interstate mergers. That statutory scheme of reserving to the individual states the final authority to determine statewide banking structure is consistent with prior relevant federal bank statutory schemes and with other provisions of the Interstate Act itself.

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[2] Because of the short time available to us, we were unable to broaden our research and analysis to include citations to the substantial judicial precedent on proper statutory interpretation, which we believe will further support our conclusions on this issue.

The Consistency of the Federal Statutory Scheme

The two major federal statutory provisions dealing with interstate bank branching and interstate bank acquisitions are the McFadden Act, 12 U.S.C. § 36(c), and the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d).[3] Congress gave the states final authority to decide the structure of branch banking within the state and whether out-of-state bank holding companies would be permitted to acquire in-state banks. First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122(1969); First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966); Lewis v. BT Investment Managers, Inc., 447 U.S. 22 (1980). The Interstate Act follows the same statutory scheme with respect to interstate mergers/branching by reserving to each state the authority to avoid interstate mergers by prohibitive legislation.

Had Congress intended to flatly impose interstate merger/branching on all states, with no opt-out opportunity, it could have done so directly. For example, in Section 101 of the Act, Congress did exactly that with respect to interstate bank acquisitions. Section 101 authorizes the Federal Reserve Board to approve interstate bank acquisitions by bank holding companies and expressly denies states the authority to prohibit such transactions.

> (A) ACQUISITION OF BANKS.-The Board may approve an application under this section by a bank holding company that is adequately capitalized and adequately managed to acquire control of, or acquire all or substantially all of the assets of, a bank located in a State other than the home State of such bank holding company, without regard to whether such transaction is prohibited under the law of any State.

The Interstate Banking Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2339 (1994) (to be codified at 12 U.S.C. § 1842(d)).

Section 102 takes exactly the opposite approach with respect to state authority to prohibit interstate bank mergers/branching. Rather than a prohibition on state authority, it contains an express grant of authority to states to prohibit interstate mergers. The only purpose of this provision is to permit each state to determine for itself whether it wants to have banks located

[3] The repeal of this provision by Section 101 of the Interstate Act, as discussed below, by eliminating any state authority over the issue, illustrates Congress's ability to clearly express its intent with respect to state authority on various areas in the Act.

within its borders engage in interstate merger transactions. (It is also noteworthy that Section 102 authorizes states to enact legislation permitting federal banking agencies to exercise their interstate merger authority prior to June 1, 1997, further demonstrating Congress's intent to permit state, not federal, law to continue to control this issue. Id. at § 1831u(a)(3).)

The Consistency of the Interstate Act

Other provisions of the Interstate Act itself are consistent with the conclusion that Congress intended to preserve federal law deference to each state's statutory choice in interstate merger/branching decisions within its borders. For example, Section 102:

(i) Permits interstate merger transactions that involve a branch acquisition without the acquisition of a bank, but only if such acquisitions are permitted under the laws of the state where the target branch is located. Id. at § 1831u(a)(4);

(ii) Prohibits the responsible federal banking agency from approving an interstate merger application unless the target institution satisfies any host state minimum "time-in-existence" requirement. Id. at § 1831u(a)(5);

(iii) Requires that any bank that files an application for an interstate merger transaction comply with certain filing requirements of the host state, and that a copy of the application be submitted to the state banking supervisor of the host state, even if all banks party to the transaction are national banks. Id. at § 1831u(b);

(iv) Provides that no interstate merger transaction can be approved if the resulting bank would exceed national and statewide deposit concentration limits established in Section 102, but also authorizes each state to establish a different applicable concentration limit. Id. at § 1831u(b)(2)

Section 103 of the Interstate Act allows national and state banks to establish and operate de novo branches across state lines, but only if the host state expressly permits out-of-state banks to do so. Pub. L. No. 103-328, § 103, 108 Stat. 2352-54 (to be codified at 12 U.S.C. § 36(g)).

Opt-Out Is Not An Irrevocable Decision

The Conference Report on the Interstate Act summarizes Congressional intent to maintain the same statutory scheme of deference to the states on this issue:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. * * * Congress did not intend that the [Interstate] Act alter [the balance of State and Federal law under the dual banking system] and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.

H.R. Rep. No. 651, 103d Cong., 2d Sess., at 53.

Following Senate passage on September 13, 1994, Senator Roth, a conferee on the Interstate Act, addressed the precise issue of the revocability of a state's opt-out decision:

> Therefore, while this legislation does unconditionally authorize interstate banking, the same cannot be said of interstate branching. Instead, the legislation gives the policymakers in each State a choice whether or not to allow interstate branching in their State.
>
> * * *
>
> I say that each State has at least until June 1, 1997, in that any State that desires additional time beyond that date may simply opt-out before that date. **Then, under the legislation, it may opt-in at any later time it finally decides.** This is a point that is not well understood by commentators seeking to provide a simplified explanation of the legislation. But this is, indeed, how the legislation works. The 1997 date is there for a State to act by such time or be deemed to have elected interstate branching. But if a State needs more time to resolve tax or enforcement issues, for example, it may affirmatively obtain as much time as it needs under the legislation. Each State has the power to write its own script.

140 Cong. Rec. S 12788 (daily ed., Sept. 13, 1994) (emphasis added).

Section 102 expressly gives states the option to avoid the Act's provisions permitting interstate mergers. Nowhere does it state that a state's decision to enact opt-out legislation is irrevocable. Had Congress intended that result, it would have stated it clearly. (See, In re Criswell, 154 BR 264 (Bkrtcy, E.D. Ark. 1992), in which the court found that absent a clear statement of irrevocability by Congress, states given a legislative option with respect to the applicability of a federal statute, may opt-out and subsequently opt-in.) To read Section 102 as making an opt-out election irrevocable and imposing on states which enact such legislation a "penalty" forever prohibiting interstate mergers, ignores its plain language and is inconsistent with the history of the Interstate Act, as discussed above. The only supportable reading of Section 102 is that it continues the statutory scheme of federal deference to state bank structure laws as and when adopted, amended or repealed. This clearly was the result intended by Congress.

CONCLUSION

Based on the facts and research discussed above, we must conclude that, should the State of [redacted] prior to June 1, 1997, enact a law prohibiting merger transactions involving out-of-state banks, it may at any time thereafter repeal such law, and federal banking agencies then may approve such transactions pursuant to Section 102 of the Interstate Act.

LJR
ESB

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February 8, 1995

Mr. J. Joseph Brannen
State Executive
Georgia Bankers Association
50 Hurt Plaza
Suite 1050
Atlanta, Georgia 30303

Dear Mr. Brannen:

At your request on behalf of you and your colleagues, we have reviewed Section 44(a) of the Federal Deposit Insurance Act (the "FDI Act") to determine if it allows a State to pass a law prohibiting interstate merger transactions, that is "opt-out" of interstate branching, and then at some future date, reverse that decision. Based upon a review of the statute and legislative history, we have concluded that there is no clear answer to your question. Both the express language of the statute and the legislative history can be viewed as ambiguous on this issue, raising significant uncertainty for States that choose to opt-out of interstate branching on the assumption that they may, at some later time, opt back in.

Section 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[1] (the "Riegle-Neal Act") added Section 44 to the FDI Act, which authorized interstate merger transactions. Paragraphs (1), (2) and (3) of Subsection (a) of Section 44 specifically addresses the authority of States to "opt-out" of and "opt-in" to such transactions. Paragraphs (1) and (2), which are the most relevant to this issue,[2] read as follows:

1/ P.L. 103-328.

2/ Paragraph (3) provides that a state may permit interstate branching before June 1, 1997, by passing a law to that effect, i.e., "opting-in" to branching.

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Mr. J. Joseph Brannen
February 8, 1995
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Sec. 44 Interstate Bank Mergers.
(a) Approval of Interstate Merger Transactions Authorized.--
(1) In General.-- Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.
(2) State Election to Prohibit Interstate Merger Transactions.--
(A) In General.-- Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home State of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997, that--
(i) applies equally to all out-of-State banks; and
(ii) expressly prohibits merger transactions involving out-of-State banks.
(B) No Effect on Prior Approvals of Merger Transactions.-- A law enacted by a State pursuant to subparagraph (A) shall have no effect on merger transactions that were approved before the effective date of such law.

The starting point for interpreting Section 44(a) is the language of the section. The language of the section, however, is silent on the ability of a State to prohibit interstate merger transactions and then reverse that decision. Paragraph (2) of Section 44(a) permits a State to "opt-out" of interstate merger transactions, provided it has "enacted a law" to that effect between the date of enactment of the Riegle-Neal Act and June 1, 1997, but neither that Paragraph, nor any other provision of Section 44(a), expressly provides that a State may reverse that decision.

As a result, Section 44(a) likewise fails to address the mechanics of how or when a State could reverse an "opt-out" decision if it wanted to do so. It does not state that the repeal of an "opt-out" statute effectively reverses a prior decision. It does not state that a timely decision to "opt-in" under the terms of Paragraph (3) effectively reverses an earlier decision to "opt-out". Finally, it does not include any time frame for a State to reverse an earlier decision, even though

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February 8, 1995
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there is a limited time period in which a State must "opt-out" of interstate merger transactions.

The silence of Section 44(a) can be interpreted two ways. On one hand, it is possible to argue that the absence of any express authorization for a State to reverse an "opt-out" decision means that Congress did not intend States to have this power. According to this view, Paragraph (2) should be read as a limited opportunity for States to override the general authorization contained in Paragraph (1) and that once a State has elected to override that authorization it cannot revoke it. Support for this view is found in the term "enacted" as it appears in Paragraph (2). The use of that term indicates that a State's decision to "opt-out" is linked to a specific event, the "enactment" of a statute, and once that event has occurred, it cannot be reversed.

Alternatively, it is possible to argue that the absence of any express prohibition on the ability of a State to reverse an "opt-out" decision means that Congress did not intend to stop a State from doing so at some later date. According to this view, Section 44(a) is intended to preserve the ability of States to control the entry of branches by out-of-State banks.

In cases where the statutory language is ambiguous, the courts have resorted to legislative history for guidance. In this case, however, the legislative history of Section 44(a) also leads to conflicting interpretations of the Section.

Both the House and Senate versions of the bill that ultimately became the Riegle-Neal Act included "opt-out" provisions. While the House and Senate bills were structured somewhat differently,[3] the intent of the "opt-out" provisions was the same, to give the States the option and some time to prohibit interstate branches of out-of-State banks. There was,

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3/ The "opt-out" provisions in the House bill were associated with provisions to permit national banks and state banks to branch interstate and to permit subsidiaries of bank holding companies to consolidate on an interstate basis. The Senate bill only dealt with "opting-out" in the context of bank holding company consolidations, since that was the only mechanism to branch interstate directly authorized under the bill. Under the Senate bill, States could permit banks to branch directly, as opposed to through bank holding company acquisition/conversion, but they would have to take legislative action to that effect.

however, one significant difference between the House and Senate versions of the "opt-out" language. The Senate-passed bill specifically addressed the ability of a State to reverse an earlier "opt-out" or "opt-in" decision. It provided that--

> A State described in [the provision that authorized a State to "opt-out"] or [the provision that authorized a State to "opt-in"] may elect at any later time to permit or withdraw permission for interstate combinations authorized under [the provision that authorized interstate combinations] if such State enacts a law that applies equally to all out-of-State banks and that expressly permits (or withdraws permission for, as the case may be) interstate combinations by all national and State banks.[6]

In other words, the Senate-passed bill expressly authorized States to reverse an "opt-out" or "opt-in" decision at any time.

After the House and Senate passed their respective versions of the interstate bill, the bill was sent to conference. There, the competing structures of the House and Senate bills were rationalized and the "opt-out" language was placed in Section 44(a) of the FDI Act. In that process, the Senate provision that authorized a State to reverse an "opt-out" or "opt-in" decision was deleted from the bill. While other interpretations are possible, the elimination of that provision can be interpreted to indicate that Congress did not intend for the States to have the ability to reverse a decision to "opt-out."

On the other hand, when the conference report was debated on the Senate floor, one of the Senate conferees (but not the Chairman or Ranking Member of the Senate Banking Committee), stated that the final version of the bill still gave the States the ability to reverse an "opt-out" decision:

> I say that each State has at least until June 1, 1997, in that any State that desires additional time beyond that date may simply opt-out before that date. Then, under the legislation, it may opt-in at any later time it finally decides. This is a point that is not well understood by commentators seeking to provide a simplified explanation of the legislation. But this

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6/ Proposed Section 3(h)(6) of the Bank Holding Company Act of 1956 as amended by Section 103(a) of H.R. 3841, as passed by the Senate, see Congressional Record for May 2, 1994, p. S 4984.

Mr. J. Joseph Brannen
February 8, 1995
Page Five

is, indeed, how the legislation works. The 1997 date is there for a State to act by such time or be deemed to have elected interstate branching. But if a State needs more time to resolve tax or enforcement issues, for example, it may affirmatively obtain as much time as it needs under the legislation. Each State has the power to write its own script.[5]

Therefore, like the language of Section 44(a), the legislative history of the Section can be read two ways. The elimination of the express authorization could indicate that Congress did not want States to have the authority to reverse an "opt-out" decision. On the other hand, the lack of clarity in the statute and the floor statement of a conferee could lead one to believe that that power is implicit in the statute.

Ultimately, this may be an issue that is resolved in the courts. Given the ambiguity of Section 44(a) and its legislative history, a State should not automatically assume that a court will sanction an attempt to reverse an earlier "opt-out" decision.

Sincerely,

Robert E. Barnett

Robert E. Barnett

James C. Sivon

5/ Floor statement of Senator Roth of Delaware, see Congressional Record, September 13, 1994, p. S 12788.

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, Washington, D.C. 20036

MEMORANDUM

January 25, 1995

To: State Association Executives

From: Ken Clayton
Irv Warden

Re: Interstate Banking Act-Preemption Principles

Some of you have raised questions about a state's power to regulate in-state branches of out-of-state national banks -- which comes down to the question of whether the state law has, or will be, "preempted" by the OCC (and not invalidated by the courts). While there is no telling what the Comptroller will decide to preempt in the future, it is instructive to look to general preemption principles and the history of OCC preemption activity as a guide to what state laws could be preempted in the future. This memo presents summaries of the principles of preemption law, changes made by the interstate act, and some examples of the areas in which the OCC and the courts have found that federal law has preempted state law. This should help you better determine strategy for upcoming state legislative issues involving this subject.

(I) Traditional Preemption Principles

Historically, a state's ability to regulate the activities of national banks was determined using general principles of law governing federal preemption of state laws and regulations. Under court-evolved interpretations, state laws have been preempted when:

1) the state law is in direct conflict with federal law;

2) federal law is so comprehensive as to evidence Congressional intent to occupy a given field;

or

3) state law stands as an obstacle to the accomplishment of the full purposes and objectives of the federal law.

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The Comptroller of the Currency has used these principles to preempt the application of various state initiatives to national banks (see examples below).

(II) The Interstate Act

The interstate banking act neither changed the legal standard to be applied in preemption cases, nor expanded state power over national banks.

In the areas of community reinvestment, consumer protection, fair lending, and the establishment of intrastate branches, the new act does add two significant provisions. The Comptroller may not issue, with limited exceptions, any opinion letter or interpretive rule which concludes that federal law preempts state law in these areas without conducting a notice and comment procedure. This requirement does not change the legal standards used in preemption decisions, but it might affect the result in some cases. The Comptroller will decide which actions fall into the four areas requiring a notice and comment procedure. Further, the act also permits the Comptroller to preempt any state law in the four areas if the Comptroller determines it to be discriminatory toward branches of out-of-state national banks, e.g., applies only to such branches, and not to in-state institutions. The new statute provides no greater clarity on what will be considered discrimination against a branch of an out of state national bank. State laws in the specified four areas which are applied to branches of out-of-state national banks shall be enforced by the Comptroller.

(III) Examples of Preemption

The OCC has preempted the following types of state laws, some of which have been validated by the courts (while this list is not exhaustive, it does give a sense of the types of issues that the OCC looks to preempt):

CONSUMER ISSUES

A state's enforcement mechanism and complaint resolution process in it's anti-redlining statute are preempted as being inconsistent with the OCC's exclusive enforcement authority. Substantive parts of the state statute may apply.

A state's request, under its supervisory authority, for information about mortgage lending is preempted by a national bank's federal disclosure requirement under Regulation C.

State laws regulating the advertisement of deposit account interest rates and home mortgages are preempted by federal regulation on the same issue.

Adjustable Rate Mortgages made by national banks are governed by federal law and regulations and conflicting state laws or regulations are preempted.

National banks are not required to follow state laws or regulations governing consumer checking accounts which are inconsistent with the federal authority of national banks to engage in the business of accepting deposits. (Congress has suggested, in conference committee report language on the interstate act, that this decision be reexamined.)

SUPERVISION AND SANCTIONS

State laws authorizing state officials to exercise licensing, visitation, and enforcement functions over credit card issuers are preempted as they apply to national banks.

State laws authorizing state officials to register and examine national banks performing brokerage activities are preempted by federal law.

A state law giving state regulators the power to make assessments against "electronic branches" is preempted by federal law.

A national bank needs approval from the Comptroller, not the state to "host" a trust service office. Additionally, state officials do not have the authority to order an audit of a national bank's trust department or of a particular trust account.

A state bank regulator's power to review bank acquisitions does not extend to national banks.

National banks do not have to respond to state regulators' questionnaires designed to detect interlocking relationships prohibited by state law. Federal law addressing interlocking directorates preempts this state law.

Federal law preempts state law which authorizes state regulator to license and investigate records of national bank which purchases certain retail consumer contracts.

RESTRICTIONS ON BANK OPERATIONS

State statutes restricting bank activities on Saturdays and Sundays are preempted by federal law.

State laws setting maximum or minimum interest rates national banks may pay on deposits are preempted by federal law.

Under federal law, the interest rate and fees which a national bank may charge on credit cards and other types of credit are set by the laws of the state in which the national bank is located. Interest rate and fee limits set by the law of the state in which the borrower resides are preempted by this federal law.

RESTRICTIONS ON BANK PRODUCTS

State laws which purport to prevent national banks from selling variable and fixed rate annuities are preempted by federal law.

State statutes cannot restrict or undermine insurance activities authorized to national banks by federal law. OCC interpretations of this area of preemption are the subject of several pending court cases.

A state prohibition against the payment of commissions on insurance coverage to non-licensed agents is preempted as it applies to national banks performing federally permitted activities.

National banks cannot be prevented from entering into debt cancellation contracts by state law.

State law cannot require national banks which sell insurance to be incorporated under state law as corporate insurance agents.

A State cannot require employees of a national bank engaged in securities brokerage activities to submit to state registration and examination

State laws requiring national banks to register with the state as a broker-dealer are preempted by federal law.

State "Blue Sky" laws cannot require a national bank or its employees to register with the state regarding the issuance and sale of bank securities as permitted under federal law.

National banks originating insurance premium financing are not required to obtain state licenses or establish state licensed subsidiaries in order to conduct this business.

MISCELLANEOUS

A state cannot impose a fee on a national bank engaging in activities that a national bank is authorized to perform by federal law.

State laws requiring a trader's license are preempted for national banks which sell merchandise in a deposit promotional campaign.

National banks are not required to comply with a state law which requires registration and examination for any person acting as a municipal financial consultant.

TESTIMONY

HB 2670

KANSAS HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE

FEBRUARY 7, 1996

JOE C. MORRIS

FIRST BANK KANSAS

Mr. Chairman, Members of the Committee:

I am Joe Morris, a Senior Vice President of First Bank Kansas. First Bank Kansas has 27 banking offices serving the following 17 communities in Kansas: Andover, Augusta, Clay Center, El Dorado, Emporia, Lawrence, Lenexa, Manhattan, Overland Park, Prairie Village, Pratt, Eureka, Gardner, Holton, Iola, Topeka and Wichita.

Kansas should join the 22 states that have opted in to the national banking system. Only Texas has voted to opt out, and Texas' opt out legislation "sun sets" in 1999. Kansas is trying to attract and retain businesses. Opt out could put Kansas at a competitive disadvantage. Would businesses looking at Kansas consider opting out an indication of a restrictive business environment? When Kansas businesses need large credit facilities, will they have to go outside Kansas for those services, thereby reducing our state's economic base and costing jobs? Kansas banking needs to be part of the 21st century financial system!!

IF OPT IN LEGISLATION WERE ENACTED

1. What would be the effect on Kansas banks--large and small, urban and rural?

The best interest of all Kansas banks is not enhanced by positioning the opt out/opt in issue as a fight between large banks and small banks, or between urban and rural banks. All Kansas banks must not be blocked from having the opportunity to engage in fair competition with the "non-banks". Over a period of years, non-banking institutions, such as finance companies, insurance companies, mutual funds, brokerage houses etc., which have only marketplace considerations determining where they locate and in what form, have been providing a greater number of financial services previously

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provided by banks. The "non-banks" have been gaining market share from the banks. A recent estimate indicated that twenty years ago, banks' market share was approximately 50%. Today, it is estimated to be approximately 23%. One of the reasons federal interstate banking and branching law was passed was to enable all banks to compete on a more equal footing with "non-banks". All banks in Kansas should have that opportunity.

2. How would Kansas business and individual customers be affected? Interstate branching will produce more efficient competition to get the banking business from Kansas businesses and Kansas citizens. This competition will produce more and better products and services, and probably lower long run costs of banking for Kansas customers. It may also produce a marketplace in which Kansas customers have a clearer choice between personal service at a slightly higher price, and less personal service at a slightly lower price. Kansas businesses which serve multi-state and national markets will benefit from interstate branch banking. They will be able to avoid the costs associated with having separate bank accounts in each state--which they now may need to have.

3. Would enactment affect Kansas banks that wish to branch into other states? Because Kansas would be a part of the interstate branch banking system, any bank headquartered in Kansas would be permitted to branch into other states. Kansas banks should have the option to branch into other states. In order for banks chartered in Kansas to have this option, Kansas must enact opt in legislation.

4. What difference would there be in the operation of branch banks in Kansas by out-of-state banks? Out-of-state banks will operate branches in Kansas whether Kansas opts out of, or opts in the interstate branch banking system. Out-of-state banks are permitted to operate branches in Kansas as long as they own a Kansas bank and have branches of that Kansas bank. If Kansas opts in or becomes a part of the interstate branching system in June 1997, out-of-state banks could convert their Kansas bank branches into branches of their national banking network, thereby becoming more efficient--which could increase the franchise value of many Kansas banks. Either way--opt out or opt in--the concerns of some bankers about the existence of branch banks of out-of-state banks in their communities will continue.

My 30 years in the financial services business (savings and loan and banking) have convinced me that personal banking relationships are extremely important to the success of a financial institution. Banking may be best when it is as close to the people as possible, and as personal as possible. I believe that a community bank has a strong competitive advantage because most customers want their banker to know them; know their business; know their character; and, they want their banker to be willing to judge their credit risk based on this personal relationship and knowledge. If a bank does that in its community, that bank, will succeed and prosper, no matter how many regional or national branches are attempting to compete for its customers.

I ask that you support HB 2670--the "opt in" legislation. "Opt in" will benefit Kansas, Kansas banks, Kansas businesses and Kansas bank customers.

Thank you for the opportunity to present these views.

Mitchell County Bank

P.O. Box 66
SIMPSON, KANSAS 67478
Phone (913) 593-6611
Fax (913) 593-6835

February 7, 1996

TO: Chairman & Members of the Financial Institutions and Insurance Committee
Topeka, Kansas

FROM: Stephen Redman, President & CEO
Mitchell County Bank
Simpson, KS

RE: HB 2670 (Opt-In) Supporting Testimony

Dear Mr. Chairman and Members of the Committee:

I would like to take this opportunity to express to you several reasons that HB 2670 should be supported and made into law.

First of all, HB 2670 has been drafted with exceptional concern for what is in the best interest of the citizens of Kansas in the long run.

I say this because not only does this legislation understand the many benefits to customers of centralized operations in banking, that interstate branching can bring. Things like lower loan rates, higher deposit rates & better facilities.

However, the thing that is most important in the eyes of a small banker like myself is that HB 2670 offers the increased possibility of continued existence. In my town of 100 people (Simpson, KS) this is a real possibility.

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Feb. 7, 1996

I feel that HB 2670 can actually save some small communities in Kansas from becoming a thing of the past. These small towns need small banks. And with the ongoing regulatory requirements forever increasing, the farming operations around the state forever decreasing, the possibilities of a small bank being able to survive in a rural setting is a real uncertainty.

If HB 2760 were made into law, all banks will be able to consider all options, as most of the states in this country will have the rights to do. This is especially important for small banks because an out-of state bank may be the only interested party that could save a community. If the bank dies, in most cases so does the town. Instead of being forced to close HB 2670 will increase the chances of a small town finding the resources to continue a viable operation. Thus saving the town and the community.

In conclusion, I think that we all know that the natural order of the banking industry is coming to the point HB 2670 would take us anyway. The state of Kansas can join the other half of the nation that is leading the way into the 21st century.

The state of Kansas can be a part of that leadership role and I feel be rewarded for it by being in the main stream of opportunity that will come in this year. If Kansas does not get ready for the new banking system of the future as soon as possible, and as I think we all agree it is coming anyway, it is accepting a "reactive role" and can not expect to receive the benefits other nearby states will that have already adopted a law similar to HB 2670.

I suggest today that Kansas become "proactive" in this new age of banking opportunities and lead the way along with most of the other states. Give Kansas and its citizens an advantage in the future by seeing the future and what is coming...be ready for it.

I feel that HB 2670 would be a good law for us all. Thank you for the opportunity to be here today and express the views of the smallest bank in Kansas.

Testimony
by:
Frank Suellentrop, Pres.
State Bank of Colwich
in opposition to HB 2670

Chairman Bryant, and members of the House Financial Institutions & Insurance Committee, I come before you today to present testimony in opposition to opt-in legislation, House Bill 2670.

My name is Frank Suellentrop. I am President of the State Bank of Colwich, a $64 MM bank in N.W. Sedgwick County.

I was present for yesterday's hearings along with several other community banks in support of opt out legislation - HB 2716. I had not intended to testify at todays hearing, however, after listening to the testimony of those who support opt-in legislation, there were some issues brought up that I felt needed to be addressed.

A significant part of their argument for opt-in was that it will increase competition among financial institutions, and create more and better choices of products and services for consumers.

My question is: Why are these things only going to happen if we allow interstate branching and thereby eliminate the requirement of a bank charter?

The notion that opting in will increase competition, and create more choices for customers is totally inaccurate. Intense competition is here now, and will continue to be...even without interstate branching. Interstate banking operations can offer customers additional services...even without interstate branching. These operations are not barred from entry into Kansas. They are welcome to do business here. All we ask it that the current Kansas statutes be maintained, thereby continuing to require that banks doing business in Kansas maintain a state bank charter.

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In previous testimony, opt-in supporters suggested that banks should be compared to Qwik Trips and be allowed to compete freely across the United States without barriers. This statement makes for a good sound bite, but it shows a lack of understanding of fiscal or monetary policy on both the national and statewide level.

There are reasons for regulatory control of financial institutions. We have a fiduciary responsibility with regards to our customers' deposits and to the communities we serve. By having a Kansas bank charter, and a board of directors made up primarily of Kansas citizens, we are accountable to the State of Kansas and the Kansas communities we serve.

Please be aware if Kansas opts in, out-of-state banks will be able to minimize their branch's Kansas tax liability though a variety of accounting techniques. Fees assessed to branches can be easily shifted to other states that have a more favorable system of taxation of financial institutions. You can remedy this situation by continuing to require banks to maintain **one** Kansas Charter. By doing so, Kansas will be assured that **all** doing business in the State will pay their share of tax on the income they generate in Kansas.

Opt-in supporters suggest that Kansas has nothing to lose and everything to gain by eliminating the requirement that banks maintain a Kansas bank charter. What Kansas will lose is the control of some of Kansas' financial resources! Opt-in supporters are asking you to transfer total regulatory control of out-of-state branches -- branches that will control Kansas deposits and capital -- to other states like Missouri - soon to be in Ohio - North Carolina - New York - or California.

I ask each of you -- as members of the Committee for Kansas Financial Institutions -- Are you willing to transfer control of this vital segment of the Kansas economy to other states? I hope note. I ask you to keep Kansas and Kansans in control of our financial resources. Please vote against House Bill 2670.

Thank you for the opportunity to comment. I'll be happy to answer any questions you may have.

STATE OF KANSAS LEGISLATIVE HEARINGS
OPT IN HB 2716
TESTIMONY BY CLARK P. YOUNG
FEBRUARY 7, 1996

Chairman Bryant, members of the committee, my name is Clark P. Young and I;m president of the Citizens State Bank in Hugoton. I'm also a longstanding member of the KBA and am currently serving as president of the CBA.

Let's review on how we got to where we are today. The KBA spent hours and hours educating the banks of Kansas on interstate banking and the opt in vs. opt out issue. Regional meetings were held in six convenient locations throughout the state to discuss this issue.

After all this was done, a poll was taken, a total of 437 ballots were sent to every member. This included every bank in Kansas except four. The educated bankers voted on this issue and 75% of all banks responded. There were 221 banks that favored opting out, a Majority of <u>ALL</u> its members. In fact, the vote was 2 to 1 in all six regions of Kansas to support opt out. Both rural bankers and urban bankers support it.

Likewise, the CBA polled its members. Its results were similar: a clear majority of bankers favoring opt out. I wish I could fill this room with every banker and bank that supports this legislation, but I can't. That's why we're here today to share with you these findings.

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Contrary to what the newspaper reported today, over half of the bankers in this room yesterday supported opting out.

Speaking of yesterday, we heard the same old argument that Kansas bankers are afraid of outside competition. If I'm serving my customers and providing services they desire at a reasonable rate, I have nothing to worry about. We can compete and do so on a daily basis. We even heard this testimony yesterday from the opt in supporters.

What I am concerned about is not the competition, but whether all banks in Kansas can operate under the same rules and conditions. Nobody's closing the borders to out of state banks, we are simply asking that you tax them equally and fairly. And, that they serve their communities under the same CRA rules that we must follow.

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I am not opposed to Boatmans or any other bank coming to Kansas. I am opposed to any other bank doing business in my trade area and being assessed the privilege tax under a different formula than our bank. If they are going to be called a "bank", then let them be treated the same way. Why should we give out-of-state banks any advantage over our current Kansas banks? The state privilege tax raised $40 million in 1994. Do we want to do anything to adversely impact this tax?

Who wants interstate branching? Have your constituents called you saying, "Boy, I'm sure glad my banks being bought by an out-of-state bank and I'm looking forward to all the new services!" Has a businessman or businesswoman expressed concern about his or her inability to receive their operating capital and that we need large out-of-state banks to supply their initial requirements?

We Kansas bankers are merely asking for banks that operate in Kansas to follow the same rules. What's wrong with asking for fair competition? Shouldn't every bank, large or small, new or long-established, be following the same rules?

see: "MAINTAINING OUR OPT OUT POSITION" sheet.

Kansas banks are currently enjoying the highest loan to deposit ratio since World War II. Why should we opt in now and close the door to ever going back to the current fair system of taxation, etc? If we opt out, we retain the flexibility to opt in at a later date.

Boatmans has the authority to do everything they want to do. They stated in an article in the Wichita Eagle that they will be retaining a charter in Kansas. If that is correct, then they have complied with every aspect of HB 2716 and opting out. As my four year old daughter says, "Hakuna Matata", which means "no worries". I urge you to support HB 2716.

A BURNING QUESTION — WILL IT AFFECT SMALL BUSINESS LENDING?

New legislation authorizing full interstate banking has been hailed as beneficial to both the banking industry and consumers, even though some analysts worry that these benefits will be achieved at the expense of small business.

William R. Keeton, a senior economist at the Federal Reserve Bank of Kansas City, has looked at new information on small business loans in states of the Tenth Federal

Reserve District and reports his findings in the second quarter issue of *Economic Review*, the bank's research journal.

In his article, "Multi-office Bank Lending to Small Businesses: Some New Evidence," Keeton reviews the controversy over the effects of multi-office banking on small business lending.

While Keeton's research supports the view that further growth in multi-office banking may impose short-run costs to some small businesses, he cautions against concluding that multi-office banking should be curtailed.

To reach his conclusions, he examined the small business lending patterns of multi-office banks in Tenth District states: Missouri, Kansas, Nebraska, Colorado, Wyoming, Oklahoma and New Mexico. For his analysis, Keeton used new call report data on loans under $100,000 to approximate loans to small businesses.

"Data for mid-1994 in the Tenth District show that branch banks, smaller banks in multibank holding companies and banks owned by out-of-state holding companies all tend to lend a smaller proportion of their funds to small businesses than other banks," Keeton reports.

"These results support the view that further growth in multi-office banking may impose short-run costs to some small businesses."

But there are many exceptions and Keeton is quick to caution against concluding that multi-office banking should be curtailed. For one thing, he says, any costs to small businesses may be only temporary because other banks may step in to provide needed financing. Also, other benefits of multi-office banking may outweigh any costs of small businesses.

"There is substantial evidence," Keeton points out, "that multi-office banking improves services to depositors and increases competition in local markets.

Multi-office banking also makes banks less vulnerable to downturns in the local economy, increasing bank safety and the ability of banks to maintain lending during periods of economic stress. That, in turn, helps soften local recessions."

He says his study "underscores the importance of keeping local banking markets competitive." In his view, "Regulators should continue to ensure that multi-office banks do not dominate local markets by absorbing smaller banks."

He calls for further progress on reducing regulatory reporting burdens which tend to hurt small banks more than large ones, and concludes:

"Such measures should preserve the benefits of multi-office banking while helping guarantee that legitimate credit needs will be met."

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AMERICAN BANKER
Thursday, January 4, 1996

5-6

Interstate Banking: More Harm than Good

By ANTHONY S. ABBATE

The potential for large out-of-state banks to operate branches in New Jersey — a prospect that would be facilitated by a bill currently before the state Senate — is an impending threat to community banking as we know it, and to small businesses and their communities by extension.

Comment

The Interstate Banking/Branching Bill, which passed the state Assembly last spring and is due for a second reading before the Senate this term, would allow increased branching into the New Jersey banking community by domestic and foreign financial institutions.

Proponents of interstate banking argue that bigger banks, with geographically and economically diversified loan portfolios, are "safer" banks. Economists at the Federal Reserve Bank of Minneapolis disagree. They say larger banks get into trouble more often than smaller banks.

Another argument proffered by interstate banking advocates is that consolidated operations lead to increased services at lower fees.

But we are in the realm of myth here.

A study by Arthur E. Wilmarth Jr., associate professor of law at George Washington University, showed that in the highly concentrated California banking market, banks charged higher rates for loans and paid lower rates on deposits than banks in comparable states.

Anthony S. Abbate

A study released in September by the Federal Reserve clearly demonstrates that bank fees rise as banks grow and branch across state lines.

The Fed's annual survey, Retail Fees and Services of Depository Institutions, found that during 1994 customers at out-of-state banks paid about $2 more in fees for stop-check orders, bounced checks, and overdrafts than did customers of in-state banks. Interstate bank customers also were required to keep up to $170 more in their accounts to avoid additional fees.

Professor Nicholas M. Didow summarized it well years ago during testimony before Congress: "The larger the bank, the higher the level of fees. The smaller the bank, the lower the level of fees."

It's a simple equation: bigger banking equals higher fees.

Businesses should worry about the alarming phenomenon known as "flight of capital," a scenario in which deposits collected by branches in one state are disbursed as loans in another.

As an insidious effect of mergers, geographic diversification, and flight of capital, a handful of powerful, centralized banks will eventually divide our nation into "colony" and colonizer" states, whereby the bank's home state economies will thrive at the expense of the colonized states.

This point was recently brought to the fore by Kenneth H. Thomas, a professor at the Wharton School of Business, a banking consultant, and author from Miami who has seen colonization at work in his home state. A major out-of-state bank in Florida now operates with a 30%-to-5% imbalance of deposits to loans, and the colonizing bank directs fully 80% of its loans to its home state.

Who wants to see this type of economic subjugation? My home state of New Jersey seems particularly vulnerable in this regard, flanked as it is by New York, the world's financial center, and Philadelphia.

Another red flag for small business is that the largest banks control half the state's deposits, but offer less than a third of all small-business loans. The chairman of one new banking conglomerate stated openly that the bank does not even consider granting small-business loans less than $200,000.

Maintaining our Opt Out position

1 Bank Charter

1. Local Board of Directors
2. Level Playing Field
3. Equal Taxation
4. *Separately Audited Financial Statements*
5. *Separate Community Reinvestment Examination*
6. *More Accountability*

5-7

Community Bankers Association of Kansas

Statement in opposition of HB 2670

by

Larry Stutz

before the

House Financial Institutions and Insurance Committee

February 7, 1996

House FI+I
Attachment 6
Feb. 7, 1996

STATE OF KANSAS LEGISLATIVE HEARINGS
OPT IN HB 2670
TESTIMONY BY LARRY J. STUTZ
FEBRUARY 7, 1996

Ladies and gentlemen, my name is Larry J. Stutz, President and CEO of the First National Bank in Alma, Kansas. I am here today to offer reasons why you should reject House Bill 2670 which would Opt Kansas in to interstate branching. Contrary to what's been stated the last two days, I am not here out of fear of competition. In addition, the over 220 bankers who voted in favor of opt out did not cast their ballots out of fear of competition.

I am President of L.O.O.K., which stands for Lets's Opt Out Kansas. L.O.O.K. is a coalition of Kansas bankers, business associations, business and civic groups who are opposed to HB 2670 and who support the state legislature adopting HB 2716. You may have noticed several bankers in the audience yesterday wearing these L.O.O.K. buttons.

Many Kansans are represented in the L.O.O.K. coalition. This includes the NFIB - Kansas, with over 8,000 business members across the state, the Kansas Farmers Union, representing 2,500 families, the Kansas Independent Automobile Dealers Association, representing nearly 250 members, the Kansas Automobile Dealers Association, representing 300 members, as well as a majority of the 150 members of the Community Bankers Association of Kansas. In addition, the coalition has over 32 individuals, businesses and civic groups. Earlier this week you should have received a copy of a letter from NFIB stating their opposition to opt in legislation and support of the legislature enacting opt out legislation.

Many of the facts about interstate banking and branching which I will present here today, are included in the notebooks which were distributed to the committee yesterday.

In order to analyze the impact of this bill, we must first look at the winners and the losers this legislation would create. First, who will gain the most from interstate branching? The proponents of this bill would like you to believe that Kansas banks in general would benefit because this would lower their costs, make them more efficient and allow them to compete on a "level playing field". In order for a Kansas bank to even see the potential of this statement, they must first participate in interstate branching. The Kansas Legislature was sold this same bill of goods with the Regional Interstate Banking Bill passed in 1992.

At that time, we were told that many Kansas banks on our borders needed regional interstate banking in order to remain competitive. We were also told that Bank IV needed that law in order to build itself to a point that it would not be a takeover target. At that time, I testified that besides Bank IV, that bill would primarily be used by Missouri banks to enter the Kansas market.

So, what has happened over the last three years? Who used the interstate banking law that Kansas banks needed to remain competitive? To date besides Bank IV, now a division of Boatmans' Bank of St. Louis, Missouri, three Kansas banks have made three purchases totaling $224,428,000 in total assets. Thus, less than one percent of all the banks in Kansas took advantage of the regional interstate banking law and acquired a minimal amount of assets outside the boundaries of Kansas.

On the other hand, seven Missouri banks and five Nebraska banks have purchased forty-three Kansas banks with total assets of $9,817,365,000, or one-third of all Kansas banking assets. Did we in fact help Kansas banks become more competitive or did banks from other states benefit the most from that legislation? Do you really believe that this legislation really promotes the competitiveness of Kansas banks or is it for the benefit of the stockholders of banks headquartered in some other state?

In 1985, the Florida Legislature, faced with similar arguments, passed interstate banking to help the banks in Florida remain competitive. In the September 1, 1995 issue of USA Today, an article on Florida banking stated "This isn't what Florida lawmakers envisioned in 1985." That's when Florida became one of the first states to approve interstate banking. Lawmakers hoped Florida's banks would become bigger and better able to compete. Barnett Banks of Jacksonville has become the biggest bank in Florida - but many believe that it, too, will be sold.

"It's the law of unintended consequences. Nobody expected Florida to wind up being dominated by out-of-state banks," says Doug Johnson, assistant director, Florida Division of Banking." The *USA Today* article states also "In all, 400 banks have been bought - mostly by big out-of-state banks. Now, even small banks considered too small to bother with, are takeover targets. Every bank has a for sale sign in the window - visible to only out-of-state banks, says Kenneth Thomas, a bank analyst based in Miami."

So, if this law will most likely benefit out-of-state banks' moving into Kansas, then who receives the "benefits" derived from the cost savings of consolidation? Are these costs savings passed on to the consumers within our state? Most studies on the effects of interstate branching indicate that out of state branches tend to charge higher service fees, pay lower savings rates and charge higher rates on loans than their in state counterparts.

In its annual report to Congress, the Federal Reserve reported that it found "In most cases, average fees charged by out-of-state banks were higher than those charged by in-state banks." In the August 9, 1995 Wall Street Journal Edmund Mierzwinski with the U.S. Public Interest Research Group reported, "All of the recent merger activity is a problem because consolidation means there will be fewer institutions and our studies show it's the biggest banks that charge the highest fees."

Right now, I am working with two other community bankers to refinance a small business owners business. His bank of 15 years was acquired by a Missouri bank. He is trying to expand his operation and the Missouri bank has no interest in the expansion loan. Working together our three banks will not only help him expand but will also preserve over 70 jobs for Kansas. Yesterday, we heard that competition is good. We agree. However - consolidation of the banking industries reduces competitors in the market place. In the last decade, we've reduced the number of banks in Kansas from over 600 to less than 450. It seems clear to me and common sense would indicate that the fewer competitors - the less the competition. Thus I would argue that the consumers of Kansas would not benefit from Interstate Branching.

To recap, thus far, it is clear that neither Kansas Banks nor Kansas consumers would benefit from the passage of HB 2670. Next let's look at the Kansas economy in general.

In a study by Deloitte & Touche of New York, it is estimated that nationwide, the adoption of interstate branching will cost us over 450,000 jobs over the next five years. Since the merger of the largest bank in Kansas was announced, it has already eliminated 140 positions and estimates another 270 job loses over the next three to fifteen months. How many more job losses will follow with the passage of this legislation? Our economic prosperity is measured by our ability to create jobs not eliminate them in the name of "progress".

California, a progressive state, is learning this lesson the hard way. In a February 6th *Newsweek* article, "Take This Job and Cut It," Wells Fargo won the merger battle over Interstate Bank because they could cut more jobs in California than First Bank.

As a result of this merger, 9000 people will be fired and 400 branches will be closed. I encourage you to read this article which is enclosed with my speech.

In another matter mentioned yesterday, a big question facing Kansas today is how would we tax these branches? I have worked with the KBA State Affairs Committee concerning changes in the tax code to solve this problem. Only one system assures us that out-of-state banks pay on the same basis; make them keep a charter in Kansas; then all banks in Kansas will be taxed under the same tax rules.

What about the arguments that the proponents of HB 2670 are presenting for its passage? They say the 30 mile rule allows interstate branching now. This rule of the OCC's is scheduled to phase out on June 1, 1997 and Texas, which has passed an opt-out bill, is fighting the legality of this rule after a state opts out. Another argument is that branching is inevitable. To this, I point out that the Riegle-Neal Act gives us the opportunity to opt-out. We must remember that this is our one opportunity. Once we opt-in there is no turning back. However, if Kansas opts out now, the legislature will have the opportunity for further study of this issue and to opt in later under Kansas' own terms and conditions if the Legislature so desires.

Are you alone on this issue? At this time, over half of the states have taken no action. Groups in Missouri, Nebraska, and New Mexico are actively pursuing opt-out legislation. Texas has already passed an opt-out bill. Thus, other states with similar economies and geography are also looking to pass opt-out Legislation.

What do you accomplish by saying no to HB 2670 at this time? First, you will require that every bank operating in the state of Kansas maintains a charter in the state. This simplifies the taxation issue in that all banks would be under the same tax rules. It protects state revenue. It would assure that each bank maintains a Board of Directors within the State of Kansas, which will allow consumers and businesses more access to the decision makers of the bank and help assure the banks will remain accountable to its deposit base. It would provide for examinations of the bank within Kansas by either state or federal examiners. This would include a full CRA examination which branches don't receive.

Contrary to the language in HB 2670, the state Banking Department does not have examination authority over nationally chartered banks or their branches. It is important to remember that the majority of the large out-of-state banks have national charters. Overall, by opting out, all banks operating in the state of Kansas will be on a level playing field with those from out-of-state who choose to do business in Kansas. The vast majority of Kansas banks won't branch out of state. Voting to opt out, not opt in, is the best way to continue to insure that Kansas bankers are provided the level playing field.

Who initiated this whole controversy in the first place? It was our federal government through its passage of the Riegle-Neal Act. Once again the federal government, in its infinite wisdom, decided that it knows what's best for states to do. How many of these mandates in the past have not been what they were cracked up to be? In the 1970's, we were told to implement federal speed limits of 55 MPH. In the 1980's we were successful in raising the speed limits on rural interstate highways to 65 MPH and now in 1996, the federal government has returned this decision making back to the states. With interstate banking there is no opportunity to turn back, once it is here we are stuck forever. This is our one, and only, opportunity to say NO!

I ask you now to vote for the consumers of Kansas, who will be stuck with higher costs. Vote for the majority of the banks in Kansas to insure tax equality. Vote for Kansas small businesses and agriculture, who will find fewer sources for loans, and for the economy of Kansas, which will lose jobs and tax revenues. Vote NO on HB 2670.

KANSAS

NFIB
National Federation of Independent Business

February 2, 1996

The Honorable William M. Bryant, Chairman
Kansas House Financial Institutions and Insurance Committee
State Capitol - Room 112-S
Topeka, KS 66612

Dear Representative Bryant:

Due to a prior commitment, I will be unable to testify before your committee on the interstate branch banking "opt-out -- opt-in" issues on February 6 and 7. However, I do want to make known to you and members of the Committee concerns that Kansas small business owners have on this issue.

In a survey conducted in December 1995, NFIB/Kansas' 8,000 members were asked: "Should legislation be enacted to allow the state of Kansas to 'opt out' of the new federal branch banking laws?" Of those responding, **63.6% said yes**; 21.6% said no; and, 14.8% were undecided.

The concern most often expressed is the fear that interstate branch banking will result in out-of-state firms controlling the Kansas banking industry, to the detriment of the small business owner.

Small business owners often rely on relationships with their hometown banker, built over a number of years. They rely on banking and financial decisions that go beyond the current P&L statement, balance sheet, or credit worthiness as determined by these documents. They often look to their hometown banker for advice based on his/her knowledge of economic conditions in their community, and their personal standing in the community, as well as the history of their own business.

We understand that if Kansas "opts out" now, "opt-in" is a future option. However, if Kansas "opts in" now, there are no future options. We urge you to support enactment of HB 2716, to opt-out now.

At a time when large businesses are downsizing and laying off employees, Kansas is very dependent upon small business to provide job opportunities, to maintain stability of the Kansas economy. We urge you not to make staying in business more difficult for these small firms.

Thank you for your consideration of Kansas small business owners' concerns.

Sincerely,

Hal Hudson

Hal Hudson, Kansas State Director

cc: Committee members

6-9

3601 S.W. 29th Street, Suite 116-B • Topeka, Kansas 66614 • 913-271-9449 • Fax 913-273-9200

The Guardian of Small Business for Fifty Years

About NFIB / Kansas

Since 1943, business owners from all walks of commercial life have joined the National Federation of Independent Business to have a powerful, united voice in government decision making. Today, NFIB's Kansas chapter has more than 7,800 members, making it the largest small-business advocacy group in the state.

Each year NFIB/Kansas polls its entire membership on a variety of state legislative and regulatory issues. The federation uses the poll results to set its legislative agenda and aggressively promotes those positions approved by majority vote.

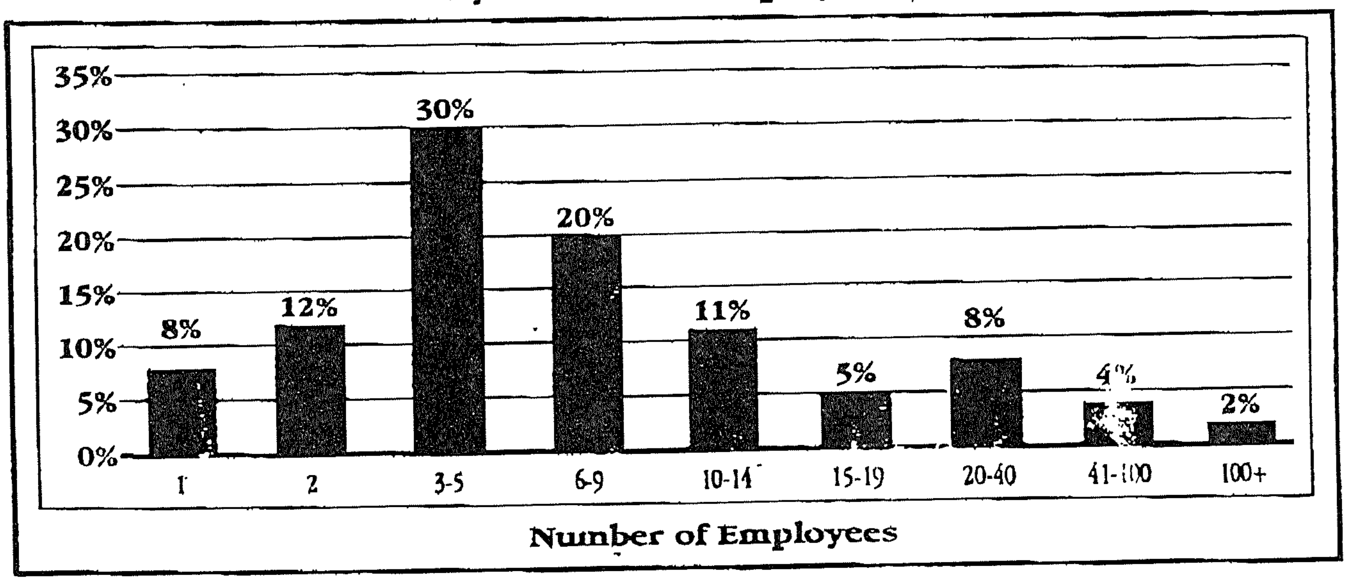
This democratic method of setting policy assures that the positions advanced by NFIB reflect the consensus views of the entire small-business community rather than the narrow interests of any particular trade group. Lawmakers wanting to know how proposed legislation and regulation will affect Main Street businesses can get the authoritative answer from NFIB's legislative office in Topeka.

6-10

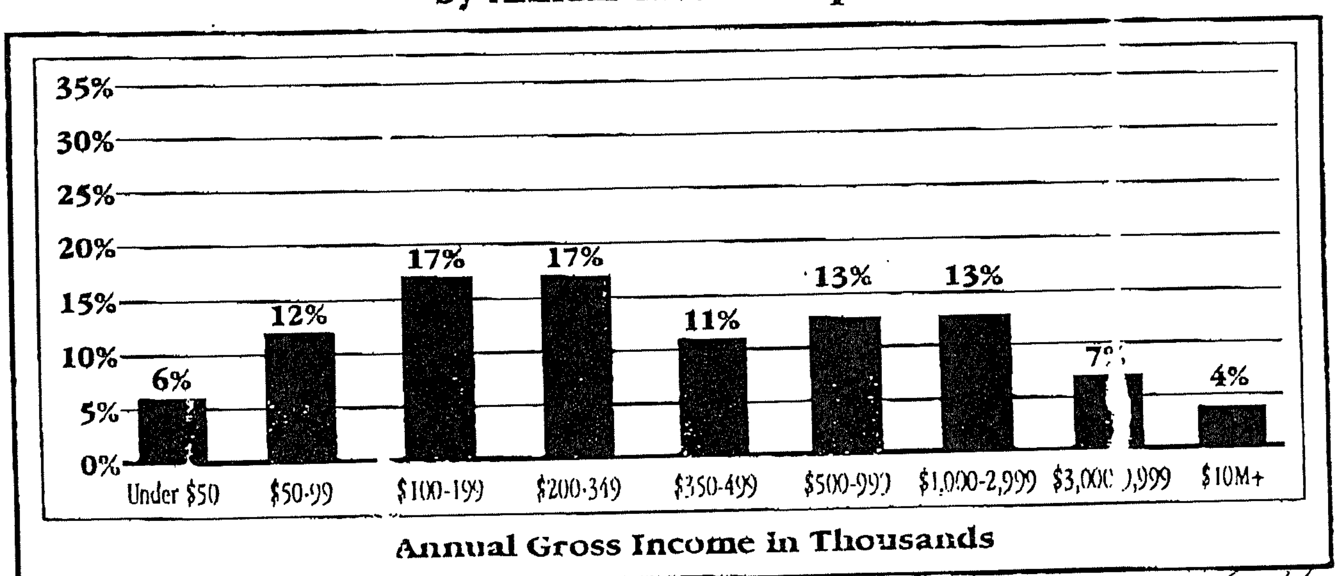
NFIB / Kansas Membership Profile

NFIB/Kansas represents the entire spectrum of independent business, from one-person home-based operations to enterprises employing more than 100 people. The typical NFIB/Kansas member is quite small, employing five workers and ringing up gross sales of about $330,000 per year. Yet, in aggregate, the membership is a potent economic force, employing nearly 95,000 and earning more than $8.5 billion (gross) annually.

NFIB / Kansas Membership by Number of Employees



NFIB / Kansas Membership by Annual Gross Receipts



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L.O.O.K. Coalition Members

Kansas - Community Bankers Association (150 members); Kansas Automobile Dealers Association (300 members); Kansas Farmers Union (2,500 families); Kansas Independent Automobile Dealers Association (243 members); National Federation of Independent Business - Kansas (NFIB) (8,000+ members); **Aliceville** - Farmers State Bank; **Alma** - Alma Chamber of Commerce; First National Bank; **Altamont** - Labette County State Bank; **Alta Vista** - State Bank; **Andover** - State Bank; **Anthony** - First National Bank; **Argonia** - Farmers & Merchants State Bank; **Arkansas City** - Union State Bank; **Arma** - First State Bank; **Ashland** - Stockgrowers State Bank; **Auburn** - Security State Bank; **Axtell** - State Bank; **Baldwin City** - State Bank; **Baxter Springs** - American Bank; Baxter State Bank; **Belle Plaine** - Valley State Bank; **Bendena** - State Bank; **Bern** - State Bank; **Bird City** - Security State Bank; **Bison** - State Bank; **Blue Mound** - Farmers State Bank; **Burden** - State Bank; **Burlingame** - Norman Bloomquist; First State Bank; Burlingame Rotary Club; James J. Clancy; Osage County Chronicle; Soendker's Grocery & Deli; Harry E. Taylor; **Burlington** - First National Bank of Kansas; Peoples National Bank & Trust; **Burrton** - State Bank; **Canton** - Farmers State Bank & Trust; State Bank; **Carbondale** - State Bank; **Cawker City** - Farmers & Merchants State Bank; **Cedar Point** - Cottonwood Valley Bank; **Centerville** - State Bank; **Cheney** - Citizens State Bank; **Circleville** - Farmers State Bank; **Clay Center** - Union State Bank; **Colby** - Peoples State Bank; **Coldwater** - National Bank, Peoples Bank; **Colwich** - State Bank; **Conway Springs** - First National Bank; State Bank; **Cottonwood Falls** - Exchange National Bank; **Council Grove** - Farmers & Drovers Bank; **Courtland** - Swedish American State Bank; **Cunningham** - First National Bank; **Derby** - First National Bank; **DeSoto** - State Bank; **Dighton** - First National Bank; **Denton** - Bank of Denton; **Dodge City** - Fidelity State Bank & Trust; **Downs** - National Bank; State Bank; **Dwight** - Farmers State Bank; **Edna** - First State Bank; **Effingham** - Farmers & Merchants State Bank; **Elkhart** - First State Bank; **Ellis** - State Bank; **Emporia** - Admire Bank & Trust; First National Bank; **Enterprise** - Dickinson County Bank; **Eskridge** - Flint Hills Bank; **Eureka** - Home Bank & Trust; **Everest** - Union State Bank; **Fairview** -Farmers State Bank; **Fort Riley** - National Bank; **Fort Scott** - City State Bank; **Fowler** - State Bank; **Frankfort** - Amoco Food Shop; Davenport Lumber; First National Bank; Gift Box; Harrington Retail Liquor and Snack Shop; Harrington Oil; Welsh Brothers Meat Company; Whiteway Chevrolet; **Galena** - Citizens State Bank; **Garnett** - Kansas State Bank; State Savings Bank; **Genesseo** - Citizens State Bank; **Goddard** - Suburban West State Bank; **Gorham** - State Bank; **Grainfield** - Citizens State Bank; **Greeley** - Bank of Greeley; **Greensburg** - State Bank; **Halstead** - Halstead Bank; **Hanston** - State Bank; **Hardtner** - Farmers State Bank; **Harper** - Freeport State Bank; **Hartford** - State Bank; **Harveyville** - First National Bank; **Haven** - State Bank; **Healy** - First State Bank; **Hesston** - State Bank; **Hiawatha** - Citizens State Bank & Trust; **Hill City** -Consolidated State Bank; Farmers & Merchants Bank; **Hillsboro** - State Bank; **Hoisington** - National Bank; **Holton** - Denison State Bank; **Hope** - First National Bank; **Hoxie** -State Bank; **Hugoton** - Citizens State Bank; Hugoton Area Chamber of Commerce; **Humboldt** - National Bank; **Hutchinson** - Central Bank and Trust Co.; **S. Hutchinson** - Bank of Kansas; **Inman** - United Bank; **Jetmore** - Farmers State Bank; **Junction City** -Community Bank; First National Bank & Trust; **LaCrosse** - Nekoma State Bank; **LaCygne** - Linn County

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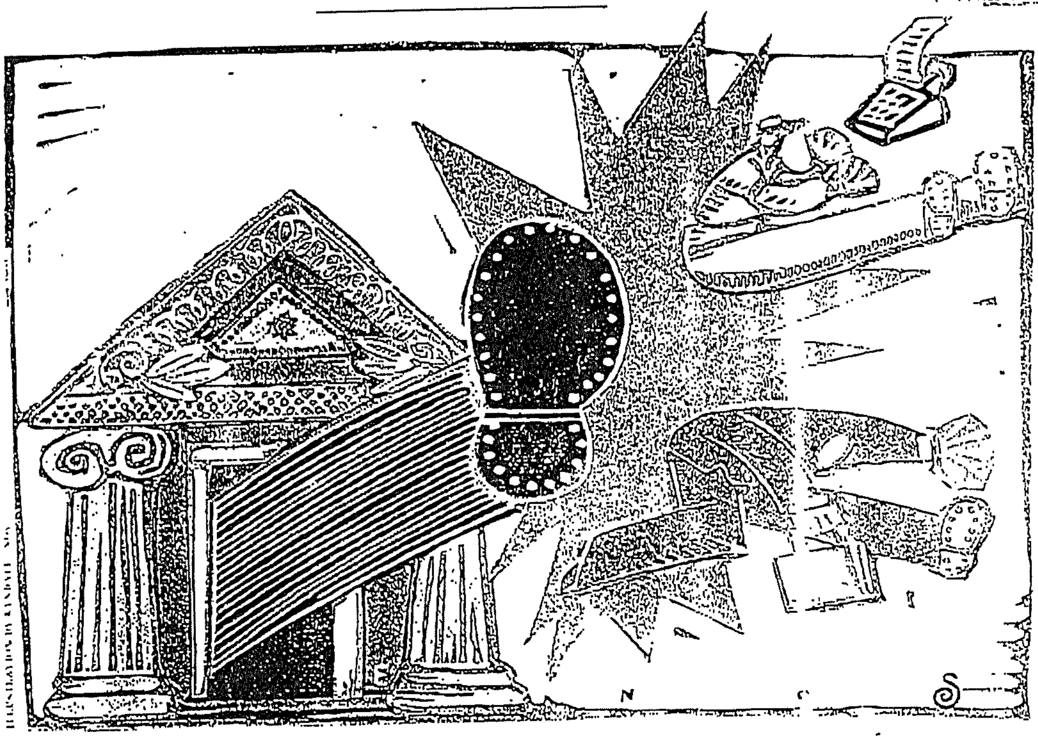
Bank; **Lawrence** - University National Bank; **Lebo** - State Bank; **Lenexa** - Premier Bank; **Lenora** - Exchange Bank; **Leon** -State Bank; **Leoti** - First State Bank; **LeRoy** - First National Bank; **Liberal** - Citizens State Bank; **Lincoln** - Saline Valley Bank; **Lorraine** - State Bank; **Lyons** - Coronado Bank; **Lyndon** - State Bank; **Lyons** - State Bank; **Macksville** - Farmers & Merchants State Bank; **Manhattan** - Kansas State Bank; **Mankato** - State Exchange Bank; **Maple Hill** - Stockgrowers State Bank; **Marquette** - Farmers State Bank; **McDonald** - Peoples State Bank; **McLouth** - Bank of McLouth; **McPherson** - Farmers State Bank; Peoples Bank & Trust; **Meriden** - Glenn and Ida Swank; Kiwanis Club of Meridan; State Bank; **Miltonvale** - Citizens State Bank; **Montezuma** - State Bank; **Morland** - Citizens State Bank; **Mound City** - Farmers & Merchants Bank; **Moundridge** - Citizens State Bank; **Mount Hope** - First National Bank; **Natoma** - United National Bank; **Nickerson** - State Bank; **Norton** - First State Bank; **Norwich** - Farmers State Bank; **Oakley** - Farmers State Bank; **Olathe** - First National Bank; **Olpe** - State Bank; **Olsburg** - Union State Bank; **Onaga** - First National Bank; **Osage City** - Citizens State Bank; **Osawatomie** - First National Bank & Trust; **Osborne** - Farmers National Bank; **Oskaloosa** - State Bank; **Oswego** - American State Bank; **Overbrook** - First Security Bank; Kansas State Bank; **Palmer** - Bank of Palmer; **Peabody** - State Bank; **Phillipsburg** - Farmers National Bank; First National Bank & Trust; Don Hayes, Retired; Don Keeten, B&B Farms; Darel Olliff, Funeral Home Director; Ross Reeves, Farmer; Chester Rumbaugh, Retired; Doyle Stanton, Car Salesman; Wayne Whitney, Retired; **Piqua** - State Bank; **Pittsburg** - First State Bank & Trust; **Plains** - State Bank; **Plainville** - State Bank; **Pratt** - First National Bank; **Protection** - Bank of Protection; **Ranson** - First State Bank; **Reading** - State Bank; **Rose Hill** - State Bank; **Sabetha** - Farmers State Bank; **Scott City** - First National Bank; **Seneca** - Baileyville State Bank; **Shawnee** - Spoon Creek Marketing; State Bank; **Smith Center** - First National Bank; **Spearville** - First National Bank; Ford County State Bank; **Spring Hill** - State Bank; **St. John** - First National Bank & Trust; National Bank; **St. Marys** - First National Bank; State Bank; **Stockton** - National Bank; **Sterling** - Farmers State Bank; **Sylvan Grove** - State Bank; **Tescott** - Bank of Tescott; **Topeka** - Capital City Bank; Columbian National Bank & Trust; Deghand Retail Liquor, Foltz-Roepke Insurance Agency; Guardian Trust Company; Kaw Valley State Bank & Trust; Peoples State Bank; Rodd Miller, Everen Securities; The Hat Box; Webb and Associates; **Towanda** - State Bank; **Tribune** - First National Bank; **Troy** - 1st Bank; State Bank; **Udall** - Bank of Commerce; **Ulysses** - Grant County Bank; **Uniontown** - Union State Bank; **Vermillion** - Argo Construction; State Bank; **Wakeeney** - Trego-Wakeeney State Bank; **Wakefield** - Farmers & Merchants State Bank; **Wamego** - First National Bank; Kaw Valley State Bank & Trust; **Wathena** - Farmers State Bank; **Weir** - Citizens Bank; **Wellington** - Security State Bank; **Wellsville** - Wellsville Bank; **Westmoreland** - Farmers State Bank; **Whitewater** - Bank of Whitewater; **Wichita** - Bankers Bank of Kansas; Jane A. Deterding, Attorney; Garden Plain State Bank; Intrust Bank; PC Business Services; Trust Company of Kansas; **Wilmore** - State Bank; **Wilson** - State Bank; **Yoder** - Farmers State Bank.

DEALS

Take This Job and Cut It

How Wells Fargo won the battle of the banks



BY ALLAN SLOAN

ON THE SURFACE, WELLS FARGO & Co.'s $11 billion victory last week in the battle for First Interstate Bank looks like your typical giant bank takeover. When the California-based banks formally combine this spring, hundreds of bank branches will close, thousands of perfectly fine employees will lose their jobs and bank customers will have fewer competitors to choose from. Shades of the Chemical Bank-Chase Manhattan merger in New York or any other deal that combines banks in the same market.

But look deeper, and you see something quite different: this is probably the first big takeover battle ever decided by how many people Wall Street thought each bidder could fire. The players here were Wells and First Bank System of Minneapolis, both of which lusted to buy Interstate, which has banks in 13 Western states. Interstate made a deal to sell out to First Bank in November. Interstate was seeking protection from Wells, which launched a hostile bid in October. But what made First Bank attractive to Interstate made its offer a loser on Wall Street. To wit: First Bank, with no branches in California, couldn't close as many branches and fire as many people as Wells could. Thus, it would make less money from Interstate than Wells would make. Wells will close about 400 of the two banks' 1,400 California branches and will fire about 9,000 people from the combined work force of 47,000. First Bank would close a relative handful of branches outside California and fire a mere 6,000 people.

Wall Street got to decide which bid would prevail, because the bidders were offering a fixed amount of stock rather than a fixed price. Wells was offering two thirds of a Wells share for each Interstate share, while First Bank was offering 2.6 First Bank shares. Stockholders would accept the higher offer. So the game began: get your stock up and the other guy's stock down. At the end of November, First Bank's 2.6 shares were worth $134 per Interstate share while Wells's offer was worth $140. That was essentially a tie, because First Bank could do its friendly deal faster than Wells could do its hostile deal. And because Interstate would pay First Bank a $200 million "breakup fee" if it went to another bidder. But by last week, the difference in the bids was approaching $20.

What happened? The pivotal event came in early December, when Wells's top execs journeyed to New York City for the first time in years to meet analysts and investors. Wells wowed Wall Street with the prospect of big cuts. Wells is renowned for cost-cutting and general toughness. Its takeover of crosstown San Francisco rival Crocker Bank 10 years ago, in which it wiped out most of Crocker's employees, is Wall Street's model for combining banks. The more blood, the more Wall Street likes it.

As Wells's numbers circulated, its stock rose while First Bank's stagnated. This despite the fact that Wells would have to reduce its reported profits by more than $300 million a year for 25 years if it bought Interstate. These accounting charges wouldn't cost Wells any cash, despite reducing reported profits. Normally, investors obsess over reported profits. But Wells convinced the Street that this charge, which would reduce profits of the combined enterprise by around 20 percent at the start, was just bookkeeping, not real life. Which is exactly right. First Bank, which is less blasé about the charge, said it would avoid it by using fancy accounting called pooling of interests. Oops! On Jan. 18, First Bank announced that the Securities and Exchange Commission wouldn't let it buy back stock for two years if it used pooling. Buying back stock was vital to First Bank's offer, because those purchases increase per-share profits and help prop the stock price. Wells, too, buys back lots of stock, and promised to keep doing so if it bought Interstate.

Easy caper: When its pooling hopes drained away, First Bank's chances of prevailing went down the drain. It agreed to walk away if Wells promised to pay the $200 million fee Interstate had promised instead of fighting over it. Wells agreed. First Bank says it spent only $10 million on its Interstate caper, which puts it $190 million ahead. That's certainly easier than making $190 million in the banking biz.

So there you have it. Wells, the biggest cost cutter, prevails. Interstate stock closed Friday at more than $40 above its price of $106 before Wells pounced. Wells stock was up almost $20 from its pre-offer price of $207. First Bank has made $190 million. The losers? Guess who? The Interstate and Wells employees who will lose their jobs when the banks are combined. Meanwhile, Wall Street's blood lust for job cuts rages on, looking for the next set of victims.

SLOAN *is* NEWSWEEK'S *Wall Street editor. His e-mail address is sloan@panix.com.*

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NEWS QUOTES

- **SMALL BUSINESS VITAL TO ECONOMY ...**

"Clustered as a single economic entity, American small business would rank third after the United States and Japan in gross domestic product (GDP). Small business generates about 88 percent of the GDP in the United States, or close to $8 trillion annually.

Small business survival and success is crucial for the ongoing vitality of the U.S. and global economy.

Unfortunately, while the entrepreneurial march is proceeding, many financial institutions, particularly the large money center banks, are operating on a business as usual basis." **Atlanta Business Chronicle** (2-95)

- **OUT OF STATE BANKS MAKE FEWER LOANS ...**

"Some experts are predicting that as a result of this new law (Riegle-Neal Act) more than 5,000 traditional banks may disappear by combining with other small banks or merging into large money center banks.

Economist William Keeton of the Federal Reserve Bank of Kansas City recently analyzed data from banks in Kansas and other states in the 10th Federal Reserve District. He found that 'Branch banks, smaller banks in multibank holding companies, and banks owned by out-of-state multibank holding companies all tend to lend a smaller portion of their funds to small businesses than other banks. These results support the view that further growth in multi-office banking may impose short-run costs to some small businesses. Regulators should continue to ensure that multi-office banks do not dominate local markets by absorbing smaller banks.'

He calls for further progress on reducing regulator reporting burdens which tend to hurt small banks more than large ones." **Bank News** (7-95)

- **SERVICE DETERIORATES AFTER MERGER ...**

"Nearly half of the 939 companies surveyed by IBM believe that the quality of their bank service will deteriorate after a bank merger." **Independent Banker** (7-95)

- **KANSAS BANKS LOCATED IN SMALL COMMUNITIES ...**

"'More than 70 percent of Kansas banks are located in communities of fewer than 5,000 people,' said Jim Maag, vice president, Kansas Bankers Association."

• **CONSOLIDATION INCREASES BANK SERVICE FEES ...**

"Edmund Mierzwinski with the U.S. Public Interest Research Group reported, 'All of the recent merger activity is a problem because consolidation means there will be fewer institutions and our studies show it's the biggest banks that charge the highest fees.'

In recent months, some banks have been boosting fees to discourage consumers from using certain bank services. Earlier this year, for example, First Chicago Corp. began charging some customers $3 to visit a human teller instead of an automated teller machine, or ATM." Wall Street Journal (8-9-95)

• **BANK BRANCHES AND JOBS WILL DISAPPEAR ...**

"450,000 bank jobs will disappear within five years and half of all U.S. bank branches will close in 10 years, according to a study by Deloitte & Touche of New York.

Banks will shut branches and replace them with sales offices that cater to affluent consumers who are willing to pay for personal service." Kansas City Star (8-15-95)

• **MERGERS LEAD TO REDUCTION IN STAFF ...**

... regarding the Boatmen's/Bank IV merger ... "Typically, bank mergers lead to 10 percent to 20 percent reductions in staffing at the acquired institutions. If this acquisition follows industry norms, it could wipe out nearly 700 jobs. About half of Fourth Financial's 3,400 employees work in the Wichita area." Wichita Eagle (8-26-95)

• **MERGERS DETRIMENTAL TO CONSUMERS ...**

"'The big concern is that whenever we see banks with a huge presence in a market merging, we see fees increased, and fees for things that used to be free,' said Janice Shields, a research analyst at the Center for Study of Responsive Law.

Boatmen's officials told analysts that they expect to cut $60 million in costs during the first three years after completing the purchase of Fourth's Bank IV subsidiaries. The figure represents 24 percent of Fourth's total expenses.

Fewer bank branches and the creation of a new biggest banking company (Chase/Chemical merger), consumer groups fear, will erode competition and give the remaining players more leeway to boost fees on everything from checking accounts to home mortgage loans.

'Maybe in 10 years, 15 or 20 banks will control a majority of the assets,' said Joseph

A. Stieven, a St. Louis bank analyst.

'Every time a bank acquisition is made, the decision point is moved a little farther from the community,' said Harold Stones, executive vice president of the Kansas Bankers Association.

'When you have a community bank...you walk in to get a car loan, usually you can get a decision right there,' said Rob Rowe the group's [Independent Bankers Association of America] regulatory counsel. 'If you go into a big bank, they may or may not have the authority to do anything about a loan.'" **Kansas City Star** (8-29-95)

- **CONSUMERS BENEFIT WITH LOCAL CONTROL ...**

"Between the mergers, consolidations, and bank failures, the number of independent banks not in holding companies shrank from around 9,000 in 1980 to less than 3,000 by 1993.

Some legislators, especially those in states with large rural areas, are concerned that interstate branching will add further momentum to the consolidation already under way through interstate banking and that local banks need protection from big-bank competition.

Unrestrained branching, argued state Representative Bill Martin of Colorado, would lead to the Wal-marting of Colorado's banking system. Big, out-of-state banks, freed up to operate under looser rules would kill Colorado's local competition." **Governing** (9-95)

- **SMALL LOANS DON'T INTEREST MEGA BANKS ...**

"In general, small business does not benefit when mega banks take over in an area unless the business needs to borrow a million dollars or more. Most mega banks are not interested in small loans, especially those under $100,000."

Wichita Independent Business Association (9-95)

- **THE LAW OF UNINTENDED CONSEQUENCES ...**

"In Florida, four banks control 70% of bank deposits. Fees are higher than in most states. Savings interest rates are lower. Loan rates are higher.

Of the 10 biggest banks in Florida in 1985, eight have been acquired or have failed. In all, 400 banks have been bought -- mostly by big out-of-state banks.

This isn't what Florida lawmakers envisioned in 1985. That's when Florida became one of the first states to approve interstate banking. Lawmakers hoped Florida's banks would become bigger and better able to compete.

'It's the law of unintended consequences. Nobody expected Florida to wind up being dominated by out-of-state banks,' says Doug Johnson, assistant director, Florida Division of Banking." USA Today (9-1-95)

• **CONSOLIDATION COSTS CUSTOMERS MORE ...**

"The latest fad in banking has to do with the strategy that size is key to banking profitability. Growth through growth is a messy, risky business, requiring aggressive competition. Besides, it can involve cutting fees and providing better service, which is a nuisance. Growth through cannibalism, on the other hand, provides instant stockholder gratification and, in a market with fewer players, greater ability to raise fees.

History teaches us that when the nation's bankers get a good idea and run with it, watch out. Let us hope that banking consolidation is a better idea than the real estate investment trusts, the wonder investments that almost sunk Chase Manhattan in the 1970s.

Experience tells us that the trend toward bigger banks is a trend toward lower-cost banking for the banks and higher-cost banking for the retail customers."

Newsday (printed in Wichita Eagle 9-4-95)

• **LAYOFFS SURGE ...**

"The recent pickup in corporate-merger activity is raising fresh concerns about job stability, as a new report suggests that layoff announcements jumped 39% in August.

The biggest cut last month: the proposed elimination of 12,000 jobs from the merger of New York banking giants Chemical Banking Corp. and Chase Manhattan Corp."

The Wall Street Journal (9-6-95)

• **LESS COMPETITION BRINGS HIGHER LOAN RATES ...**

... regarding the Chase Manhattan and Chemical merger ... "By merging operations and cutting staff -- 12,000 jobs out of a combined 75,000 in 39 states and 51 countries and close about 100 of its 626 branches -- the banks expect to save $1.5 billion a year. Consumer advocates aren't optimistic that those savings will be translated into benefits for customers. Mergers often lead to less competition, higher fees and loan rates and increased inconvenience from branch closings." Lake Charles Louisiana American Press (9-7-95)

• **OUT-OF-STATE BANKS CHARGE HIGHER FEES ...**

"The Federal Reserve released a study finding that banks headquartered out-of-state charge their customers higher fees than their in-state competitors." CSBS Examiner (9-8-95)

• **MERGERS ELIMINATE BANKS ...**

"Mergers have eliminated almost 4,500 banks since 1990, and thousands more are likely to go." **Newsweek (9-11-95)**

- **MISSOURI WILL CONTROL ONE-THIRD OF KANSAS BANK ASSETS ...**

"Once St. Louis-based Boatmen's completes it proposed acquisition of Kansas' biggest banking company, Fourth Financial Corp. of Wichita, **Missouri bank-holding companies will control about one-third of Kansas' $30 billion in bank assets**. Just three years ago, out-of-state companies held less than one-tenth of one percent of Kansas' bank assets.

Acquiring institutions save money by eliminating duplicate jobs. Since 1992, when the Kansas Legislature approved regional interstate banking, more than 550 Kansas banking jobs have been lost.

Nationally, about 10,220 commercial banks are chartered; Kansas claims 440 of that total, making it, per capita, one of the most heavily banked states in the nation." **Wichita Eagle (9-11-95)**

- **BANK FEES CHARGED BY OUT-OF-STATE BANKS HIGHER ...**

"In its annual report to Congress on banks fees and service charges, which for the first time compared in-state and out-of-state banks, the Federal Reserve Determined that: "In most cases, average fees charged by out-of-state banks are higher than those charged by in-state banks. There were 'statistically significant differences between the two groups'." **IBAA Washington Weekly Report (9-15-95)**

- **EXPECTED JOB LOSS ...**

"About 50 employees of Railroad Savings Bank are expected to lose their jobs by year-end as a result of the Wichita-based thrift's pending merger with Commercial Federal Corp. of Omaha. Neb. Approximately 45 of the 50 jobs to be cut will be in Sedgwick County." **Wichita Business Journal (9-15-95)**

- **NUMBER OF BANKS TO DWINDLE ...**

"The nation's top banking analysts predict that in the next 20 years, the number of banks in the country will dwindle to a couple of dozen megabanks and a smattering of community institutions." **Kansas City Business Journal (9-22-95)**

- **KANSAS' LARGEST BANKING INSTITUTION TO BE CONTROLLED OUTSIDE OF STATE**

Regarding the Bank IV/Boatmen's merger..."Kansas Bankers Association executive vice president, Harold Stones told the Salina Journal, 'I'd be dishonest to say it's not sobering to see your largest institution get controlled by an institution with its headquarters outside Kansas'." **Sherman County Star** (9-27-95)

- **KANSAS TO BE TARGET ...**

"'Kansas will be increasingly colonized by out-of-state banks,' said Ken Guenther, executive vice president of the Independent Bankers Association of America.

Guenther predicts a nationwide two-tiered banking world with big banks on top, only a few regional banks in the middle and thousands of community banks at the bottom, as more and more banks acquisitions and mergers occur.

He also predicts the nation's 9,000 banks could dwindle to around 2,000 by the turn of the century." **Wichita Eagle** (9-29-95)

- **BIG BANKS CONTROL MORE ...**

"At the end of June, the top 300 (banks) held 68.6% of the $2.9 trillion of total bank deposits, up from 66.8% at year end and 62.4% seven years ago.

The 300 also held 73.5% of total banking assets of $4.17 trillion, up from 67.8% five years ago." **American Banker** (October 1995)

- **SMALL BANKS ACCOUNT FOR MORE BUT CONTROL LESS ...**

"Banks with less than $100 million in assets account for about 70 percent of the nation's 10,168 commercial banks. But they control only 10% of banking assets. And that percentage is shrinking as big banks become low cost producers."

Kansas City Star (10-8-95)

- **ERA OF THE BIG BANK ...**

"The era of the big bank has not only arrived, it is at an early stage. Some predict that mega-banks based in Ohio, North Carolina, New York or Minnesota will own all of Kansas City's large banks within five years." **Kansas City Business Journal** (10-20-95)

- **CENTRALIZATION BOOSTS COSTS ...**

"William C. Hunter, the Chicago Fed's director of research, wrote in a recent issue of *Economic Perspectives* that centralized decision-making increases costs as much as

9.6%.

'Centralizing the delivery of services didn't work either,' he said. 'In no case did centralized delivery systems reduce costs as envisioned by proponents,' Mr. Hunter said."

American Banker (10-30-95)

- **SMALL BANKS CHARGE LESS ...**

"Fee income, broadly defined as non-interest income, is generated from service charges, commissions and fees on a wide range of products, including deposit accounts, ATM use and financial planning. As a percentage of gross income, the nation's smallest banks -- those with less than $150 million in assets -- had an average of 23 percent of gross income generated from non-interest income through June 30, 1995. By comparison, banks larger than $500 million had non-interest income equaling 47 percent of gross income.

Recent studies have shown that large and out-of-state banks consistently charge higher fees than small, locally based banks. One study, conducted by U.S. Public Interest Research Group, an organization affiliated with consumer activist Ralph Nader, found that transaction account fees are rising at twice the rate of inflation. Significantly, the report found that small banks charge lower fees than larger banks.

The study concluded that as more banks consolidate, more consumers could pay higher fees.

Fees charged by out-of-state banks are significantly higher than those at in-state banks, a Federal Reserve survey shows. Additionally, the survey says, when banks branch across state lines, their customers usually start paying more for products and services."

Independent Banker (November 1995)

- **ACQUISITION MEANS JOB LOSS ...**

Regarding NationsBank's acquisition of Bank South ... "As a result of the deal, Bank South will close 100 branches and cut 2,000 jobs from its 3,300-person work force."

Bank Investment Representative (November 1995)

- **COMBINATION RESULTS IN TRIMMING OF JOBS ...**

Regarding the merger of First Interstate with First Bank ... "The two big bank-holding companies said they expect to cut an eyebrow-raising $500 million in operating costs as a result of the combination. To accomplish that, they said, about 6,000 jobs will be trimmed from the combined companies' roughly 41,000-person work force."

The Wall Street Journal (11-7-95)

- **KANSAS BANKERS SAY NO TO INTERSTATE BANK BRANCHING ...**

"About two out of three Kansas bankers surveyed think the state should not make it easier for banks outside Kansas to open branches in the state.

Rejecting the law would 'preserve the smaller community banks and keep the services at home,' said Pat Regan, president of American National Bank.

'Loan decisions would no longer be made locally and out-of-state banks would not be compelled to invest in local communities,' said David Young, president and chief executive officer of State Bank of Conway Springs. **Wichita Eagle** (11-11-95)

- **SMALL BANKS LEND MORE TO SMALL BUSINESS ...**

"Typically, small banks are more successful in making loans to small and start-up businesses because personnel in a small bank tend to be aware of what is happening in the community. More importantly, they know their customers personally.

Emerging small businesses are said to be the driving force of our present economy. If credit is curtailed for this segment of the population, our total economy will suffer."

Lending Sense (Winter 1995)

- **OPERATING COSTS MUST BE CUT ...**

"The fact remains that to make money on an acquisition, you have to 'cut operating costs by 40%,' says Charles Herbert, a principal of Fergus & Co., an Irving, Texas, bank consulting firm.

'The major problem with large banks is they try to run commercial accounts from a regional office,' said Morris Albright, chairman of Gulf Copper Manufacturing Corp., a Port Arthur, Texas ship repairer. 'In banking, you have to deal with someone you know will stick with you.' He found just that in Community Bank, whose senior chairman, Walter Umphrey, is a high-school friend and whose chief executive, Mr. McNinch, hunts quail with him. 'They know that if I live, I'll pay my debt.' Mr. Albright says." **The Wall Street" Journal** (12-8-95)

- **JOBS ELIMINATED AS OPERATIONS MERGE ...**

"Fourth Financial Corp. on Wednesday announced it would eliminate 270 jobs in the next three to 15 months as it merges operation with Boatmen's Bancshares of St. Louis.

Fourth Financial already has cut 140 positions from its ranks since the merger was announced in August.

Together, the cuts will bring Fourth Financial's total jobs reduction in preparation for the consolidation to 410 jobs -- nearly 12 percent of the company's workforce of 3,450." Wichita Eagle (1-25-96)

• **BRANCHING BRINGS CONSOLIDATION ...**

"Experts have predicted $150 million of cost savings at NationsBank over three years just by consolidation of its existing banks. This prospect of $50 million of annual cost savings has led NationsBank to combine all of its bank subsidiaries stretching from South Carolina to Maryland into a single banking unit." Business Law Today (Jan/Feb 1996)

• **INTERSTATE BRANCHING NOT ONLY A BANKING ISSUE ...**

"At first glance, it [interstate branching] looks strictly like a banking issue. But some bankers believe it crosses boundaries to affect other Kansas businesses.

'I think every farmer and small business person really needs to sit back and evaluate what's going on,' said Jon Pope, president of Peoples State Bank in Colby. 'If it [interstate branching] does pass, you can mark my words, in five or 10 years people will say, "Who was asleep?"'

Branch banks don't provide the amount of business and agricultural loans that locally owned banks provide, Pope said. Deposits are taken out of the community to be invested elsewhere. Branch banks also operate with smaller staffs." Salina Journal (1-14-96)

• **TAKE THIS JOB AND CUT IT**

regarding the Wells Fargo - First Interstate merger ... "When the California-based banks formally combine this spring, hundreds of bank branches will close, thousands of perfectly fine employees will lose their jobs and bank customers will have fewer competitors to choose from.

But what made First Bank attractive to Interstate made it offer a loser on Wall Street. To wit: First Bank, with no branches in Califormia, couldn't close as many branches and fire as may people as Wells could. Thus, it would make less money from Interstate than Wells would make. Wells will colse about 400 of the two banks' 1,400 California branches and will fire about 9,000 people from the combined work force of 47,000. First Bank would close a relative handful of branches outside California and fire a mere 6,000 people.

Wells is renowned for cost-cutting and general toughness. Its takeover of crosstown San Francisco rival Crocker Bank 10 years ago, in which it wiped out most of Crocker's employees, is Wall Street's model for combining banks. The more blood, the more Wall Street likes it.

The losers? Guess Who? The Interstate and Wells employees who will lose their jobs when the banks are combined. Meanwhile, Wall Street's bolld lust for job cuts rages on, looking for the next set of victims. Newsweek (2-5-96)

Kansas Farm Bureau

2627 KFB Plaza, P.O. Box 3500, Manhattan, Kansas 66505-8508 / (913) 587-6000

February 7, 1996

Rep. Bill Bryant, Chairman
Financial Institutions & Insurance Comm.
Capitol Building
Room 112-S
Topeka, KS 66612

Dear Mr. Chairman:

This letter comes to express to you and your colleagues the support of our members for H.B. 2716. At the same time we would like to express our opposition to H.B. 2670.

Mr. Chairman, you are hearing both sides of the "opt in/opt out" provisions of federal legislation relating to the activity of banks and banking in the State of Kansas. At the heart of the debate is the federal law (PL103-328), the so-called Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

Our members examined this issue during 1995. At the KFB Annual Meeting, which concluded on November 18, 1995, our farmers and ranchers - the voting delegates representing other farmers and ranchers in each of the 105 counties - adopted the policy which is attached to this letter. I invite your attention to the third paragraph which is set out in bold face type. The essence of it is that "we support legislation to prohibit banks located outside Kansas from operating only branches in Kansas unless those out-of-state banks own and operate a Kansas chartered bank."

The discussion our people had on this issue centered on:

(1) Availability of credit;
(2) Sensitivity of bankers in a community to the credit needs of production agriculture, and a thorough understanding of the operations of those seeking credit;
(3) Community involvement of banks and bankers; and
(4) Concern about lack of community interest, lack of empathy by nonresident, far distant bank owners and principal officers.

House FI&I
Attachment 7
Feb. 7, 1996

We regret it was not possible to be in attendance to present testimony supporting the opt out measure - H.B. 2716. Therefore, since my colleagues and I were not able to be in your committee, and since we do want to present the views of our membership to your committee, we ask that copies of this letter and the attached policy position be shared with all members of the Financial Institutions and Insurance Committee. Thank you for this opportunity to go on record in support of legislation providing for Kansas to opt out of the provisions of Riegle-Neal.

Respectfully,

Paul E. Fleener

Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

cf
attachment

Kansas Farm Bureau

Resolutions 1996

Adopted by the Voting Delegates representing 105 County Farm Bureaus at the 77th Annual Meeting of Kansas Farm Bureau in Wichita, November 18, 1995.

Agricultural Credit **AG-4**

"Farmers and ranchers need a variety of credit facilities to finance operating and ownership expenses.

Banking laws and regulations should allow lending institutions the opportunity to amortize loan losses over a 10-year period of time, flexibility in restructuring agricultural loans and use of flexibility in restructuring existing distressed loans.

In order to help maintain the viability and vitality of production agriculture and of rural communities in Kansas, we support legislation to prohibit banks located outside Kansas from operating only branches in Kansas unless those out-of-state banks own and operate a Kansas chartered bank.

Special programs should be designed at federal and state levels to specifically deal with credit and financing problems of young farmers and ranchers who are trying to get established."

Bank of America Plans To Open a Branch On America Online

WSJ
2/7/96

By a WALL STREET JOURNAL *Staff Reporter*

SAN FRANCISCO—Bank of America, a unit of **BankAmerica** Corp., said it would open a branch on **America Online** Inc.'s computer on-line service.

Bank of America said its area on America Online would allow users to tap into money tips, corporate financial reports and initiate home-loan and consumer-loan applications by using on-line forms. Bank of America said it will provide America Online members and users of its Internet service on the World Wide Web with home-banking services in the spring, allowing them a host of banking options from their computer keyboards.

The move amounts to a coup for America Online, which has reached critical mass with its nearly five million subscribers. All of the commercial on-line services have struggled to keep partners from fleeing to the World Wide Web where they can set up their own electronic shops.

House FI&I
Attachment 8
Feb. 7, 1996

Vol. 140 WASHINGTON, TUESDAY, SEPTEMBER 13, 1994 No. 127

Congressional Record

United States
of America

PROCEEDINGS AND DEBATES OF THE 103d CONGRESS, SECOND SESSION

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House F&I
Attachment 9
Feb. 7, 1996

As printed in the September 13, 1994 issue of the Congressional Record, Senator William V. Roth of Delaware states:

"I say that each State has at least until June 1, 1997, in that any State that desires additional time beyond that date may simply opt-out before that date. Then, under the legislation, it may opt-in at any later time it finally decides. This is a point that is not well understood by commentators seeking to provide a simplified explanation of the legislation. But this is, indeed, how the legislation works. The 1997 date is there for a State to act by such time or be deemed to have elected interstate branching. But if a State needs more time to resolve tax or enforcement issues, for example, it may affirmatively obtain as much time as it needs under the legislation. Each State has the power to write its own script."

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tion over the years, the conferees unanimously voted to name this historic legislation in his and Chairman NEAL's honor. It would certainly be a fitting tribute to him if we could pass this bill now. I can think of no better way to recognize Chairman RIEGLE's great contribution and his successful term as Banking Committee chairman. He has a record of which he can be very proud. I have enjoyed working with him these many years and wish him much future success.

Mr. DOLE. Madam President, today is an important day for the banking community. We have just passed the Interstate Banking Efficiency Act of 1994. This bill, among other things, will enable bank holding companies to acquire banks in any State 1 year after enactment of this legislation, and generally enable a bank to merge with a bank in another State after June 1, 1997.

I voted for final passage of this bill, but I did so with caution and reserve. Many bank mergers have occurred in the banking community in recent years. And there seems to be a clear trend toward these mergers in an effort to provide customers with one-stop shopping for banking products. With banks mergers, come more financial products available to local customers, more efficient and less-costly administration, streamlining of banking operations across the Nation. And competition. But with it also comes, perhaps the end of an era. The possible dwindling in the number of local neighborhood banks. Banks where you were greeted by someone you grew up with. Banks who knew not only your business, but you as a person. Relationship banking that could make the determination to lend your startup business the necessary capital to expand because of who you were, not because of what your credit history looked like. This type of banking is what creates the fuel for our Nation's economy—the small businesses across the country.

I voted for this package because I believe interstate banking will foster competition, and will provide a more varied array of financial products to the local communities that do not yet have such alternatives. But I do so with the hope, the belief, that the banking community and Congress will not forget to continually strive toward a healthy balance of relationship, neighborhood banking, and one-stop shopping.

I also had reservations regarding how this bill would affect State rights and State laws. Through many discussions, and changes, I now feel comfortable that consideration was given to ensuring that State's rights would not be preempted arbitrarily. Under this bill, States have the option to opt-out of this legislation or opt-in prior to the June 1, 1997, effective date. Interpretations concerning the Federal preemption of State laws will undergo a process that is more accessible to the public for comments, more responsible, and more open than what we have had in the past—especially as it relates to community reinvestment, consumer protection, fair lending, and establishment of intrastate branches.

All in all, I think that this is a good bill. It may not be a perfect bill, nor even an excellent bill, but I believe that passage of this bill was inevitable. Even without this bill, many banks are already merging across State lines. This bill clarifies the procedure and the intent of Congress in this area. And this clarification is very much needed. And for this reason, I support the bill.

Mr. ROTH. Madam President, I rise in support of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. As a conferee on the legislation, I believe that the report shows the excellent work of many Members and their staffs, both in the House and the Senate. I wish to express my appreciation particularly to Chairmen GONZALEZ and NEAL as well as to ranking Republican LEACH on the House side, and to Chairman RIEGLE and Senator D'AMATO on the Senate side, for their courtesy, patience, and understanding with respect to my concerns.

This legislation allows bank holding companies to acquire banks in any State in 1 year. It also allows bank holding companies to consolidate their subsidiaries after June 1, 1997, in any State unless that State has opted out of interstate branching by that time.

Therefore, while this legislation does unconditionally authorize interstate banking, the same cannot be said of interstate branching. Instead, the legislation gives the policymakers in each State a choice whether or not to allow interstate branching in their State.

In this legislation, we do not make that policy judgment for any State. Rather, we have attempted to construct for the States a fair choice. To make the choice fair, the legislation seeks to protect State interests in three different ways:

First, the conference report—unlike the House bill—gives each State an ample timeframe, from the date of enactment to June 1, 1997, to decide whether to opt out of interstate branching. The House bill would have allowed interstate branching to occur even before a State decided, thereby creating additional constituent pressure in favor of State approval. But the conferees rejected that approach, with the result that each State has at least until June 1, 1997, to decide without such additional pressure.

I say that each State has at least until June 1, 1997, in that any State that desires additional time beyond that date may simply opt-out before that date. Then, under the legislation, it may opt-in at any later time it finally decides. This is a point that is not well understood by commentators seeking to provide a simplified explanation of the legislation. But this is, indeed, how the legislation works. The 1997 date is there for a State to act by such time or be deemed to have elected interstate branching. But if a State needs more time to resolve tax or enforcement issues, for example, it may affirmatively obtain as much time as it needs under the legislation. Each State has the power to write its own script.

At our committee markup of the legislation, I had filed an amendment to provide each State 3 years to act. The bill at that time only allowed each State a single year. At that time, several other items were also unresolved, so as part of a compromise on these matters, the chairman agreed to allow each State 2 years to act. Thereafter, various State organizations voiced their support for 3 years and I was pleased to join in a successful effort on the Senate floor to extend the date to June 1, 1997. This fulfills the purpose of my 3 years amendment, which was to provide a State such as Delaware, whose general assembly meets every spring, a minimum of three legislative sessions to address this complex subject.

This was one of the major issues resolved in conference, and I am pleased to say that the prerogatives of the States are protected in the conference report.

The second area where the conference report protects State interests is that of State taxation. In providing each State with a fair choice on interstate branching, the last thing we wanted to do is to create a threat to any State's collection of tax revenues. Of course, there is no way we could guarantee to every State that tax collections in future years would be the same as the current level. We cannot make such a guarantee even if we don't pass this legislation.

However, when we were last on the Senate floor considering this legislation, I was able to secure a provision as part of the managers' amendment that makes clear that the authority of the States to tax as they are taxing today remains undiminished by this legislation. I am pleased that the provision is retained in the conference report.

Remember that the legislation provides a choice for each State regarding interstate branching within its State. It is quite conceivable that not all States will make the same election under this legislation. But no matter what choice a State may make, my amendment makes clear that the taxing authority of the State, whether or not it elects interstate branching, remains undiminished by this legislation. Of course, it is equally appropriate to note that nothing in the legislation augments the tax authority of any State.

It is my purpose in espousing my amendment to preserve the status quo in State taxation not only between all tax collectors and all taxpayers but also to preserve the current equilibrium among individual States. Only in this way can tax considerations, which are so important to States in establishing State policy and to banks in determining their future plans, be re-

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January 23, 1995

Mr. James B. Watt
President and Chief Executive Officer
Conference of State Bank Supervisors
1015 - 18th Street, N.W., Suite 1100
Washington, D.C. 20036-5725

Re: **Authority of a State to "Opt In" to Interstate Branching after It Has "Opted Out" under Section 44(a)(2) of the Federal Deposit Insurance Act**

Dear Jim:

You have asked me to consider the question of whether a state may choose to "opt in" to interstate branching by merger after it has "opted out" of such branching pursuant to Section 44(a)(2) of the Federal Deposit Insurance Act (the "FDI Act"), as amended by Section 102(a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the "Riegle-Neal Act"), Pub. L. No. 103-328, § 102(a), 108 Stat. 2338, 2343-44. In addition, you have asked me to review two legal opinions, which have concluded that a state may not elect to "opt in" to interstate branching by merger after it has "opted out." Those opinions are set forth in a letter dated December 6, 1994, from Day, Edwards, Federman, Propester & Christansen, P.C. of Oklahoma City, Oklahoma (the "Day Opinion"), and a letter dated January 13, 1995, from Foss and Moore of Bismark, North Dakota (the "Foss Opinion").

For the reasons stated below, I respectfully disagree with the conclusion reached in the Day and Foss Opinions. In my view, Section 44(a)(2) of the FDI Act allows a state to "opt

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out" of interstate branching by merger at any time until May 31, 1997, while retaining the power at a subsequent date to repeal its "opt out" statute and thereby "opt in" to interstate branching.

Statutory Language

Section 44(a)(1) of the FDI Act generally provides that, beginning on June 1, 1997, the responsible federal agency may approve an interstate merger between two FDIC-insured banks that have different home states "without regard to whether such transaction is prohibited under the law of any State." Under Section 44(d), the resulting bank may retain any banking office that the constituent banks were operating prior to the merger, and may also establish additional branches at each location where either of the constituent banks could have established or acquired branches under applicable federal and state law.

However, under Section 44(a)(2), a federal agency may not approve an interstate merger if the home state of either constituent bank has "opted out" of interstate branching by enacting a law, between September 29, 1994 (the date of enactment of the Riegle-Neal Act) and June 1, 1997, that expressly prohibits merger transactions involving all out-of-state banks. Thus, a state that "opts out" of interstate branching under Section 44(a)(2) will experience the following effects: (i) out-of-state banks will be prohibited from establishing in-state branches by merger, and (ii) home state banks will be barred from establishing out-of-state branches by merger.[1]

The Riegle-Neal Act contains no provision which expressly deals with the issue of whether a state would have authority to repeal its "opt out" statute and, thereby, "opt in" to interstate branching by merger. Section 44(a)(2) is silent on this point, as is the conference report accompanying the Riegle-Neal Act.[2]

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[1] See H. Conf. Rep. No. 651, 103d Cong. 2d Sess. 56 (1994) (hereinafter "Conf. Rep."), reprinted in 1994 U.S. Cong. & Ad. News 2068, 2077.

[2] See id. at 50, 56, reprinted in 1994 U.S. Code Cong. & Ad. News at 2071, 2077.

Analysis

The Day and Foss Opinions conclude that, because Section 44(a)(2) does not expressly grant a state the right to "opt in" to interstate branching by repealing an earlier "opt out" statute, Congress intended to forbid any state from taking any such action. Both Opinions claim to base their conclusion on the "plain language" of Section 44(a)(2), but in fact their conclusion is based on an inference from congressional silence. For example, the Day Opinion acknowledges that its position is "inferred by [sic] the literal language of H.R. 3841," and the Day Opinion goes on to suggest: "By its express provisions, H.R. 3841 seemingly makes irrevocable a state's election to opt out of section 44(a)(1), since it provides no relief whereby a state may elect to come back within the preemptive effect of such statute."[3]

The inference from congressional silence relied upon in the Day and Foss Opinions is erroneous, because it is completely contrary to controlling principles of legislative authority and federal preemption analysis, as well as applicable case law. It is a fundamental axiom that, except as otherwise limited by constitutional law (e.g., with respect to the protection of vested rights), a legislature always retains the power to repeal any statute that the legislature

[3] Day Opinion at 2-3 (emphasis added in part). The Foss Opinion (at 2) similarly relies on congressional "silence" with respect to the authority of a state to "opt in" after "opting out" under Section 44(a)(2). The Foss Opinion also relies on an "assum[ed]" congressional intent to "encourage the speedy development of a nationwide interstate banking and branching network . . . by making the consequences of an 'opt-out' decision irrevocable and so potentially onerous to a state's banking industry that no state will choose to 'opt-out'" (Id.). The Foss Opinion cites no legislative materials to support this "assumed" congressional intent, and the author acknowledges that "I have not thoroughly researched the legislative history of the Act" (Id. at 1).

In fact, as pointed out infra at notes 9-10 and accompanying text, the House and Senate floor debates on the conference report for the Riegle-Neal Act indicate a strong consensus in favor of giving the states a meaningful choice on whether to permit interstate branching. No participant in those debates suggested that Congress intended to force the states to "opt in" by making any "opt out" decision irrevocable. Thus, the "assumed" congressional purpose cited in the Foss Opinion is unfounded.

has enacted.[4] Thus, the position taken in the Day and Foss Opinions would lead to a significant preemption of state legislative authority, because it would deny to a state legislature its inherent power to repeal a previously-enacted "opt out" statute.

The Supreme Court has said that courts must apply a "presumption against finding pre-emption of state law in areas traditionally regulated by the States."[5] There is no doubt that this presumption against preemption applies to the interpretation of Section 44(a)(2), because the regulation of banking has long been recognized as an area of traditional state power. For example, the Supreme Court has repeatedly affirmed that "banking and related financial activities are of profound local concern."[6]

Section 44(a)(2) defines a specific and limited area of preemption by providing that a state may not "opt out" of interstate branching by merger after May 31, 1997. As discussed above, Section 44(a)(2) is completely silent on the question of whether a state may repeal an "opt out" statute. In this context, the Supreme Court has warned that the scope of Congress' express preemption must be given a "narrow reading" in order not to disturb the presumption against "the pre-emption of state police power regulations." Cipollone, 112 S.Ct. at 2618. Put another way, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Id. (emphasis added). In light of these principles of preemption analysis, the Day and Foss Opinions are plainly in error when they argue that a state's authority to repeal an "opt out" statute should be deemed preempted based merely on congressional silence in Section 44(a)(2).

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[4] E.g., District of Columbia v. John R. Thompson Co., 346 U.S. 100, 113-14 (1953); People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 21 N.E.2d 318, 321-22, appeal dism'd sub nom. Illinois ex rel Eitel v. Toman, 308 U.S. 505 (1939); 1A Sutherland, Statutes and Statutory Construction § 23.03 at 322 (N. Singer 5th ed. 1993). This axiom is a corollary of the well-established principle that a legislature cannot, by ordinary enactment, "bind its own hands or those of future Legislatures by adopting rules not capable of change." People's Advocate, Inc. v. Superior Court, 181 Cal.App.3d 316, 328, 226 Cal. Rptr. 640, 647 (1986). Accord, 1A Sutherland, supra, § 23.03 N.4 at 323.

[5] California v. ARC America Corp., 490 U.S. 93, 101 (1989). Accord, Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2617, 2618 (1992).

[6] Northeast Bancorp v. Board of Governors, 472 U.S. 159, 177 (1985) (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 38 (1980)).

The same conclusion can be derived from the explicit language of Section 44(a)(2), which prohibits interstate merger transactions only in states that have "enacted" an "opt out" law prior to June 1, 1997. Once a state repeals its "opt out" statute, that statute should not thereafter be deemed to have been "enacted" for purposes of Section 44(a)(2). This conclusion follows from two basic maxims of statutory construction, which hold that (i) a repealing statute destroys the continued effectiveness of the repealed law, and (ii) the repealed law is thereafter considered, except with regard to past and closed matters, as if it had never existed.[7] Thus, a repealed "opt out" statute is no longer an "enacted" statute and would not present a barrier to subsequent interstate merger transactions under Section 44(a)(2).

The foregoing position -- viz., that Section 44(a)(2) does not preempt a state's authority to repeal its "opt out" statute -- is further supported by two cases cited in the Day Opinion. In Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. (1992), the Court of Appeals considered a situation in which the Massachusetts legislature first "opted out" of a federal statute, which preempted certain state law restrictions on interest rates charged by FDIC-insured state banks,[8] and subsequently repealed its "opt out" statute. The Court of Appeals held that, in view of this repeal, Massachusetts had, "in effect, opted back in" to the federal regime for bank interest rates. Id. at 823 n.4. The recognition in Greenwood Trust of a state's authority to repeal its "opt out" statute is directly applicable to the interpretation of Section 44(a)(2). The statutes involved in Greenwood Trust (Sections 521 and 525 of DIDMCA) were identical to Section 44(a)(2) by virtue of the fact that they expressly permitted each state to "opt out" of the federal preemptive scheme but were silent on the ability of a state to repeal any "opt out" statute. This congressional silence did not deter the Court of Appeals from upholding the state legislature's inherent authority to repeal its "opt out" statute and, thereby, to "opt back in" to the federal program.

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[7] Isenstein v. Rosewell, 106 Ill.2d 301, 478 N.E.2d 330, 335 (1985); Cooper v. Ken Hilton Ford Sales, Inc., 486 So.2d 424, 425 (Ala. 1986); People ex rel. Eitel v. Lindheimer, supra note 4, 21 N.E.2d at 322; 1A Sutherland, Statutes and Statutory Construction, supra note 4, § 23.33 at 424.

[8] Depository Institutions Deregulations and Monetary Control Act of 1980, Pub. L. No. 96-221 ("DIDMCA"), § 521, 94 Stat. 132, 164 (codified at 12 U.S.C. § 1831d). Section 525 of DIDMCA, 94 Stat. 167, granted each state the right to "opt out" of the federal preemptive scheme established by Section 521.

A federal bankruptcy court reached the same result in In re Criswell, 152 B.R. 264 (Bkrtcy. E.D. Ark. 1992). The court in Criswell considered a federal statute, 11 U.S.C. § 522, which established a federal list of exemptions from the estates of bankrupt debtors but, at the same time, allowed each state to "opt out" of the federal list and establish its own list of exemptions. While the right of a state to "opt out" of the federal scheme was expressly recognized in 11 U.S.C. § 522(b), the statute was silent with respect to the power of a state to repeal its "opt out" election. In 1981, the Arkansas legislature enacted a law "opting out" of the federal list of exemptions, but ten years later the legislature repealed its "opt out" law.

A creditor in Criswell asserted that Arkansas' repealing statute was invalid because the state's decision to "opt out" was irrevocable under 11 U.S.C. § 522(b). The court rejected this argument, noting that "Congress could have inserted language making the opt-out irrevocable, as it has in other statutes. . . . 11 U.S.C. § 522 contains no language suggesting that a state's decision to opt-out of the federal exemption scheme is irrevocable." 152 B.R. at 266. Thus, Criswell, like Greenwood Trust, followed an approach consistent with the Supreme Court's preemption analysis described above. Under this analysis, where Congress has not adopted express statutory language to forbid a state from repealing its "opt out" law, it must be presumed that Congress did not intend to preempt the state from exercising its fundamental power of repeal.

The foregoing judicial interpretations of "opt out" statutes are consistent with the legislative history of Section 44(a)(2). During the Senate floor debate on the conference report for the Riegle-Neal Act, Senator Roth (a member of the Senate Committee on Banking, Housing, and Urban Affairs) specifically confirmed that a state could choose to "opt out" of interstate branching by merger prior to June 1, 1997, and could then "opt-in at any later time it finally decides."[9] No member of Congress contradicted Senator Roth or otherwise indicated that a state's decision to "opt out" would become irrevocable under Section 44(a)(2). On the contrary, the House and Senate floor debates on the conference report contain numerous statements indicating that Congress intended to give each state a meaningful choice on the

[9]140 Cong. Rec. S 12,788 (daily ed. Sept. 13, 1994) (emphasis added).

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issue of whether to allow interstate branching. No member of Congress stated during those debates that Congress intended to force the states to "opt in" by using the tactic of barring the states from repealing any "opt out" election.[10]

Conclusion

Based on the authorities reviewed above, I believe that Section 44(a)(2) of the Riegle-Neal Act permits a state to "opt out" of interstate branching by merger prior to June 1, 1997, and subsequently to repeal its "opt out" law and thereby "opt in" to interstate branching by merger.

Please call me if you have any questions regarding the matters discussed in this letter.

Sincerely yours,

Art E. Wilmarth

Arthur E. Wilmarth, Jr.

ABW/dg/202416.1

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[10] See 140 Cong. Rec. S 12,771 (daily ed. Sept. 13, 1994) (remarks of Sen. D'Amato); id. at S 12,787 (remarks of Sen. Dodd); id. at S 12,788 (remarks of Sen. Dole and Sen. Roth); id. at H 6,775 (daily ed. Aug. 4, 1994) (remarks of Rep. Neal and Rep. Gonzalez); id. at H 6,777-78 (remarks of Rep. Roukema and Rep. Bereuter); id. at H 6,779 (remarks of Rep. Thomas); id. at H 6,781-82 (remarks of Rep. Vento and Rep. Castle).

The Senate committee bill (S. 1963), which provided the basis for the Senate's earlier deliberations on interstate branching legislation, would have expressly preserved the right of any state to "opt in" after it had "opted out" of interstate branching by consolidation. S. Rep. No. 240, 103d Cong. 2d Sess. 21, 31 (1994). This provision was not included in the Riegle-Neal Act. However, it should be noted that the House-Senate conference committee did not follow the Senate bill's general approach to interstate branching, and therefore the conference report did not include many of the Senate bill's provisions. See Conf. Rep. 50, reprinted in 1994 U.S. Code Cong. & Ad. News at 2071. In view of the drafting history of the conference report, and the other judicial and legislative authorities discussed in this letter, I do not believe that the conclusion reached herein should be changed merely because the Riegle-Neal Act does not include the Senate bill's express reservation of state power to repeal an "opt out" statute.

9-10

State Regulators Taking Aim at the 30-Mile Rule

By BRETT CHASE

State banking regulators are stepping up their attack on a tactic used by national banks for expanding across state lines.

The banking commissioner of Michigan is protesting KeyCorp's use of the "30-mile rule" to move a Michigan unit to Indiana. And Oklahoma's banking chief is threatening to sue over plans by a small bank in that state to jump into Texas using the rule.

Meanwhile, a dozen state regulators have thrown their support behind Texas' banking commissioner in her fight against an expansion based on the rule.

The commissioners' protests mark the latest outburst over the 30-mile rule, which lets national banks move headquarters offices 30 miles — even across state lines. Despite sharp opposition from the states, the Office of the Comptroller of the Currency has approved a number of interstate 30-mile moves.

The banks say they are using the rule to consolidate operations and save money. State regulators, however, say the banks are gaining an unfair advantage and are jumping the gun on the federal interstate branching law enacted in 1994.

In fact, the commissioners charge that Comptroller Eugene Ludwig and his agency are deliberately trying to undermine the authority of the states.

Some state commissioners, such as those in Kansas and Wisconsin, have knuckled under over the past year. Michigan's top bank regulator said he wants to fight.

Patrick McQueen, commissioner of Michigan's Financial Institutions Bureau, was immediately suspicious last November when he learned that KeyCorp's Society Bank wanted to move its $1.1 billion-asset Ann Arbor, Mich., bank 80 miles southwest to Bronson and then hop over the state line into Indiana. He protested the application with the OCC because he felt the bank was trying to circumvent state and federal interstate banking laws.

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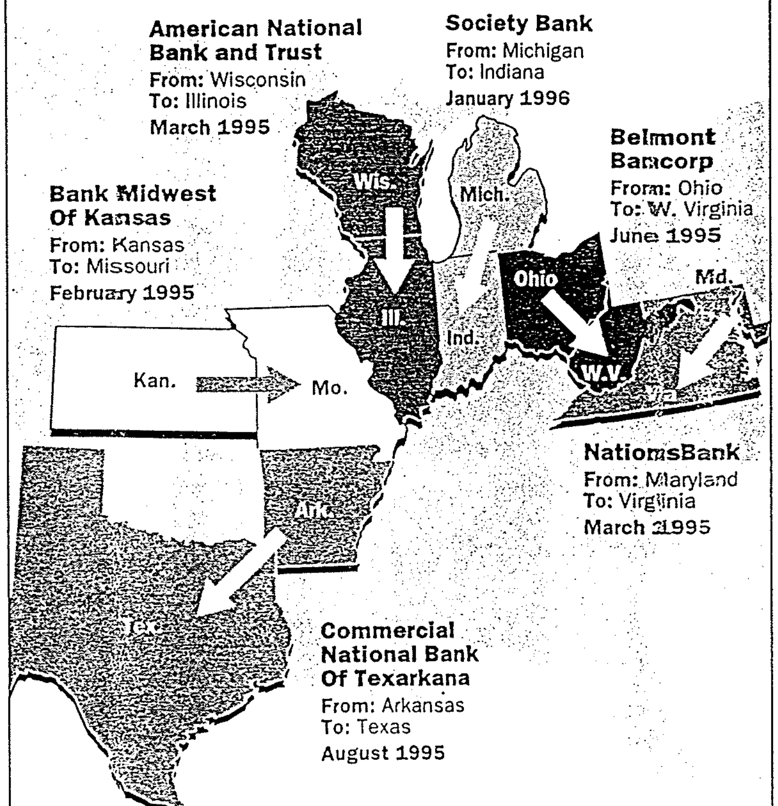
On the Move

The OCC approved headquarters relocations for these banks over objections from state banking supervisors:



Source: Conference of State Bank Supervisors

Specifically, Society converted to a national bank, relocated its main office in Bronson, again moved its main office to Angola, Ind., merged with Society National Bank Indiana and branched back into Michigan. Much to Mr. McQueen's dismay, the applications were approved in one fell swoop on Jan. 8.

"States' rights in my opinion are being trampled," Mr. McQueen said. "I think this is going to get appropriate reaction." The OCC declined to comment.

KeyCorp executives defended the move by saying that what they did was no secret. The Cleveland banking company moved its Michigan subsidiary into Indiana with the intent of eventually consolidating it with the bank in Cleveland by June.

"The filings we have done are within the boundaries of the law," said spokesman John Fuller. "We believe the applications we filed and got approval on were proper."

Still, Mr. McQueen says he believes KeyCorp has an unfair advantage over the state banks he oversees. Even though Michigan was an early state to approve interstate banking under Riegle-Neal, its law demands that it will only allow branching with states that have also opted in. Neither Indiana nor Ohio have opted in.

"I was very vocal in support of interstate branching," Mr. McQueen said. "I'm also very vocal for the right of states to control branching within their boundaries."

In all, Mr. McQueen has raised four questions. First, he wonders how the OCC can use the 30-mile rule to allow a bank to move 80 miles. Even though the rule has been applied to other banks moving across state lines, he also challenges the 30-mile rule when it moves a bank headquarters into another state.

He also doesn't believe KeyCorp should be able to leave its branches in Michigan if it's moving its headquarters to Indiana.

Finally, Mr. McQueen argues that the OCC approved interstate branching contrary to Michigan law.

KeyCorp and the OCC "overstepped their boundaries literally, contrary to state law and federal law," Mr. McQueen said. He is contemplating a lawsuit against Society Bank and the Comptroller's Office.

In Oklahoma, Commissioner Mick Thompson is awaiting a decision by the OCC that would allow $124 million-asset Bank of Southern Oklahoma to relocate to Texas. If the bank receives approval, Mr. Thompson said, he will sue.

Meanwhile, many eyes are on the controversy in Texas, which centers on a lawsuit filed in North Texas against a move into the state by Commercial National Bank of Texarkana, Ark.

If Commissioner Catherine A. Ghiglieri wins, the decision may help opponents block further applications to the Comptroller's Office.

In the Texas case, the Comptroller's Office approved an application in August one business day before a Texas law went into effect forbidding interstate branching. Texas, with more than 1,000 banks, is so far the only state to opt out of branching.

Bank departments have rallied around Ms. Ghiglieri. Commissioners of 11 states — Arkansas, Connecticut, Delaware, Iowa, Maine, Michigan, New Hampshire, North Dakota, Oklahoma, Virginia, and West Virginia — and the District of Columbia have signed a friend-of-the-court brief. The Conference of State Bank Supervisors also signed onto the brief, which was filed by Paul Foster, general counsel for the Oklahoma State Banking Department.

Mr. Foster said his bank became concerned when it discovered Bank of Southern Oklahoma, a $124 million-asset bank in Madill, was proposing a move to Dennison, Tex. Commissioner Thompson has protested to the OCC.

But Mr. Foster said he believes the comptroller has an agenda. "Congress should establish the rules. Not the comptroller of the currency," he said.

Mr. Foster contends that if Congress had intended to give discretionary power to the Comptroller's Office, it would have clearly stated so in Riegle-Neal.

"When you look back at banking legislation over the past years, every time branching brought up, it was hotly debated and highly protested — every time clear up to Riegle-Neal." □

NATIONAL CONFERENCE OF STATE LEGISLATURES

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ALFRED W. SPEER
CLERK OF THE HOUSE
LOUISIANA
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

MEMORIAL RESOLUTION

CALLING UPON CONGRESS TO HOLD HEARINGS WITH REGARD TO THE OFFICE OF THE COMMPTROLLER OF THE CURRENCY

WHEREAS, the United States Congress by an overwhelming bipartisan vote gave all states the option to decide their participation in a nationwide bank branching network in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994; and

WHEREAS, it was the intent of Congress for every state legislature to have until May 31, 1997 to decide their state's participation in interstate bank branching; and

WHEREAS, twenty-one state legislatures have voted to opt-in to interstate bank branching and one state voted to opt-out during this past legislative session and an equal number are considering legislation for passage in next year's legislative session; and

WHEREAS, the Office of the Comptroller of the Currency by approving the application of national bank in Arkansas to relocate its headquarters 30 miles into the state of Texas and maintain its former bank and branches in Arkansas as interstate branches; and

WHEREAS, this action by the OCC was in direct contradiction of the wishes of the Texas State Legislature which by a unanimous vote decided to opt-out of interstate branching; and

WHEREAS, this action by the OCC has permitted interstate branching into Arkansas, before the Arkansas state legislature has had an opportunity to decide their participation; and

WHEREAS, the OCC has taken similar actions in a number of other states, Oklahoma, Michigan, Ohio, Georgia, New Hampshire, Kansas, Wyoming, Maine, New York, Virginia and West Virginia some of which have yet to act on interstate branching; and

WHEREAS, the OCC is continuing and purposely using other mechanisms to thwart the role of state legislatures to make a decision about their state's participation in an interstate branching;

NOW, THEREFORE BE IT RESOLVED, that the National Conference of State Legislatures calls upon the Comptroller of the Currency, Eugene Ludwig, to cease any and all efforts which makes a mockery of Congressional intent to let the states decide their own participation in interstate bank branching; and

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BE IT FURTHER RESOLVED, that NCSL calls upon Senator Al D'Amato, Chairman of the United State Senate Banking, Housing and Urban Affairs Committee and Representative Jim Leach of the United State House of Representatives Banking and Financial Services Committee to initiate hearings in early 1996 on the conduct of the Comptroller of the Currency and his agency to take actions which are in direct contradiction to decisions made by state legislatures and to the intent of Congress in passing Riegle-Neal; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the President of the United States, to the Comptroller of the Currency, to all members of Congress, the National Governors Association and the Conference of State Bank Supervisors.

Resolution introduced by Representative Robert Brawley of North Carolina, Chair of the AFI Commerce and Communications Committee.

Resolution approved in Committee on Thursday, December 14, 1995 by voice vote.

Resolution approved by NCSL's Assembly on Federal Issues on Friday, December 15, 1995 by voice vote.

Loophole in Interstate Law Offers Benefits Of Branching in '95, Nearly 2 Years Early

By OLAF de SENERPONT DOMIS

WASHINGTON — An obscure provision tucked away in the interstate banking law will permit banks and thrifts to enjoy many of the benefits of branching nearly two years before the new rules take effect.

Under the provision, affiliated banks and thrifts will be able to give each other a variety of services after Sept. 29, 1995.

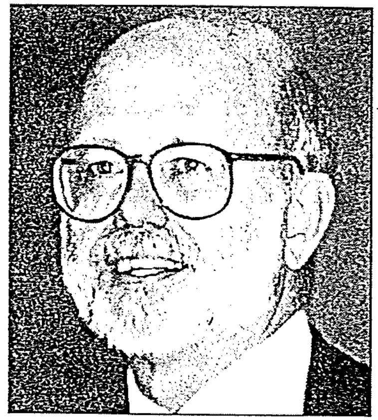
"It gives you damn near everything you're looking for in interstate branching," said Bert Ely, a financial institutions consultant.

"You can actually simplify your operation a bit, since when you branch, you have to worry about tax and compliance issues," he added. "At the very least, it's a good way to ramp up toward interstate branching."

The provision lets a bank subsidiary of a holding company receive deposits and renew certificates of deposit and other time deposits for affiliated institutions. In addition, affiliated holding company subsidiaries can close, service, and receive payments for loans as agents for each other.

Some banks are taking a close look at the provision as a way to get an early start on the road toward interstate branching.

"The provision definitely looks attractive, based on my understanding," said Betty Riess, a spokeswoman for the Bank of America unit of BankAmerica Corp. "It definitely would be a step toward providing greater convenience to customers when traveling or working across state lines."



Bert Ely
Consultant, Ely & Co.

However, affiliate banks would not be allowed to open new deposit accounts, make credit decisions, or pay out loan funds.

"It's about relationships that are already established," said Mr. Ely. "You can't establish new legal relationships with this provision — that's the key distinction — but the payoff is that that banking company can present a seamless picture to the customer, no matter what state they are in."

Affiliated banks and thrifts will be able to do various services for each other.

Another big advantage is that banks needn't get regulatory approval to take advantage of the rule.

The affiliates provision is based upon a series of letters issued by the Comptroller of the Currency in 1992.

The Comptroller ruled, on a case-by-case approval basis, that a national bank could take various actions as an agent of an affiliated bank without being considered a branch of the affiliated bank.

"Before, this was tailor-made by the OCC, and now, it'll be right off the shelf," said James Mann, a partner in the Washington office of McDermott, Will & Emery. "The fact that this requires no prior regulatory approval is critical, especially if you've got CRA problems."

Under the new interstate branching law, states will have until June 1, 1997, to decide whether they want to pass their own branching laws, opt out of interstate banking, or pass laws granting their institutions parity with national banks.

By using the affiliates provision, institutions can circumvent states' opting out of interstate branching and still get many of the benefits the federal law would have provided, Mr. Mann added.

This fact may prompt states to forgo opting in to avoid some of the hassle involved in adopting interstate branching, according to Ellen Lamb, assistant vice president and director of member relations for the Conference of State Bank Supervisors.

"States may say, 'Why bother opting in?' since they can avoid all the tax issues that way," she said. □

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Multistate Tax Commission (MTC) Membership

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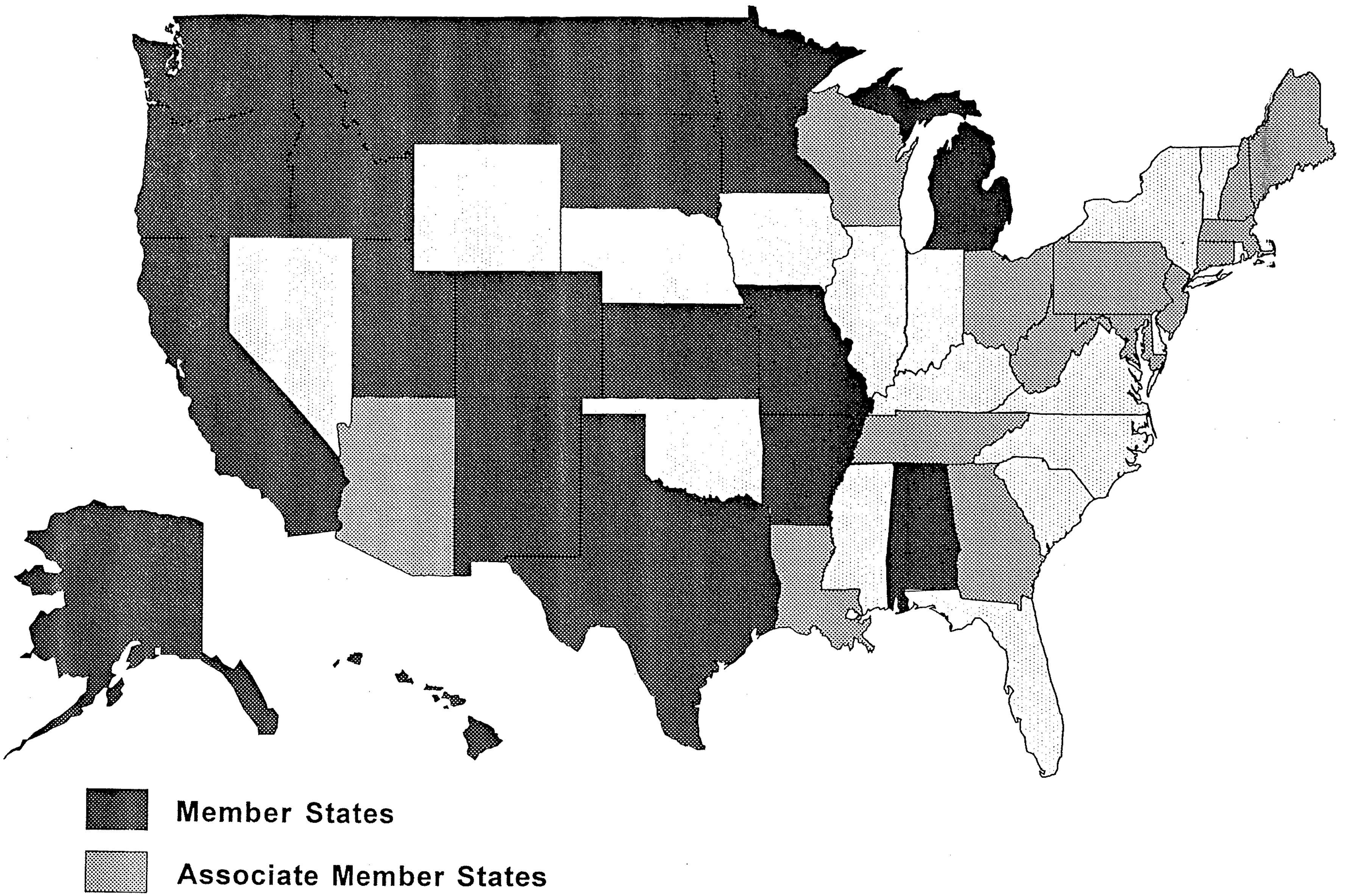

SENATE BILL No. 448

By Committee on Assessment and Taxation

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AN ACT concerning taxation; relating to the apportionment and allocation of income of financial institutions; amending K.S.A. 79-1107 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this act. All items of nonbusiness income, income which is not includable in the apportionable income tax base, shall be allocated pursuant to the provisions of K.S.A. 79-3274 through 79-3278 and amendments thereto. A financial institution organized under the laws of a foreign country, the commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income, as defined under the federal internal revenue code, is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this act and its apportionment factors shall include the part of its property, payroll and sales that is related to its apportionable income.

(b) All business income, income which is includable in the apportionable income tax base, shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by adding the taxpayer's receipts factor, as described in section 3 of this act, property factor, as described in section 4 of this act, and payroll factor, as described in section 5 of this act, together and dividing the sum by three. If one of the factors is missing, the two remaining factors are added and the sum is divided by two. If two of the factors are missing, the remaining factor is the apportionment percentage. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

(c) Each factor shall be computed according to the method of accounting, cash or accrual basis, used by the taxpayer for the taxable year.

(d) If the allocation and apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the secretary of revenue may require, in

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Federal Reserve Reports ... A Synopsis

Annual Report to the Congress on Retail Fees and Services of Depository Institutions

Board of Governors of the Federal Reserve System, September 1995

The average fees charged by out-of-state banks are in most cases significantly higher than the average fees charged by in-state banks. Of the eighteen comparisons involving average fees, out-if-state banks exhibit higher average charges in seventeen, with thirteen registering statistical significance.

Fees charged for stop-payment orders, NSF checks, and overdrafts, which are roughly $2 higher for out-of-state banks than for in-state banks, are particularly noteworthy. For money orders, the estimated difference is 58 cents for customers and nearly $1 for non-customers

Internal Organization and Economic Performance: The Case of Large U.S. Commercial Banks
By: William C. Hunter

Federal Reserve Bank of Chicago
Economic Perspectives, October 1995

This article reports empirical evidence on the impact of management decisionmaking characteristics on the productive efficiency of banks. Specifically, he examined the impact on bank costs of centralized versus decentralized decisionmaking, product delivery systems, and back-office operations.

Decisionmaking.

A change to centralized decisionmaking significantly increased costs relative to decentralized decisionmaking. For a bank with centralized delivery systems and operations, a change from decentralized to centralized decisionmaking increased costs by 3.68 percent. For a bank with decentralized delivery systems and centralized operations, a change from decentralized to centralized decisionmaking increased costs by 9.57 percent. In no case did a switch to centralized decisionmaking decrease costs.

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Delivery of services.

For banks with centralized decisionmaking and operations, a change from a decentralized to a centralized service delivery system had no significant impact on costs. For banks with decentralized decisionmaking and centralized operations, centralization of the service delivery system increased costs by approximately 6.53 percent. In neither case did the results suggest a reduction in costs. This is in contrast to the notion discussed above that centralizing a service delivery system will produce cost savings.

Back-office operations.

For a bank with decentralized decisionmaking and centralized service delivery systems, centralizing back-office operations reduced costs by approximately 4 percent. This finding is consistent with previous research which reports fairly large scale economies for back-office operations.

Impact of centralization on scale economies.

These results imply that centralization did not have a significant impact on scale economies, although it did have a significant impact on bank costs. It appears, then, that cost inefficiencies dominate the effects of scale economies in explaining variations in bank costs.

Conclusion.

The results show, first, that centralized decisionmaking tended to increase costs. Second, centralized product delivery systems either increased or had an insignificant impact on costs. In no case did centralized product and service delivery systems reduce costs as envisioned by proponents of centralization. Third, centralized back-office operations significantly reduced costs. This latter result is consistent with the existence of scale economies in back-office operations.

The Relative Performance of Bank Holding Companies and Branch Banking Systems

By: Stephen A. Rhoades and Donald T. Savage

Board of Governors of the Federal Reserve System, Washington, D.C.

Journal of Economic Business, Winter, 1981

The analysis focused on the relative merits of pure bank holding company systems and pure branch banking systems as alternative vehicles for the possible expansion of multi-market banking. Measures of profitability, operating efficiency, risk, and service to the local community were examined for organizations operating in four or more banking markets.

Both the regression analysis and the subsequent risk analysis do indicate that the pure bank holding company systems are less risky than the pure branching systems. the pure bank holding company systems have lower costs in some categories of non-interest expenses.

Future U.S. Banking Structure: 1990 to 2010
By: Timothy H. Hannan and Stephen A. Rhoades

Federal Reserve Board, Washington, D.C.
The Antitrust Bulletin, Fall 1992

The banking industry has over $3 trillion in assets and is larger in terms of employment (1.7 million) than the motor vehicles and equipment, steel, and petroleum industries with their combined number of 1.3 million employees. Consequently, any effects of structural change may be widely felt.

There are three reasons that may lead legislators to allow interstate banking by BHCs rather than branches. First, it appears that the individual states believe that they would retain more control over the banking structure within their boundaries if out-of-state entry took place through a BHC. Second, it is believed that local interests and decisionmakers would be better represented in a BHC bank, which must have officers and a board of directors, than in a branch, which is run by a manager often with very little decisionmaking authority. Third, the BHC would allow for the public availability of more financial information than would be the case with a branching system.

Simple extrapolations from trends observed for the nation as a whole, during the period from 1980-1989 and the period from 1984-1989 in *nationwide* banking structure yield, by 2010, between 5,000 and 5,600 banking organizations, between 7,500 and 9,500 banks, 80% to 86% of all banking assets accounted for by the largest 50 organizations, and 90% to 93% accounted for by the largest 100 firms.

The removal of restrictions on geographic expansion will, according to the predictions of this article, result in a substantial increase in the nationwide concentration of banking resources.

The removal of legal barriers to entry should have a pro-competitive effect by increasing potential competition in local markets. Nevertheless, a high degree of vigilance by the antitrust authorities would appear to be in order to assure that the enthusiasm over the deregulation of a major industry does not precipitate significant increases in local market concentration that would be likely to decrease competition. such an outcome could offset the possible gains (e.g. increased potential competition and added convenience for some bank customers) from removal of legal restrictions on geographic expansion. The airline industry may serve as a warning in this respect.

The federal and state bank regulators, who have supervisory responsibility with respect to financial condition of banks, will be faced with more larger banks. Over the next decade or so, it is reasonable to expect that a few banks will be far larger than any that the regulators have had to supervise so far, and there will probably be a considerable number of what are considered very big banks by today's standards. Because of their sheer size and the nationwide scope of their community banking operations, it may be a challenge for the regulators to adequately supervise such banks. In addition, the banks that may be regarded as too big to be allowed to fail because of concern with broader effects that such failures may have on the stability of other banks and the financial system more generally.

Our best-guess estimate of U.S. banking structure in the year 2010, based on several formal projections, is that there will be approximately 5,500 independent banking organizations as compared with 9,908 in 1989. The proportion of domestic banking assets accounted for by the largest 50 and

100 banking organizations will rise sharply to 70% and 87%, respectively, compared with 52% and 65% in 1989. Overall, the projections suggest that while the 50 and 100 largest banks, which include the global banks, will account for an increasing share of U.S. banking assets, there will continue to be a fairly large number of small community banks in the year 2010. This presumably reflects the attraction of the community banking industry for new entry, on the supply side, and the continuing demand for conveniently located banking facilities by the great majority of consumers and small businesses.

Multi-Office Bank Lending to Small Businesses: Some New Evidence
By: William R. Keeton

Federal Reserve Bank of Kansas City
Economic Review, Second Quarter 1995

Some analysts worry that large multi-office banks will be less able or less willing to lend to small businesses than the smaller banks they replace. Such a decline in small business lending could have serious consequences, these analysts argue, because small businesses account for a major share of job creation and lack alternative sources of financing.

The article investigates the relationship between multi-office banking and small business lending using new information on small business loans in the Tenth District states. Data for mid-1994 show that branch banks, smaller banks in multibank holding companies, and banks owned by out-of-state companies all tend to lend a smaller proportion of their funds to small businesses than other banks. These results support the view that further growth in multi-office banking may impose short-run costs on some small businesses.

Banking analysts have suggested several reasons why large, multi-office banks might lend less to small businesses than other banks. One reason is that large banks do not have to rely as heavily on small borrowers to achieve a desired level and composition of commercial lending.

Another reason large, multi-office banks might make fewer small business loans is that they tend to have long lines of managerial control. According to this view, it is not feasible for the top managers of a large bank to review every lending decision on small loans, especially when the bank's offices are dispersed over a wide area. As a result, the large bank's loan officers are given less autonomy than their counterparts at smaller banks and are required to follow rigid rules in granting credit--for example, rules about the minimum collateral on the loan or new worth of the borrower. These rigid lending rules result in fewer loans being granted to small businesses by large multi-office banks.

Finally, some critics of multi-office banks argue that such banks make fewer small business loans because they often "siphon" deposits from the banks they acquire. According to this view, large banks take over smaller banks in distant markets with the aim of using the acquired banks' deposits to fund their own loan customers. Because large banks lend mainly to large businesses and small banks to small businesses, this redistribution of deposits decreases total lending to small businesses.

Studies generally support the view that multi-office banks lend less to small businesses. Recent surveys have found that small businesses are more likely to report their credit needs are unsatisfied if they are located in markets dominated by multi-office banks. And early surveys of branch banks in New England and New York found that out-of-town branches made fewer unsecured loans to small businesses than unit banks in the same markets.

The evidence on small business lending at district banks confirms the finding of earlier surveys that multi-office banks tend to lend less to small businesses than other banks. Specifically, the date show that banks with a high degree of branching, smaller banks of in-state MBHCs, and banks owned by out-of-state MBHCs all tend to lend a smaller proportion of their funds to small businesses than other banks. The results support the view that further growth in multi-office banking may impose costs on some small businesses.

Regulators should continue to use the tools at their disposal to ensure that multi-office banks do not dominate local markets by absorbing smaller banks. Further progress should also be made in reducing regulatory reporting burdens, which tend to hurt small banks more than large banks.

Investigating the Banking Consolidation Trend
By: John H. Boyd and Stanley L. Graham

Federal Reserve Bank of Minneapolis
Quarterly Review, Spring 1991

Overview.

Based on their own analysis and other studies, Boyd and Graham conclude that banking consolidation is not primarily due to natural market forces. They find that big banks are neither more efficient nor safer than moderate-sized banks. And they argue that if the demand for banking services is in fact shrinking, as may claim, then theory says big banks shouldn't be expanding; they should be leading the exodus from the industry.

So why are mammoth banks not disappearing? According to Boyd and Graham, government policies are helping them survive and grow. The policy of not allowing very large banks to fail, for fear of derailing the economy, has extended insurance at no cost to all of those banks' liabilities -- an obviously attractive subsidy. Regulatory policies have also provided incentives for banks to get big: bureaucratic red tape discourages hostile takeovers of banks, which protects bank managers who increase their bank's size along with their own paychecks; and government approval of mergers of banks in the same market gives those banks noncompetitive advantages.

Findings.

Lately, the U.S. commercial banking industry has been consolidating. We take exception to the widely held positive view of consolidation. The date suggest that a major cause is incentives created by government policy. In fact, our investigation raises serious questions about the wisdom of certain bank regulatory practices.

Consolidation, by our definition, means a decease in the number of firms in the industry combined with an increase in their average size. While the number of banking firms has been shrinking, the average size of banking firms has been growing.

The evidence reveals a recent rapid consolidation trend in the U.S. banking industry. Why is this trend occurring? The popular belief is that market forces are causing banking economies of scale, to eliminate excess capacity, and to reduce the risk of bank failures. The available evidence, however, does not generally support this popular belief.

A firm is said to exhibit economies of scale when its average cost of production declines as the quantity of its output increases. In theory, such economies could extend indefinitely. In fact, however, the available data show something different\t for commercial banking: after banks reach a fairly modest size, there is no cost advantage to further expansion. Some evidence even suggests diseconomies of scale for the very largest banks.

Economies of scale are captured at a modes size, and once that size is reached, further increased do not improve profitability. In fact, there is some evidence that very large banking firms are less profitable than middle-sized ones. Thus, the evidence does not support the popular belief that a quest for economies of scale is behind the banking industry's consolidation.

Consolidation proponents applaud the trend they thing will result in fewer bank failures, since very large banks can diversify their investments and so reduce their risk. Unfortunately, the applause is premature and, ultimately, inappropriate.

Of course, large banks are better able than small banks to diversify. Large banks can make a greater variety of different kinds of loans, each of which demands some unique expertise and specialized staff. They can lend in more geographic areas through branching networks, loan production offices, and the like. If they choose to invest in a branching network, they can obtain retail outlets from a wider geographic area. Finally, they can access liability markets unavailable to smaller banks, such as those for commercial paper, bank acceptances, Eurodollars and Eurobonds.

All of this, however, describes what large banks ***can*** do, not what they necessarily ***do*** do. As we have already seen, large banks use systematically more financial leverage than banks, and financial leverage increases risk of failure.

In a very narrow sense, very large banking firms are unquestionable less risky than smaller firms. But this is due to special regulatory treatment. If a bank is so large that its failure might have consequences for the national economy, then the government considers that bank too big to fail. When such a bank is in serious financial trouble, the government always pays off its creditors. The government infuses public money into the bank and either operates it under government management (as was done with Continental Illinois) or arranges for a shotgun-wedding merger with a healthier bank (as was done with First Republic of Texas).

Do big banks actually fail less often than small banks? A simple head count may be behind the popular misconception that larger banks are less risky than smaller banks. What we need to know is not jus the number of failures, but what percentage of all banks of each size failed. This failure rate has been twice as great for the large banks as for the small ones.

The data do not support the notion that consolidation is occurring because larger banks are better positioned to diversify and are thus less risky. The empirical evidence shows that, contrary to popular belief, in recent years, larger banks have gotten into trouble more often than smaller banks.

The consolidation trend is real, but it is not easily explained by any natural market forces of which we are aware. What then, can explain it? Why are large and medium-sized banks so eager to combine? If the explanation is not in private market forces, the natural place to look is in public policies.

The government's too-big-to-fail policy may produce an incentive for banks to increase their size. After all, if a bank gets big enough to be considered to big to fail, it gets implicit guarantees for all its liabilities, whether they are insured deposits or not. So, in essence, attaining a certain size provides a bank with some free insurance and more complete coverage than it would get otherwise.

Another government policy that might be encouraging increases in bank size is the regulatory protection from hostile takeovers that bank managers often enjoy. This protected position could be related to the banking consolidation trend because bank managers do seem to have an incentive to create bigger banks -- an incentive that is unrelated to increased efficiency. The data suggest that, regardless of bank profitability, the bigger the bank, the bigger the compensation package its top managers receive. Even without scale efficiencies, bank managers have a personal financial incentive to expand their firms and perhaps more latitude to do so because of the way their industry is regulated.

A final government policy that could be behind the banking consolidation trend is the policy of allowing -- or even encouraging -- banks in the same market to merge. These sorts of mergers often increase the market share of the merged banks and could increase their ability to earn monopoly rents.

Research on concentration in banking suggests a relationship between market structure and pricing. Higher loan rates and lower deposit rates are seen in more concentrated markets. In other words, there is evidence of some ability for banks to earn monopoly rents, at least in some markets. If these findings are correct, they suggest an obvious incentive for banks to get bigger by merging with other banks in the same market, regardless of cost or risk efficiencies.

Consolidation in banking is not all it seems, and those who have enthusiastically applauded it are likely to be badly disappointed by its results. contrary to popular belief, large banks are not more profitable than middle-sized ones or less likely to impose costs on the Federal Deposit Insurance Corporation. In fact, according to the data, middle-sized banks have had the advantage on both counts for roughly the past two decades.

If competitive market forces are not behind this trend to consolidation, another likely candidate is public sector interventions. We have identified aspects of public policy which arguably do produce nonmarket incentives for consolidation, especially larger average bank size.

Are competitive forces and policy forces pushing the banking industry in opposite directions? By this we mean, is the market slowly eliminating large banks, while the government systematically resuscitates some of them and encourages the formation of others? We see scant evidence that further banking consolidation will benefit either the U.S. banking industry or the U.S. economy.