Comptroller of the Currency
Administrator of National Banks

250 E Street, S.W.
Washington, DC 20219

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Interpretive Letter #906
March 2001
State v. Federal Law

James Caras, Counsel
City Council Committee on Finance
75 Park Place
New York, NY 10036-7780

Re: OCC Views As To National Bank Authority to Charge ATM Fees

Dear Mr. Caras:

Pursuant to your request for comments, I am writing to bring to the attention of the New York City Council the views of the Office of the Comptroller of the Currency ("OCC") concerning the applicability to national banks of state and local laws that purport to restrict national bank automated teller machine ("ATM") fees.

We understand that the City Council is considering a proposed amendment to the New York administrative code to prohibit "surcharge"[1/] fees on ATM transactions by financial institutions generally. Without specifically addressing the features of the proposed New York legislation, we appreciate the opportunity to present the OCC's views on this issue, and our experience thus far in litigation challenging state laws and interpretations in Connecticut[2/] and Iowa that attempted to impose

[1/] The OCC uses the term "access fees" to denote what some banks call "convenience fees,"and what opponents call "surcharges."

[2/] *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999)(Connecticut enjoined from asserting enforcement jurisdiction over national bank ATMs)("*Burke*"); *cf. Burke v. Fleet Nat'l Bank*, 742 A.2d 293 (Conn. 1999)(Connecticut state law does not prohibit access fees).

restrictions on national bank ATMs,[3/] and municipal ordinances in San Francisco,[4/] Santa Monica,[5/] Newark, and Woodbridge, New Jersey that attempted to prohibit ATM "surcharges."[6/]

The OCC has taken the position in these cases, primarily through the medium of briefs *amicus curiae,* that: 1) the National Bank Act and OCC regulations implementing the Act authorize national banks to provide ATM services, to charge fees for those services, and to set the rates for those fees; and 2) under well-established Supremacy Clause principles, state or local restrictions that obstruct the exercise of those national bank powers are preempted by federal law. The OCC has also rebutted the argument consistently advanced against this position, that the federal Electronic Funds Transfer Act rather than the National Bank Act controls on these issues. None of these state or local restrictions on national bank ATM operations has thus far survived legal challenges based on these propositions.

The remainder of this letter summarizes the legal and business developments that gave rise to litigation on this subject, and the OCC's position as to the issues presented.

BACKGROUND: ATM FEES DEVELOPMENTS

The stimulus for litigation concerning ATM fees has come from statutory and market changes over the past decade that induced financial institutions to provide additional services, in a wider range of ATM locations, in return for additional fees. Until 1996, the nationwide ATM networks prohibited their member banks from charging access fees, and as a result most national banks did not do so. Over time, however, some state legislatures outlawed the network contractual restrictions,[7/] and banks

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[3/] *See Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999)(*cert. denied sub nom. Foster v. Bank One, Utah*, 120 S.Ct. 1718 (2000)(Iowa location, registration, and advertising restrictions on national bank ATMs preempted)("*Guttau*").

[4/] *Bank of America v. City and County of San Francisco, et al.*, No. 00-16994 (9th Cir. *filed* 7/18/00)(appeal from permanent injunction against ordinance entered 6/30/00 (N.D. Cal. No. C-99-4817-VRW).

[5/] *Bank of America v. City and County of Santa Monica, et al.*, No. 00-16355 (9th Cir. *filed* 7/14/00)(appeal from permanent injunction against ordinance entered 6/30/00 (N.D. Cal. No. C-99-4817-VRW).

[6/] *New Jersey Bankers Ass'n v. Township of Woodbridge*, No. 00-702 (JAG), (D.N.J Nov. 8, 2000); *New Jersey Bankers Ass'n v. City of Newark*, No. CV-00-702 (JAG)(D.N.J. Nov. 8, 2000) (consent order and permanent injunction against ordinances prohibiting ATM "surcharges").

[7/] *See Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990)(upholding state law authorization for state banks to charge fees notwithstanding network

challenged them on antitrust grounds. Those pressures caused the nationwide networks to abandon the access fee prohibition in April 1996. As a result, the availability of ATMs increased significantly as access fees enabled banks to defray costs and sometimes earn a return on ATM deployment. The other major change, also in 1996, was an amendment to the National Bank Act that removed geographical limits on the deployment of national bank ATMs.[8/] Some national banks exercised that freedom to introduce ATMs into states where restrictions had previously discouraged entry.

These changed circumstances led to a variety of legal conflicts between states and national banks: attempts to enforce state restrictions that no longer applied to national bank ATMs;[9/] charges that access fees violated existing state law;[10/] and new legislation that directly prohibited access fees.[11/] Those conflicts have given rise to requests by national banks for OCC interpretations as to the scope of the national bank power to charge fees.

NATIONAL BANK AUTHORITY TO CHARGE ACCESS FEES UNDER THE NATIONAL BANK ACT

The statutory authority for national banks to conduct business comes from the National Bank Act, tracing to 1863. In addition to setting forth the framework for the creation, regulation, and operation of national banks, the National Bank Act governs the scope of "banking powers" – *i.e.*, statutorily-authorized banking-related activities. These include a list of five enumerated powers – *e.g.*,

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prohibitions).

[8/] Under Section 36 of the National Bank Act, national banks may establish "branches" only to the extent that state law authorizes state banks to establish branches. *See* 12 U.S.C. §§ 36(c)-(g). When ATMs were first deployed in the 1970s, court decisions established that national bank ATMs constituted "branches" under section 36, and thus were made subject to state-law-based location limits. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976). Accordingly, from the 1970s until 1996, national banks generally could establish ATM "branches" only to the extent that states permitted the establishment of full-service brick-and-mortar branches in the same state. The 1996 amendment reversed that status, expressly excluding ATMs from the definition of a "branch," and thereby removed national bank ATMs from the reach of state-law-based restrictions. *See* Economic Growth and Regulatory Paperwork Reduction Act, Pub. L. No. 104-208, § 2205(a), 110 Stat. 3009-405 (Sept. 30, 1996); *Guttau*, 190 F.3d 844 (8th Cir. 1999); 12 C.F.R. § 7.4003. Those branching limits continue to apply to national banks' full-service brick-and-mortar branches.

[9/] *See, e.g., Guttau.*

[10/] *See, e.g., Burke*.

[11/] San Francisco, Santa Monica, Newark, and Woodbridge.

lending money and taking deposits, the separate authority to engage in the "business of banking,"as reasonably interpreted by the OCC,[12/] – and the umbrella phrase "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh).[13/] The Supreme Court has made clear that the "business of banking" authorization is broad and flexible, and takes on additional meaning as the business of banking changes.[14/] It is therefore settled that the "business of banking" evolves to meet the needs of a changing society, innovations in financial transactions, and advances in technology.[15/]

The National Bank Act Authorizes National Banks To Provide Services Through ATMs

The banking services provided through ATMs represent long-established banking activities: receiving deposits, disbursing cash from bank accounts, and extending credit in the form of cash advances. Each of these activities lies at the heart of national bank authority under section 24(Seventh), whether as part of the enumerated national bank power to receive deposits, as part of the authority to engage in the "business of banking," or as an activity incidental to permissible banking activity.

That conclusion is entirely unaffected by the fact that these traditional services are delivered through ATMs rather than through teller windows.[16/] The power to deploy and operate ATMs is

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[12/] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Corp.*, 513 U.S. 251 (1995)("*VALIC*")

[13/] 12 U.S.C. § 24, in relevant part, authorizes national banks: "Seventh. To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes * * * ."

[14/] *VALIC*, 513 U.S. at 258 n.2 ("We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated.").

[15/] *See also M & M Leasing Corp. v. Seattle-First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) ("[W]e draw comfort from the fact that commentators uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms * * * . [W]e believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking.").

[16/] 12 C.F.R. § 7.1019 provides, in part: "A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise

implicit in the National Bank Act's authorization of national banks to receive deposits, make loans and carry on the "business of banking," as the OCC has expressly reaffirmed in a recent regulation. 12 C.F.R. § 7.4003; 12 U.S.C. § 24(Seventh); *Guttau,* 190 F.3d at 849. ATMs and other electronic media simply represent a different means of exercising established banking powers. That authority, as with all other powers vested in national banks, is not subject to conditions imposed by state law except where Congress has so specified.[17/]

National Banks Are Authorized To Charge Fees For Their Services.

Contrary to the suggestions of some opponents of access fees, financial institutions are private, for-profit enterprises, and not public utilities. A national bank's authority to provide a product or service necessarily carries with it the authority to charge a fee for the product or service provided.[18/] National banks are charged with the authority to engage in the "**business** of banking," which cannot be separated from the authority to seek a business return. Any contrary rule would render national bank powers illusory.

The Supreme Court has long recognized that national banks are private enterprises that are entitled to conduct normal business activities. In holding that the National Bank Act preempts a state restriction on national bank advertising, the Court stated: "Modern competition for business finds advertising one of the most usual and useful of weapons.* * * It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-78 (1954).[19/] As a matter of statutory interpretation, it would make even less sense to permit national banks to "engage in a business," but then to deny them the ability to charge for providing the service.

National Banks Are Authorized To Set The Rates For Service Fees

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authorized to perform, provide, or deliver."

[17/] *See, e.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 406-408 (1987) (no geographic restrictions upon authorized securities transactions); *NBD Bank v. Bennett*, 67 F.3d 629, 632-33 (7th Cir. 1995) (national banks can transact business irrespective of their customers' locations unless federal law says otherwise).

[18/] By "customers," the OCC expressly includes any party that obtains a product or service from the bank, and not just deposit customers.

[19/] *See also Guttau*, 190 F.3d at 850 (Iowa ban on on-terminal national bank ATM advertising preempted).

Because federal statutes impose neither a prohibition on charging fees nor a cap on how much a national bank may charge, national banks are free to set the prices for their services, subject only to the OCC's supervisory oversight. Even though heavily regulated, national banks are not required to seek regulatory approval for any change in their rates. The National Bank Act does not displace business judgments by dictating any general restrictions on the kinds or amounts of fees that banks may charge for services, leaving those decisions to the discretion of bank management.[20/] National bank fee rate decisions are therefore not subject to limitation under either state law or federal law.

The OCC's interpretations of the National Bank Act reflect these principles. The applicable OCC regulation indicates that the establishment and rate of fees are matters to be determined by the national bank "in its discretion, according to sound banking judgment and safe and sound banking principles.'" 12 C.F.R. § 4.002.[21/] Furthermore, because those powers are inherent elements of national banks' authority to conduct the business of banking, no prior approval from the OCC is required for a national bank to set or change a fee or service charge. Unlike a utility or a common carrier, national banks are empowered to set fees in their sound business judgment, and thus may adjust them as business conditions dictate, without the necessity of regulatory approval. Within the bounds of supervisory considerations -- which are monitored solely by the OCC -- national banks may decide what fees to charge for the services they provide.

The Federal Electronic Funds Transfer Act Does Not Immunize The Ordinances Against Preemption By The National Bank Act

There is no basis for the argument that the federal Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. §§ 1693 *et seq.*, trumps the National Bank Act or insulates local consumer protection ordinances against preemption. That argument ignores the text of the EFTA and instead relies upon an inflated view of the scope of the EFTA "savings clause" and of the scope of the EFTA generally. This argument was raised and rejected by both the Eighth Circuit decision in *Guttau* and by the San Francisco District Court.

[20/] That statutory freedom to set the rate for **fees** contrasts with the specific National Bank Act restriction on national bank **interest** rates, which are made subject to specified state usury laws. 12 U.S.C. § 85.

[21/] The regulation provides that the bank's authority to charge fees, like all other banking activities, must be exercised in a manner consistent with safe and sound banking practices. The regulation addresses a variety of factors relevant to the OCC's supervisory concerns, including whether a fee is anticompetitive, unsafe or unsound, or arrived upon through collusion. If the fee-setting process in the bank has addressed these factors, there is no supervisory impediment to the exercise of the bank's authority to charge fees.

First, the EFTA savings clause is not a "grant of authority" to states. The text instead states that certain state consumer protection measures will be deemed consistent with the EFTA, and therefore not preempted by the EFTA **itself.** The savings clause does not purport to address the preemptive effect of any **other** federal law. The text provides:

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

15 U.S.C. § 1693q (emphasis added). The Eighth Circuit rejected an identical argument in *Guttau*: "Despite [Iowa's] claims, this anti-preemption provision is specifically limited to the provisions of the Federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." 190 F.3d at 850; *see also First Union Nat'l Bank v. Burke*, 48 F.Supp. 2d 132, 146-47 (D.Conn. 1999) (The text of the EFTA "does not contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Bank Act * * * .") The EFTA savings clause therefore has absolutely nothing to say about the preemptive effect of the National Bank Act upon restrictive state or local laws.

Second, and independently, there is no conflict between the EFTA and the National Bank Act on this issue because the EFTA simply does not address national banks' substantive power to charge fees. Instead, the EFTA primarily addresses procedural issues such as disclosures.[22/] In much the same manner as the Uniform Commercial Code, the EFTA also addresses the allocation of liabilities for electronic transactions as between consumers and financial institutions (§§ 1693g-n).[23/] The Federal Reserve Board, the agency charged with interpretation of the EFTA, has published its interpretations in Regulation E, which does not even hint that the EFTA addresses the substantive power to charge

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[22/] *E.g.*, disclosures to consumers (15 U.S.C. § 1693c); documentation of transfers (§ 1693d); procedures for preauthorized transfers (§ 1693e); and procedures for error resolution (§ 1693f).

[23/] In so doing, the EFTA, like other federal consumer statutes, roughly parallels the function of the Uniform Commercial Code, providing a procedural framework for transactions while other sources of authority – contract or other statutory provisions – generally provide the substance.

fees.[24/] Thus, the argument that the EFTA controls because it is "more specific" than the National Bank Act fails because the EFTA is specific only as to issues other than the power to charge fees.

Consistently, when the EFTA was recently amended so as to address ATM fee transactions, it addressed only the **procedure** for charging fees and was silent as to the power to charge fees. The Gramm-Leach-Bliley Act contains a section entitled the "ATM Fee Reform Act of 1999," which requires that ATM operators give consumers **notice** of access fees rates at the time of the transaction, but says nothing about the power of banks to charge those fees. Gramm-Leach-Bliley Act, Section 701-705, S. 900, 106th Cong., 1st Sess. § 702 (1999). Thus, in stating **the way in which** banks can charge such fees, Congress clearly contemplated that such fees could legitimately **be** charged.[25/] The notice provision simply extends other disclosure requirements in the EFTA and Regulation E, and thus is utterly consistent with the other procedural provisions of the EFTA. Thus, in purporting to "reform" ATM fees, Congress made no changes to the authority of national banks under the National Bank Act to charge access fees.

There is no merit to the suggestion that the EFTA is the sole umbrella federal authority over any issue related to ATMs – in essence, "occupying the field" of federal ATM regulation. The EFTA cannot be made to fit that mold. First, the EFTA shares with other federal statutes, besides the National Bank Act, authority over various aspects of ATM operation.[26/] Furthermore, ATM

[24/] The Federal Reserve's Regulation E interpreting the EFTA nowhere addresses the substantive authority to charge fees. *See* 12 C.F.R. part 205. Instead, Regulation E requires at the initiation of an account the **disclosure** of fees for electronic transfers or for the right to make electronic transfers. 12 C.F.R. § 205.7(b)(5). Regulation E includes a special section on the interaction of the EFTA with "other law," which addresses the Truth-In-Lending Act and state law, but makes no reference to the National Bank Act. 12 C.F.R. § 205.12. Accordingly, the regulation reflects the Federal Reserve's presumption that the EFTA and the National Bank Act have distinct spheres that do not interact.

[25/] Indeed, this precise reasoning was recently employed by the Connecticut Supreme Court in rejecting the Connecticut banking commissioner's interpretation of state law to prohibit ATM access fees. Noting that a Connecticut statute required disclosure to the depositor of any bank deposit fees, but was silent as to the substantive authority to charge fees, the Connecticut Supreme Court concluded that the disclosure statute "assumes that the authority to impose fees does exist." *Burke v. Fleet Nat'l Bank*, 742 A.2d 293, 304 (Conn. 1999).

[26/] Aside from the National Bank Act, aspects of ATM operation are regulated at the federal level by a number of statutes, including the Expedited Funds Availability Act, 12 U.S.C. §§ 4002(e), 4004(d)(2) and the Home Owners Loan Act, 12 U.S.C. §§ 1461 *et seq*.

operations are only a subset of the electronic funds transfers to which the EFTA is addressed.[27/] More broadly, the EFTA is merely one of an array of statutes that operate in conjunction with the National Bank Act without conflict, each statute supreme in its own sphere. Other transaction-specific statutory regimes include: consumer protection statutes such as the as the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.;* payments system regulation such as the Expedited Funds Availability Act, 12 U.S.C. §§ 4001 *et seq.;* and the omnibus allocations of rights and liabilities under the Uniform Commercial Code. Accordingly, the EFTA does not displace the National Bank Act authority for national banks to charge fees for ATM use.

STATE OR LOCAL LEGISLATION THAT WOULD PROHIBIT FEES AUTHORIZED BY THE NATIONAL BANK ACT IS PREEMPTED BY OPERATION OF THE SUPREMACY CLAUSE

Under the Constitution's Supremacy Clause, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). The nature and degree of inconsistency required to trigger preemption has been expressed in a variety of formulations,[28/] but has been usefully summarized as a question whether, under the circumstances of a particular case, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996), *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Federal courts have repeatedly applied those principles to determine that federal law preempts state law that would pose obstacles to the exercise of national bank powers.[29/] The

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[27/] In addition to ATM transactions, the scope of the EFTA covers credit card, debit card, and other electronic transfers. 15 U.S.C. § 1693a(6).

[28/] "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)*; see Bank of America Nat'l Trust & Sav. Ass'n v. Shirley,* 96 F.3d 1108 (8th Cir. 1996)(preemption may be express or by federal occupation of the field).

[29/] The Supreme Court established long ago that "the states can exercise no control over [national banks], nor in any way affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Merchants' Nat'l Bank v. Dearing*, 91 U.S. 29, 33-35 (1875). *See also First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 256 (1966)

Court has observed that the history of Supremacy Clause litigation of national bank authority is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." *Barnett Bank*, 517 U.S. at 27.[30/]

In the case of access fee prohibitions, it is our view that local laws "pose an obstacle" to the exercise of powers conferred by federal authority. Where federal law says that national banks may charge access fees, and local ordinances say that they may not, the conflict between federal and local prescriptions is manifest and total. Accordingly, it is the OCC's position that local ordinances purporting to prohibit national bank ATM access fees are preempted by federal law and rendered unenforceable with respect to national banks.

I hope that these views will be helpful to the Council. For further information, please contact Jonathan Rushdoony, District Counsel, (212) 790-4010, or Douglas Jordan, Special Counsel, (202) 874-5280.

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller
and Chief Counsel

(observing that "[t]he paramount power of the Congress over national banks has * * * been settled for almost a century and a half"). *See generally Barnett Bank* (federal statute preempts state statute restricting bank sales of insurance); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

[30/] It is immaterial to the application of this principle whether the federal power is explicit or implicit in the National Bank Act. *Barnett Bank*, 517 U.S. at 31; *see Franklin Nat'l Bank v. New York*, 347 U.S. at 375-79 & n.7.