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# The Riegle-Neal Amendments Act of 1997: The Impact of Interstate Branching on the Dual Banking System

## I. INTRODUCTION

The way Americans bank has changed dramatically since the early 1920s when “banking needs and practices were relatively localized and unsophisticated.”<sup>1</sup> Today, Americans are more mobile and need banking services when they cross state lines.<sup>2</sup> As a result, banks have used technology to make customers’ money mobile as well. Internet banking and Automated Teller Machines (ATMs), for example, give customers the ability to access and obtain funds from their bank accounts from anywhere in the country.<sup>3</sup>

Responding to the changing banking market, Congress modernized the banking laws by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal).<sup>4</sup> In short, Riegle-Neal allows bank holding companies (BHCs)<sup>5</sup> to acquire banks in any state<sup>6</sup> and permits banks to engage in interstate branching if both the “home state” and the “host state” have opted in to Riegle-Neal.<sup>7</sup> States had until June 1, 1997, to either opt in or opt out of Riegle-Neal’s interstate branching provision.<sup>8</sup> As this deadline approached, uncertainty existed over whether home or host state law would apply to state bank interstate branches.<sup>9</sup> On July 3, 1997,

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1. Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183, 210 (1996).

2. *See id.*

3. *See id.*

4. Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.). For a complete analysis of Riegle-Neal, see Rollinger, *supra* note 1.

5. A BHC is characterized as “any company which has control over any bank.” 12 U.S.C. § 1841(a)(1) (1994).

6. *See id.* § 1842(d)(1)(A).

7. *See id.* § 1831u. The “home state” is, for state banks, the “[s]tate by which the bank is chartered,” or for national banks, “[the] state in which the main office of the bank is located.” *Id.* § 1831u(f)(4). A “host state” is any “[s]tate, other than the home [s]tate of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.” *Id.* § 1831u(f)(5).

8. *See id.* § 1831(u)(a)(2)(A); *see also infra* notes 38-58 and accompanying text.

9. *See infra* notes 86, 97-101 and accompanying text. A “branch” is defined as “any

President Clinton signed the Riegle-Neal Amendments Act of 1997 (Amendments Act)<sup>10</sup> which gives host state law control over state bank interstate branches<sup>11</sup> to the same extent host state law controls national bank interstate branches.<sup>12</sup> Additionally, the Amendments Act allows state bank interstate branches to engage in activities allowed under their home state charter to the extent that those activities are permitted either for national bank interstate branches or for state-chartered banks in the host state.<sup>13</sup>

This Comment explores recent developments in interstate branching, including how the Amendments Act attempts to accomplish conflicting congressional goals relating to the dual banking system. Part II discusses the history of interstate branching,<sup>14</sup> the structure Riegle-Neal creates for interstate branching,<sup>15</sup> states' decisions to opt in or opt out of interstate branching under Riegle-Neal,<sup>16</sup> and provisions of Riegle-Neal that permit states to protect their banks and economies.<sup>17</sup> Part III analyzes why Congress enacted the Amendments Act<sup>18</sup> and explains the provisions of the Amendments Act.<sup>19</sup> Part IV scrutinizes whether

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branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, ATMs and automated loan machines are no longer regarded as branches, even if established and operated by the bank. Compare 12 U.S.C.A. § 36(j) (West Supp. 1997), with *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 951 (D.C. Cir. 1976) (holding, prior to the Economic Growth and Regulatory Paperwork Reduction Act of 1996, that an ATM is a branch if established and operated by a bank). As a result of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, national banks can now establish ATMs in states that prohibit interstate branching.

10. 12 U.S.C.A. §§ 1831a(j), 36(f)(1)(C) (West Supp. 4 1997).

11. A "state bank interstate branch" or "national bank interstate branch" is a branch of "a bank whose home [s]tate is another [s]tate." 12 U.S.C. § 1831u(f)(8). Although the statute uses the terms "out-of-[s]tate [s]tate bank" and "out-of-[s]tate national bank" to refer to interstate branches, the terms "state bank interstate branch" and "national bank interstate branch" will be used to refer to interstate branches throughout this Comment.

12. See 12 U.S.C.A. § 1831a(j)(1) (West Supp. 4 1997); see also *infra* notes 124-26, 160-77 and accompanying text.

13. See 12 U.S.C.A. § 1831a(j)(2); see also *infra* notes 123, 129-59 and accompanying text.

14. See *infra* notes 22-29 and accompanying text.

15. See *infra* notes 30-37 and accompanying text.

16. See *infra* notes 38-70 and accompanying text.

17. See *infra* notes 71-85 and accompanying text.

18. See *infra* notes 86-115 and accompanying text.

19. See *infra* notes 116-26 and accompanying text.

the Amendments Act accomplishes the goals Congress intended.<sup>20</sup> Finally, this Comment concludes that the Amendments Act succeeds in creating competitive equality between state and national banks in interstate branching, but sacrifices other competing goals to do so.<sup>21</sup>

## II. BACKGROUND

### A. *The McFadden Act*

Before the passage of Riegle-Neal, the McFadden Act of 1927<sup>22</sup> governed interstate branching practices. Under the McFadden Act, national banks could branch within a state only to the extent that a state bank could do so.<sup>23</sup> Therefore, the McFadden Act delegated to states the power to decide how national banks could branch within their borders.<sup>24</sup> In order to limit intrastate competition between banks, states generally prohibited interstate branching.<sup>25</sup> Therefore, a BHC wishing to operate in multiple states had to establish separately chartered banks in each of those states.<sup>26</sup> For customers, these barriers to interstate branching made receiving banking services difficult or impossible once customers left their home state, even at banks controlled by the same BHC as their home state bank.<sup>27</sup> For

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20. See *infra* notes 127-88 and accompanying text.

21. See *infra* notes 189-90 and accompanying text.

22. 12 U.S.C. § 36 (1989), *repealed by* Pub. L. No. 103-328, 108 Stat. 2338 (1994).

23. See *id.* § 36(c). This federal restriction on geographic bank expansion was intended to guard against overconcentration of power within the banking industry. See Clyde Mitchell, *The Arrival of Interstate Branching*, N.Y. L.J., July 16, 1997, at 3.

24. See Edward Herlihy et al., *Financial Institutions—Mergers and Acquisitions 1996: Another Successful Round of Consolidation and Capital Management*, in FINANCIAL INSTITUTIONS MERGERS AND ACQUISITIONS: THE NEW ERA, at 251, 436 (PLI Corp. Law & Practice Course Handbook Series No. B-973, 1997).

25. See Heidi Mandanis Schooner, *Recent Challenges to the Persistent Dual Banking System*, 41 ST. LOUIS U. L.J. 263, 269 (1996).

26. See Rollinger, *supra* note 1, at 186. National banks, under the National Bank Act's thirty-mile rule, circumvented state prohibitions on interstate branching by relocating their headquarters across state lines while retaining the branches in the former state. See 12 U.S.C. §§ 30(b), 36 (West Supp. 1997); see, e.g., Ghiglieri v. Sun World, N.A., 117 F.3d 309 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3493 (U.S. Dec. 23, 1997) (No. 97-1078). As a result, a single bank with branches in two states was formed. See *Sun World*, 117 F.3d at 311; see also *infra* notes 55, 64 and accompanying text.

27. Interstate branching under Riegle-Neal will provide greater convenience to bank customers. See Rollinger, *supra* note 1, at 218-21. In particular, interstate branching will benefit the sixty million Americans who commute across state lines on a day-to-day basis

businesses, the restrictiveness of the McFadden Act adversely affected profitability.<sup>28</sup> Responding to these effects, in the early 1990s some states began to allow interstate branching, usually on a reciprocal basis.<sup>29</sup>

### B. *The Riegle-Neal Act*

Recognizing that the McFadden Act impeded the progression toward nationwide banking, Congress passed Riegle-Neal, which authorizes interstate branching by both national and state banks.<sup>30</sup> As of June 1, 1997, a BHC need only have one bank subsidiary to operate in states that have opted in to Riegle-Neal's interstate branching provision.<sup>31</sup> Under Riegle-Neal, banking entities may

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because they live in "multi-state metropolitan area[s] such as Washington D.C., Philadelphia, St. Louis . . . New York City," Charlotte, Cincinnati, and Chicago. *Id.* at 220. Likewise, business travelers and tourists will experience more convenience in obtaining banking services and executing banking transactions. *Id.* People relocating will also benefit under Riegle-Neal because they may no longer have to worry about opening or closing their bank accounts. *See id.* Interstate branching may also mean lower costs to bank customers because banks will reduce operating expenses and increase efficiency. *See id.* at 218. *But cf.* Rick Stouffer, *Mergers Will Increase with New Banking Law on Books*, BUFFALO NEWS, June 3, 1997, at D1, available in 1997 WL 6439951 (arguing that Riegle-Neal will lead to greater consolidation of banks, which generally leads to higher bank fees).

28. Large companies that engage in interstate commerce or that operate in multiple states usually have several different deposit accounts with various banks for which they pay "monitoring costs, transfer fees, and other expenses." Rollinger, *supra* note 1, at 219. Riegle-Neal enables companies to cut these costs. As borrowers, businesses will also benefit under Riegle-Neal as banks grow because the larger the bank, the more it can loan to a single borrower, resulting in lower loan transaction costs. *See id.* Riegle-Neal also enables banks to cut costs because it is cheaper to operate one bank with multiple branches than to maintain separately chartered banks in different states. *See* Julie Carrick Dalton, *Interstate Banking Law Means Consolidation of Subsidiaries*, BOSTON BUS. J., June 20, 1997, available in 1997 WL 8885168.

29. *See* Edward D. Herlihy et al., *Bank Mergers and Acquisitions 1993: A Year of Increasing Franchise Consolidation*, in BANKING DEVELOPMENTS UNDER THE CLINTON ADMINISTRATION, at 145, 297 (PLI Comm. Law & Practice Course Handbook Series No. A-685, 1993). Before Riegle-Neal, the only states that allowed interstate branches were Alaska, Nevada, New York, North Carolina, Oregon, and Rhode Island. *See* John A. Buchman, *Can Community Banks Survive: What the Interstate Banking Act Will Mean*, BUS. L. TODAY, Jan.-Feb. 1996, at 44, 46.

30. Riegle-Neal automatically authorizes national banks to engage in interstate merger transactions, subject to antitrust and other considerations, with banks in states that did not expressly opt out of Riegle-Neal's interstate branching provisions. *See* 12 U.S.C. §§ 36(g), 1831u(a). States that did not expressly opt out had to adopt legislation allowing their state banks to branch interstate. *See Multistate Pacts Seek To Help State Banks On Interstate Branching*, BANKING POL'Y REP., Jan. 1, 1996, available in LEXIS, BANKNG Library, BNKPOL File.

31. *See* 12 U.S.C. § 1831u(a).

participate in interstate branching by: (1) consolidating banks with or without a common BHC;<sup>32</sup> (2) acquiring an existing bank or branch in the state they wish to enter;<sup>33</sup> or (3) opening a “de novo branch.”<sup>34</sup> Before an interstate merger or acquisition is approved, the appropriate federal regulator must evaluate the bank’s history of compliance with the Community Reinvestment Act of 1977<sup>35</sup> and any relevant state community reinvestment laws,<sup>36</sup> as well as conduct a written evaluation of the bank.<sup>37</sup>

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32. *See id.*

33. *See id.* Riegle-Neal allows states to determine whether an out-of-state bank must acquire only one branch or an entire bank in order to branch into the state. *See id.* § 1831u(a)(4); *see also infra* note 74 and accompanying text. States may also regulate branch acquisitions through state aging laws. *See* 12 U.S.C. § 1831u(a)(5); *see also infra* notes 45, 71 and accompanying text.

34. “De novo branching” occurs when a bank opens a new branch in a state where the bank does not have any existing branches. Upon receiving approval from the Office of the Comptroller of the Currency (OCC), a national bank may establish a de novo branch if the host state expressly permits de novo branching among all out-of-state state and national banks. *See* 12 U.S.C. § 36(g); *infra* notes 45, 72, 74 and accompanying text. State and foreign banks face analogous requirements. *See* 12 U.S.C. §§ 1828(d)(4) (requiring FDIC approval for state banks), 3103(a) (requiring Federal Reserve Board (FRB) and state regulatory approval for foreign banks).

35. *See* 12 U.S.C. § 1831u(a)(b)(3)(A). The Community Reinvestment Act is codified at 12 U.S.C. §§ 2901-2907. The federal regulatory agencies have adopted regulations dealing with Community Reinvestment Act requirements. *See* 12 C.F.R. § 25.21(b) (1997) (OCC); *id.* § 228.21(b) (FRB); *id.* § 345.21(b) (FDIC). This evaluation does not occur if the bank, prior to the merger, already has a branch or bank affiliate in the host state. *See* 12 U.S.C. § 1831u(b)(3). For a discussion of the Community Reinvestment Act, see Laura Turner Beyer, Comment, *The Community Reinvestment Act: A Boost to Low- and Moderate-Income Communities, a Set-Back for Minority-Owned Banks*, 1 N.C. BANKING INST. 387 (1997), and Joseph Moore, Comment, *Community Reinvestment Act and Its Impact on Bank Mergers*, 1 N.C. BANKING INST. 412 (1997).

36. *See* 12 U.S.C. § 1831u(b)(3)(C). In addition to community reinvestment requirements, Riegle-Neal also mandates that banks terminating branches in low- to moderate-income communities must give notice to their customers, allow them to comment, and discuss possible alternatives with the area’s leaders. *See id.* § 1831r-1(d). As a result of giving people a forum, the bank will face pressure to keep the branch open and receive adverse press coverage, which could damage the bank’s other branches in the area. *See* Michael K. O’Neal, *Impact of Recent and Proposed Federal Regulatory Developments and Chartering Legislation*, 51 CONSUMER FIN. L. Q. REP. 27, 30 (1997). This procedural requirement can be avoided by terminating the branch before finalizing an interstate merger transaction. *See id.*

37. *See* 12 U.S.C. §§ 2906(b), (d). The regulator must evaluate overall bank performance, write a separate report on performance in each state where the bank has one or more branches, and conduct another written evaluation if the banking entity has one or more branches in a “metropolitan area,” defined as an area with at least 250,000 people. *See id.*

## 1. States Opting In to Riegle-Neal

As under the McFadden Act, states still have the choice of whether to allow interstate branching.<sup>38</sup> Congress, arguably respecting the interest states have in controlling financial practices within their borders and the traditional role of states in regulating the banking industry,<sup>39</sup> delegated the power to states to determine whether to allow interstate branching within their borders by permitting them to opt out of Riegle-Neal's interstate branching provision.<sup>40</sup> Forty-eight states, as well as the District of Columbia and Puerto Rico, either opted in before June 1, 1997 or opted in by default.<sup>41</sup>

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38. *See id.* § 1831u(a)(2). Prior to Riegle-Neal, in situations governed by the National Bank Act's thirty-mile rule, principles of preemption dictated that states could not prevent national banks from engaging in interstate branching by moving their main office across state lines, while retaining their former headquarters as a branch. *See* 12 U.S.C. §§ 30(b), 36; *supra* note 26; *see also* Rollinger, *supra* note 1, at 191-92. National banks can no longer use the thirty-mile rule to establish interstate branches unless the retained branches could be reestablished under state law. *See* 12 U.S.C.A. §§ 30(c), 36(e)(2) (West Supp. 1997); *infra* note 55 and accompanying text.

39. States retain state taxation and antitrust regulation powers under Riegle-Neal. *See* 12 U.S.C. § 1831u(c)(1) (taxing power); *id.* § 1831u(c)(2) (power over state antitrust regulation). The manner in which states can tax the interstate operations of banks is left entirely to the states. *See id.* § 1831u(c)(1)(A)-(B). States can use their ability to tax to create a friendly or hostile environment for banks. If a state taxes banks solely on the basis of their state charter, or for national banks, the location of their main office, and did not revise its tax laws when it opted in to Riegle-Neal, state tax revenue may be affected by the consolidation of affiliated banks in multiple states. *See* Matthew D. Alman, Note, *Interstate Banking and Branching*, 16 ANN. REV. BANKING L. 27, 31 (1996). When a BHC consolidates its subsidiary banks, it can have branches in a host state and pay no tax if the host state still taxes on the basis of having a state charter, or, for national banks, the location of the bank's main office. *See infra* notes 63-70 and accompanying text (discussing NationsBank's attempt to convert its Texas operations into interstate branches). Currently, a majority of states are striving to change their tax codes so that they can tax their state-chartered banks, national banks headquartered within the state, and interstate branches equally. *See* Alman, *supra*, at 31; John L. Douglas & John A. Buchman, *As States Adopt Interstate Banking Even Before Federal Law Goes Into Effect, Holding Companies Mull Consolidating Subsidiaries*, NAT'L L.J., Jan. 29, 1996, at B4; *see also* Rollinger, *supra* note 1, at 243-44 (identifying a change in state tax laws as a solution to a reduction in state tax revenue); *infra* notes 69-70 and accompanying text (explaining how Texas amended its franchise tax laws).

40. *See* 12 U.S.C. § 1831u(a)(2).

41. In order to opt in early, a state had to adopt legislation that "(i) applies equally to all out-of-[s]tate banks; and (ii) expressly permits interstate merger transactions with all out-of-[s]tate banks." *Id.* § 1831u(a)(3)(A). By expressly opting in to Riegle-Neal, a state could have authorized interstate merger transactions as early as September 29, 1994. *See id.* California, Connecticut, Delaware, Idaho, Maryland, Michigan, Nevada, North Carolina, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, and Virginia were among the first

The fact that forty-eight states have opted in to Riegle-Neal suggests that states have acknowledged that the banking industry has changed and that states must adapt to these changes if they want to protect and empower their own banks. North Carolina, for example, which has authorized intrastate branching since it first began regulating the business of banking in 1921<sup>42</sup> and permitted interstate banking through the Southeast Compact,<sup>43</sup> was one of the first states to allow interstate branching<sup>44</sup> and then opted in early to Riegle-Neal.<sup>45</sup> As a result, North Carolina has developed a strong banking community, which includes Charlotte, the second largest money-center in the United States.<sup>46</sup> Because their state has embraced geographic bank expansion and adopted liberal banking laws, North

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states to opt in to interstate branching under Riegle-Neal. *See All But Few States Beat Trigger Date On Nationwide Branching*, BANKING POL'Y REP., June 2, 1997, available in LEXIS, BANKNG Library, BNKPOL file. If a state took no action, it automatically opted in on June 1, 1997. *See id.* Missouri opted in by default. By not adopting legislation empowering its state-chartered banks to branch interstate, a state places them at a disadvantage because they may not engage in interstate branching, but out-of-state banks may branch into the state. *See id.*; *see also* Special Order 1997-2, Kansas State Bank Commissioner (May 30, 1997) (on file with Office of the Kansas State Bank Commissioner) (establishing a framework for Kansas state banks to engage in interstate branching because the Kansas Legislature failed to do so).

42. *See* N.C. GEN. STAT. § 53-62 (Supp. 1997); 1921 N.C. Sess. Laws ch. 4, § 43.

43. In the 1980s, some states granted BHCs from reciprocating states within certain regions the ability to engage in interstate banking within their borders. *See* William D. Gaither, *Financial Institutions: Provide for Nationwide Reciprocal Banking*, 11 GA. ST. U. L. REV. 50, 50-51 (1994). In *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985), the Supreme Court approved this practice of regional interstate banking. Along with North Carolina, Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, South Carolina, Tennessee, Virginia, and the District of Columbia participated in the Southeast Compact. *See Senate Panel Oks Interstate Banking; Bill May Speed Dismantling of State Laws*, ATLANTA J. & CONST., Feb. 24, 1994, at D1.

44. *See* Buchman, *supra* note 29, at 46. North Carolina first allowed interstate branching in 1993 through the North Carolina Interstate Branch Banking Act. *See* N.C. GEN. STAT. §§ 53-219 to 53-224.8 (1994), *repealed by* 1995 N.C. Sess. Laws ch. 322, § 1. This legislation was repealed when North Carolina opted in to Riegle-Neal. *See* N.C. GEN. STAT. § 53-224.10.

45. *See* N.C. GEN. STAT. § 53-224.10. North Carolina allows de novo branching on a reciprocal basis until June 1, 1999, and has no aging laws. *See id.* § 53-224.12; *see generally id.* § 53-224.10 to .31.

46. *See* Robert Trigaux, *Pulling Florida's Banks Strings*, ST. PETERSBURG TIMES, Sept. 7, 1997, at 1H, 6H. North Carolina is home to NationsBank, the third largest BHC, First Union, the sixth largest BHC, and Wachovia, the seventeenth largest BHC in the United States, based on total assets. *See* Doug Campbell, *Wachovia Moving Into Insurance Market*, GREENSBORO NEWS & RECORD, Feb. 2, 1998, at B4; *First Union Corp. Purchase of Wheat First, Broker Firm, Is Completed*, WALL ST. J., Feb. 3, 1998, at B16; Matt Murray & Rick Brooks, *Regions Offers \$2.7 Billion for First Commercial*, WALL ST. J., Feb. 9, 1998, at A8.



Carolina banks find themselves on the buying side of the equation.<sup>47</sup> As a state, North Carolina generally need not worry about lost jobs resulting from bank mergers because North Carolina banks are usually the acquirers, not the targets.<sup>48</sup> Thus, the rapid expansion of North Carolina's banks illustrates that some states have a head start on interstate branching, which they may use to become even stronger, thereby drawing away valuable commodities like bank charters and jobs from other states.<sup>49</sup>

## 2. States Opting Out of Riegle-Neal

Texas and Montana are the only states that opted out of Riegle-Neal's interstate branching provisions.<sup>50</sup> Although initially opting out, Texas will reconsider interstate branching in 1999,<sup>51</sup> and Montana will permit interstate branching beginning October 1, 2001.<sup>52</sup> Although Montana opted out of Riegle-Neal, it amended its laws to allow statewide branching for the first time beginning July 1, 1997.<sup>53</sup> Like Montana banks, Texas banks could not branch

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47. In 1996, NationsBank bought St. Louis-based Boatmen's Bancshares, Inc. See Alman, *supra* note 39, at 31. In 1997, NationsBank acquired Florida's Barnett Banks, making it the largest bank in Florida. See *Merger of NationsBank and Barnett is Approved*, NAT'L L.J., Dec. 22, 1997, at B2. Likewise, First Union became the number one bank in Virginia by merging with Signet Banking Corp., and it recently announced an agreement to merge with CoreStates Financial. See *First Union Corp./Corestates Financial Corp.*, LEGAL TIMES, Dec. 1, 1997, at 19; Steven Lipin & Eleena De Lisser, *First Union To Buy Signet In Stock Swap*, WALL ST. J., July 21, 1997, at A3. In October, First Union also merged with Covenant Bancorp of New Jersey. See *First Union Completes Purchase*, WALL ST. J., Jan. 19, 1998, at B12. After becoming the number two bank in Virginia by merging with Jefferson Bankshares, Wachovia merged with Central Fidelity Banks, another Virginia bank. See *Southeast Wachovia/Central Fidelity Banks*, AM. LAW., Sept. 1997, at 93. Wachovia also recently acquired Florida's First United Bancorp. See Rich Brooks, *Wachovia to Take After-Tax Charge of \$205 Million Related to Mergers*, WALL ST. J., Dec. 22, 1997, at A11.

48. See *supra* note 47; cf. Alman, *supra* note 39, at 31-32 (explaining that some states' leaders fear that increased bank consolidation will cause a loss of jobs and corporate offices from their states).

49. See Alman, *supra* note 39, at 31-32; *infra* notes 63-70 and accompanying text.

50. See TEX. FIN. CODE ANN. § 32.0095 (West 1998); MONT. CODE ANN. § 32-1-381(2) (1997).

51. Texas' opt-out legislation sunsets on September 2, 1999. See TEX. FIN. CODE ANN. § 32.0095(c).

52. See MONT. CODE ANN. § 32-1-370.

53. Formerly, Montana banks were only permitted to branch within their home and adjoining counties. See *id.* § 32-1-372.

statewide until recently.<sup>54</sup> Therefore, Montana and Texas almost certainly had a protectionist motive for opting out: providing their own banks time to branch into other regions of the state before out-of-state banks seize the opportunity. Texas, known for its opposition to interstate branching,<sup>55</sup> also may have decided to opt out because it has no mega-banks like North Carolina's NationsBank, First Union, or Wachovia.<sup>56</sup> Thus, it is likely that many Texas banks are not interested in interstate branching. Additionally, in the mid-1980s, many Texas banks became insolvent and were acquired by out-of-state BHCs like NationsBank and BankAmerica.<sup>57</sup> Therefore, many out-of-state BHCs already have a strong foothold in Texas and do not need to utilize Riegler-Neal's interstate branching provision to expand into the Texas market.<sup>58</sup>

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54. In 1988, a federal court ruled that because Texas state-chartered savings and loans enjoy statewide branching privileges, national banks could also engage in statewide branching within Texas pursuant to the McFadden Act. *See Texas v. Clarke*, 690 F. Supp. 573 (W.D. Tex. 1988). Subsequently, the Texas State Banking Commission ruled that both state and national banks could branch statewide under the Texas Constitution. *See Leonard Bierman et al., Regulatory Change and the Availability of Banking Facilities in Low-Income Areas: A Texas Empirical Study*, 49 SMU L. REV. 1421, 1429 (1996). In 1989, the Texas Legislature explicitly authorized statewide branching for all banks. *See id.*

55. Texas has vehemently fought the OCC's determination that national banks can utilize the National Bank Act's thirty-mile rule to relocate their headquarters to an adjacent state while retaining branches in the former state. *See Ghiglieri v. Sun World, N.A.*, 117 F.3d 309 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3493 (U.S. Dec. 23, 1997) (No. 97-1078) (upholding the OCC's approval); *Ghiglieri v. Ludwig*, 125 F.3d 941 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3493 (U.S. Dec. 23, 1997) (No. 97-1078) (upholding the OCC's approval); *see also supra* note 26; *infra* notes 63-70 and accompanying text. The outcome of these decisions has little importance to banks now because as of June 1, 1997, this method of interstate branching is no longer permissible in states that have opted out of interstate branching. *See* 12 U.S.C.A. §§ 30(c), 36(e)(2) (West Supp. 1997). However, banks that did utilize this method of interstate branching may be able to use these branches as deposit production branches. *See infra* notes 82-85 and accompanying text. In addition, these branches may possibly be used to branch intrastate. *See supra* note 26; *infra* notes 61-64 and accompanying text.

56. *See Rollinger, supra* note 1, at 252. Texas' largest bank in terms of assets is NationsBank of Texas, which ranks 17th nationwide. *See Top 100 U.S. Commercial Banks in Total Assets*, AM. BANKER, Oct. 24, 1997, at 8.

57. After the OPEC oil embargo, crude oil prices climbed. *See Bierman, supra* note 54, at 1427. In response to this financial surge, extant Texas banks enlarged their operations and many new banks were formed. *See id.* When crude oil prices collapsed in 1986, the Texas banking industry collapsed as well. *See id.* In response, the Texas Legislature loosened its restrictive acquisition and branching regulations in order to attract out-of-state banks to buy failed Texas banks. *See id.* at 1428. Out-of-state BHCs now control one-third of Texas' deposits. *See Rollinger, supra* note 1, at 252.

58. *See Rollinger, supra* note 1, at 252-53.

The fact that Texas and Montana opted out of interstate branching will not stop banks from entering these two states.<sup>59</sup> The ability to branch nationwide through federal savings banks,<sup>60</sup> to own banks in multiple states within a BHC structure,<sup>61</sup> and to use bank affiliates as agents<sup>62</sup> mitigates the opt-out choice. However, more direct attempts to circumvent state opt-out legislation may cause friction. Currently, NationsBank is involved in a battle with the Texas Banking Commissioner over its efforts to convert its Texas banking network into a series of interstate branches. Not wanting to wait until 1999 when Texas' opt-out provision sunsets, NationsBank is attempting to convert its NationsBank of Texas operations into a series of branches of its main national bank headquartered in Charlotte, North Carolina. In the first part of a multi-step transaction, NationsBank utilized the National Bank Act's thirty-mile rule<sup>63</sup> before it expired on June 1, 1997. First, NationsBank relocated the headquarters of Sun World, N.A. (Sun World), an indirect subsidiary bank of its BHC, from El Paso, Texas, to Santa Teresa,

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59. See Alman, *supra* note 39, at 28; see also *infra* notes 63-66 and accompanying text.

60. A federal savings bank may branch into any state, regardless of whether the state has opted in or opted out of Riegle-Neal. See Herlihy, *supra* note 24, at 439. In illustration, BankAmerica, the fifth largest BHC in the United States, controls an Oregon thrift that applied to the Office of Thrift Supervision in 1995 to open 274 full-service branches in all fifty states. See *id.* However, even though the permissible activities of federal savings banks have been expanded in recent years, national banks still enjoy broader activity powers. See 12 U.S.C. § 1464(c) (1994); 12 U.S.C.A. § 1467a(c)(1) (West Supp. 1997) (implications for thrift holding companies); J. Virgil Mattingly & Kieran J. Fallon, *Understanding the Issues Raised by Financial Modernization*, 2 N.C. BANKING INST. 25 (1998); JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 404-406 (2d ed. 1997).

61. BHC structures will not become extinct under Riegle-Neal because they will be used to operate in opt-out states and to meet special needs. See Rollinger, *supra* note 1, at 263-67; Bill McConnell, *Interstate Starts Sunday; Impact Will Take Longer*, AM. BANKER, May 30, 1997, at 2. For example, because Chase Manhattan Corporation owns Texas Commerce Bank in Houston, Chase Manhattan will keep its BHC structure. See McConnell, *supra*. Also, state-chartered banks, like Chase Manhattan, may be required by state or federal regulators to operate their "Section 20" securities affiliates as a BHC subsidiary rather than as an operating subsidiary. See *id.* Because the OCC decided to permit national banks to engage in "securities underwriting and other activities through an operating subsidiary," national banks now have less of an incentive to keep their BHC structures. *Id.*

62. See 12 U.S.C. § 1828(r)(2). "Bank affiliates" are banks controlled, either through stock ownership or otherwise, by the same BHC. See *id.* § 221a(b)(2). Bank affiliates have limited power and are not equivalent to establishing a branch. See Rollinger, *supra* note 1, at 256.

63. See *supra* notes 26, 38, 55 and accompanying text.

New Mexico, less than three miles away, retaining Sun World's two existing branches in El Paso and establishing a new branch at Sun World's former headquarters in El Paso.<sup>64</sup> Then, upon the Office of the Comptroller of the Currency's (OCC) approval, NationsBank merged Sun World with its flagship bank, NationsBank, N.A., headquartered in Charlotte, North Carolina.<sup>65</sup> As the last step in this series of transactions, NationsBank is attempting to merge NationsBank of Texas, N.A., another indirect subsidiary bank of its BHC, into NationsBank, N.A., thus converting its Texas branches into interstate branches.<sup>66</sup> If successful, NationsBank will by-pass Texas' ban on interstate branching.

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64. See *Ghiglieri v. Sun World, N.A.*, 117 F.3d 309, 310-11 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3493 (U.S. Dec. 23, 1997) (No. 97-1078). In *Sun World*, the Fifth Circuit upheld the OCC's approval of these steps under the deferential *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* standard. See *id.* at 313, 316 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-43 (1984)). The court found that 12 U.S.C. §§ 30(b) and 36 are silent as to the validity of these transactions and held that the OCC's interpretation of these statutes is a permissible construction. See *id.* at 316.

65. See Brief for Respondent NationsBank, N.A. in Opposition at ii, *Ghiglieri v. Sun World, N.A.*, 117 F.3d 309 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3493 (U.S. Dec. 23, 1997) (No. 97-1078). The OCC granted approval for this merger and the merger was completed on January 15, 1998. See *id.*

66. See Bill McConnell, *Texas Fights NationsBank End Run on Branching*, AM BANKER, Dec. 30, 1997, at 2; *Bank Delays Merger Plan for Texas*, HOUSTON CHRONICLE, Dec. 17, 1997, at 4, available in 1997 WL 13078321. NationsBank relies on two arguments for the validity of this merger. First, NationsBank asserts that, independent of Riegle-Neal, the National Bank Act permits "mergers between [national] banks 'located [with]in the same state' even if headquartered in separate states." McConnell, *supra*; see 12 U.S.C. § 215a(a). Thus, NationsBank argues that by virtue of the merger of Sun World, which operates branches in Texas, into NationsBank, N.A., NationsBank, N.A. is now "located" in Texas for purposes of 12 U.S.C. § 215a(a). As a result, NationsBank believes it can now merge NationsBank, N.A. with NationsBank of Texas, N.A. because they are "located within the same state."

Furthermore, NationsBank asserts that the legislation Texas enacted to opt out of Riegle-Neal is flawed. See McConnell, *supra*. In order to opt out of Riegle-Neal's interstate merger transaction provision, a state had to enact nondiscriminatory legislation that "(i) applies equally to all out-of-[s]tate banks; and (ii) expressly prohibits merger transactions involving out-of-[s]tate banks." 12 U.S.C. § 1831u(a)(2)(A). Based on this statutory language, NationsBank maintains that because Texas' opt-out legislation fails to prohibit mergers with state savings banks, the legislation is discriminatory and is ineffective to prohibit interstate merger transactions with national banks. See *id.* § 1813(a)(1)-(2) (establishing that a state savings bank is considered a "bank" under federal law); *Cf. id.* § 1831u(a)(2)(A); McConnell, *supra*.

As of March 3, 1998, the OCC was still considering the merger application. However, NationsBank has agreed to postpone the merger for up to thirty days following regulatory approval. See *Bank Delays Merger Plan for Texas, supra*.

Arguing that NationsBank is violating Texas' opt-out law, the Texas Banking Commissioner is fighting NationsBank's attempt to establish an interstate branching network within Texas.<sup>67</sup> If NationsBank succeeds, Texas-chartered banks will be at a competitive disadvantage with NationsBank, which can better take advantage of economies of scale.<sup>68</sup> In addition, Texas will stand to lose tax revenue<sup>69</sup> unless it thoroughly revises its tax laws.<sup>70</sup> If NationsBank's legal arguments are successful, the transaction will illustrate the ability of banks to circumvent state opt-out legislation.

### 3. Permissible State Protectionism Under Riegle-Neal

Opting out of interstate branching is not the only way for a state to protect its banks. Riegle-Neal incorporated some protections for states and their economies. After opting in, Riegle-Neal allows states to exercise control over interstate branching through state aging laws,<sup>71</sup> de novo branching prohibitions,<sup>72</sup> and deposit cap

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67. See McConnell, *supra* note 66.

68. See Scott Park, *Texans Decry OCC 'Private Agenda,'* REGULATORY COMPLIANCE WATCH, Dec. 8, 1997, available in LEXIS, BANKNG Library, ABBB file.

69. See *Bank Delays Merger Plan for Texas*, *supra* note 66, at 4. The Texas Banking Commissioner asserts that Texas stands to lose \$10 million in tax revenues if the merger occurs. NationsBank disputes this figure, but agrees that the merger will result in a loss of some tax revenue for Texas.

70. The Texas Legislature did revise its franchise tax laws, effective January 1, 1998. See TEX. TAX CODE ANN. § 171.001 (1992 & West Supp. 1998). The Texas franchise tax is imposed on "each corporation that does business in [Texas] or that is chartered or authorized to do business in [Texas] . . ." *Id.* § 171.001(a)(1) (1992). Prior to the 1997 amendment, the definition of "corporation" did not explicitly include banks; therefore, only banks chartered in Texas were explicitly subject to the franchise tax. See *id.* § 171.001(b)(2). In 1997, the Texas Legislature included "banking corporations" (which include national banks) within the franchise tax definition of "corporation," bringing all banks within its realm. See *id.* § 171.001(b)(3) (West Supp. 1998). Despite this revision, other Texas state tax issues will contribute to a loss of tax revenue resulting from the merger.

71. Aging laws safeguard a bank's franchise value by prohibiting out-of-state banks from forming a new banking subsidiary in a state and then merging with it as a means of entering the state. See Buchman, *supra* note 29, at 47. A state may require a bank to be in existence for no more than five years before it can be acquired by an out-of-state bank. See 12 U.S.C. § 1831u(a)(5)(A). The effect aging laws will have on interstate merger transactions is unclear because acquirers generally are only interested in buying banks with over \$1 billion in assets, and these banks are usually more than five years old. See Buchman, *supra* note 29, at 50. Yet, aging laws may affect many smaller banks located near state lines that are predicted to account for the vast amount of interstate mergers under Riegle-Neal. See McConnell, *supra* note 61, at 2.

restrictions.<sup>73</sup> Most states prohibit de novo branching and dictate that banks must either merge with an existing bank or acquire a branch of an existing bank within the state.<sup>74</sup> Additionally, states have the power to mandate filing requirements for interstate bank mergers and may disapprove a merger for substantial noncompliance with these requirements.<sup>75</sup>

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At least thirty states require banks to be in existence three to five years before being acquired. See *All But Few States Beat Trigger Date On Nationwide Branching*, *supra* note 41, at 12. Twelve states, including North Carolina, have no aging laws. See *id.*; see also N.C. GEN. STAT. § 53-224.12 (Supp. 1997). For an overview of each state's interstate branching legislation, see generally *All But Few States Beat Trigger Date On Nationwide Branching*, *supra* note 41.

72. See 12 U.S.C. § 36(g) (national banks); *id.* § 1828(d)(4) (state banks). A "de novo branch" is defined as "a branch . . . which is originally established by the [national or state] bank as a branch; and does not become a branch of such bank as a result of . . . [an interstate merger or acquisition transaction]." 12 U.S.C. §§ 36(g)(3)(A), 1828(d)(4)(C). If a state chooses not to force banks to buy their way into the state, the criteria for opening de novo branches closely resemble those for interstate mergers: state filing, community reinvestment, capital adequacy, and management requirements. See 12 U.S.C. 36(g)(1)(A); O'Neal, *supra* note 36, at 28.

73. An interstate merger transaction will not be approved if the resulting entity and its affiliates "would control more than 10% of the total amount of deposits of insured depository institutions in the United States . . . [or] would control 30% or more of the total amount of deposits of insured depository institutions" in any state in which any two banks involved in the transaction both have branches. 12 U.S.C. § 1831u(b)(2)(A)-(B). However, a state can make these deposit caps more or less stringent. See *id.* § 1831u(b)(2)(C)-(D). Affiliated banks that merge do not have to meet these requirements. See *id.* § 1831u(b)(2)(E). Although the purpose of deposit cap restrictions is to prevent excessive concentration of power, a state's low deposit cap may stunt geographic expansion, hinder competition, and prevent its own banks from being acquired by out-of-state banks. See Buchman, *supra* note 29, at 49.

74. At least thirty-four jurisdictions completely prohibit de novo branching, while eleven jurisdictions, including North Carolina, permit it on a reciprocal basis. See N.C. GEN. STAT. §§ 53-224.12, .14 (Supp. 1997) (restricting de novo branching until June 1, 1999); *All But Few States Beat Trigger Date On Nationwide Branching*, *supra* note 41, at 12. Four jurisdictions allow unrestricted de novo branching. See *All But Few States Beat Trigger Date On Nationwide Branching*, *supra* note 41, at 12. Interstate mergers and acquisitions will increase under Riegle-Neal because states that prohibit de novo branching typically require acquirers to purchase an entire bank rather than only one branch of a bank. See *id.* But see N.C. GEN. STAT. § 53-224.14 (establishing that, prior to June 1, 1999, out-of-state banks may purchase one branch of a North Carolina bank rather than the entire bank only if the home state of the out-of-state bank allows North Carolina banks to do the same). States that require acquisition of an entire bank also adopted five-year aging laws. See *All But Few States Beat Trigger Date On Nationwide Branching*, *supra* note 41, at 12.

75. A state's filing requirements must be nondiscriminatory and can be no stricter than requirements for out-of-state nonbanking corporations wanting to do business in the state. See 12 U.S.C. § 1831u(b)(1)(A); see, e.g., N.C. GEN. STAT. § 53-224.20 (Supp. 1997). When the interstate merger transaction includes only national banks, only the filing requirements permitted under 12 U.S.C. § 1831u(b)(1) must be met. See, e.g., OCC Corporate Decision No. 96-29, Decision of the Office of the Comptroller of the Currency of the Applications to Merge First Interstate Bank of Alaska, N.A., Anchorage, Alaska, First

Riegle-Neal also protects opt-in states from “deposit siphoning.”<sup>76</sup> As of October 10, 1997, new regulations adopted pursuant to section 109 of Riegle-Neal<sup>77</sup> bar banks from using interstate branches acquired or established under Riegle-Neal primarily for deposit production.<sup>78</sup> After one year, the primary federal regulator examines an interstate branch’s “statewide loan-to-deposit ratio,” which cannot be less than fifty percent of the “host state’s loan-to-deposit ratio.”<sup>79</sup> If an interstate branch’s statewide loan-to-deposit ratio is below fifty percent, the primary federal regulator may consider whether the branch “is reasonably helping to meet the credit needs of the communities in the host state that are served by the bank.”<sup>80</sup> Otherwise, the regulator may impose sanctions, such as closing the interstate branch or restricting the bank from opening other interstate branches.<sup>81</sup>

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Interstate Bank of Idaho, N. A., Boise, Idaho, First Interstate Bank of Nevada, N.A., Las Vegas, Nevada, First Interstate Bank of New Mexico, N.A., Santa Fe, New Mexico, Bank of Utah, N.A., Salt Lake City, Utah, With and Into Wells Fargo Bank, N.A., San Francisco, California, at \*27 n.11 (June 1, 1996), *available in* LEXIS, BANKNG Library, OCCPL File.

76. “Deposit siphoning” refers to the practice of collecting deposits in one state and using those deposits to make loans in a different state. *See* Rollinger, *supra* note 1, at 230.

77. The purpose of section 109 is to ensure that interstate branches are meeting the community’s credit needs, and it mandates that banks cannot use interstate branches primarily for deposit production. *See* H.R. CONF. REP. No. 103-651, at 62 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2039, 2083; Prohibition Against use of Interstate Branches Primarily for Deposit Production, 62 Fed. Reg. 47,728, 47,734 (1997) (to be codified at 12 C.F.R. § 25.61). In section 109, Congress required the federal banking agencies to formulate regulations forbidding the use of interstate branches primarily for deposit production. *See* 12 U.S.C. 1835a(a).

78. *See* Prohibition Against use of Interstate Branches Primarily for Deposit Production, 62 Fed. Reg. at 47,734-37. The OCC, Federal Deposit Insurance Corporation, and Federal Reserve Board proposed these regulations. *See FDIC Approves Interagency Final Rule to Ban Interstate Branch Deposit Production*, 69 Banking Rep. (BNA) 355 (Sept. 8, 1997).

79. *See* Prohibition Against use of Interstate Branches Primarily for Deposit Production, 62 Fed. Reg. at 47,735-37 (to be codified at 12 C.F.R. § 25.63 (national banks); *id.* § 208.28(c) (state member banks); *id.* § 369.3 (state nonmember banks)). A bank’s “statewide loan-to-deposit ratio” is defined as “the ratio of the bank’s loans to its deposits in a state in which the bank has one or more [covered] interstate branches, as determined by the [appropriate federal regulator].” *Id.* at 47,735 (to be codified at 12 C.F.R. §§ 25.62(h) (national banks)). “Host state loan-to-deposit ratio” refers to “the ratio of total loans in the host state relative to total deposits from the host state for all banks . . . that have that state as their home state . . .” *Id.* (to be codified at 12 C.F.R. § 25.62(f) (national banks)).

80. *Id.* (to be codified at 12 C.F.R. § 25.64(a)). For the six factors considered in making this determination, *see, e.g., id.* (to be codified at 12 C.F.R. § 25.64(b) (national banks)).

81. *See id.* (to be codified at 12 C.F.R. §§ 25.65 (national banks); *FDIC Approves*

Despite these new regulations prohibiting deposit siphoning, some banks may find a loophole, one that is thirty-miles wide.<sup>82</sup> Because the deposit production regulations were adopted pursuant to Riegle-Neal, national bank branches established under the thirty-mile rule or interstate branches existing before the June 1, 1997 deadline are exempt.<sup>83</sup> Thus, these branches could be used as deposit production offices. In regard to this possibility, the OCC stated "that new branches established under the law [Riegle-Neal] would cause all branches [within that host state] to fall under the deposit production prohibition."<sup>84</sup> How many national banks slipped through these loopholes is unclear, but according to the OCC, "this number might fall as the banks engage in Riegle-Neal branching, which would bring them under the new rule."<sup>85</sup>

### III. THE NEED FOR THE AMENDMENTS ACT

#### A. *The Nationwide Cooperative Agreement and the Nationwide State-Federal Supervisory Agreement*

As June 1, 1997 approached, there was uncertainty over whether home or host state laws apply to interstate branches and which state regulates interstate branches.<sup>86</sup> Originally, Riegle-Neal provided that host state law would govern the activities of state bank interstate branches.<sup>87</sup> Unlike national banks, state banks would have had the additional burden of complying with many different state laws concerning permissible banking activities.<sup>88</sup> In 1996, due to

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*Interagency Final Rule to Ban Interstate Branch Deposit Production*, *supra* note 78, at 355.

82. See 12 U.S.C. 30(b) (1994); *supra* notes 55, 64 and accompanying text.

83. See *FDIC Approves Interagency Final Rule to Ban Interstate Branch Deposit Production*, *supra* note 78, at 355.

84. *Id.* (statement of Julie Williams, Chief Counsel, OCC).

85. *Deposit Production Branches Banned By New Rule*, Fed. Banking L. Rep. (CCH) No. 1718 (Aug. 29, 1997); see *supra* notes 61-64 and accompanying text.

86. See *H.R. 1306—The Riegle-Neal Clarification Act of 1997: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the House Comm. on Banking and Fin. Servs.*, 105th Cong. 8 (1997) [hereinafter *H.R. 1306 Hearing*] (testimony of John Traier, Deputy Commissioner of Banking for the State of New Jersey, on behalf of the Conference of State Bank Supervisors); see *infra* notes 97-101 and accompanying text.

87. See 12 U.S.C. § 1831a(j) (1994), *amended by* 12 U.S.C.A. § 1831a(j) (West Supp. 4 1997).

88. See *H.R. 1306 Hearing*, *supra* note 86, at 14 (testimony of John Bley, Chairman of the Interstate Task Force for the Conference of State Bank Supervisors).



concern that this burden and uncertainty would cause state banks to convert to national bank charters,<sup>89</sup> bank supervisors from all fifty states, the Federal Deposit Insurance Corporation, and the Federal Reserve Board entered into the Nationwide Cooperative Agreement (Cooperative Agreement),<sup>90</sup> and the Nationwide State-Federal Supervisory Agreement (Supervisory Agreement).<sup>91</sup> These agreements authorize the home state regulator to be the primary supervisor and regulator of state bank interstate branches.<sup>92</sup> Host state regulators, however, will “participate in examinations for compliance with [host state laws]” on consumer protection, fair lending, intrastate branching, community reinvestment, and other applicable laws, as well as “provide the home state supervisor with guidance on the application of [host] state laws.”<sup>93</sup> The host state regulator, in an emergency, may also conduct an independent examination of the interstate branch if the home state regulator would be unable to do so within a reasonable period of time, or, upon proper notice to the home state regulator, “take any enforcement action . . . permitted under host state law.”<sup>94</sup> Currently, the Conference of State Bank Supervisors (CSBS)<sup>95</sup> is working on a uniform test for all state regulators to use in evaluating interstate branches.<sup>96</sup>

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89. See *infra* notes 97-101 and accompanying text.

90. See *Nationwide Cooperative Agreement*, Nov. 13, 1996 (visited on Mar. 3, 1998) <[http://www.csbsdal.org/news\\_PR/agreement1.html](http://www.csbsdal.org/news_PR/agreement1.html)>.

91. See *Nationwide State-Federal Supervisory Agreement*, Nov. 14, 1996 (visited on Mar. 3, 1998) <[http://www.csbsdal.org/news\\_PR/agreement2.html](http://www.csbsdal.org/news_PR/agreement2.html)>.

92. See *Nationwide Cooperative Agreement*, *supra* note 90, at Section 2.3; see generally *Nationwide State-Federal Supervisory Agreement*, *supra* note 91. The Amendments Act does not alter this aspect of the Cooperative Agreement and Supervisory Agreement. See generally 12 U.S.C. §§ 1831a(j), 36(f)(1)(C) (West Supp. 4 1997). Although the host state regulator is familiar with the local community and their needs, the home state regulator does not know the community where the state bank interstate branch is located.

93. *Nationwide Cooperative Agreement*, *supra* note 90, at § 4.2.

94. *Id.* at §§ 4.2, 5.2.

95. The CSBS is an association of state regulators who regulate and supervise approximately 6,802 state-chartered banks. See *The Financial Services Competitiveness Act of 1997: Hearings Before the Subcomm. On Fin. and Hazardous Materials of the House Comm. on Commerce*, 105th Cong. 160 (1997) [hereinafter *Financial Services Competitiveness Act Hearings*] (prepared statement of Catherine A. Ghiglieri, Banking Commissioner of Texas, on behalf of the CSBS).

96. See Mitchell, *supra* note 23.

Although the roles of the home and host state regulators were undisputed, attorneys and the CSBS disagreed over which state's laws applied to state bank interstate branches under Riegle-Neal, as originally enacted.<sup>97</sup> The CSBS interpreted the Cooperative Agreement, the Supervisory Agreement, and Riegle-Neal as giving the home state control over general charter issues like lending limits, while some attorneys believed that host state laws applied.<sup>98</sup> Furthermore, the CSBS argued that under Riegle-Neal national bank interstate branches would have a competitive advantage over state bank interstate branches.<sup>99</sup> The CSBS reasoned that under the original version of Riegle-Neal, state bank interstate branches could not engage in an activity if it is impermissible under host state law, even if home state law permits the activity, and even though a national bank interstate branch in the host state could engage in the same activity.<sup>100</sup> Due to this uncertainty over which state law applies and the potential disadvantages for state-chartered banks, some believed Riegle-Neal created an incentive for state-chartered banks to convert to a national charter in order to avoid this dilemma.<sup>101</sup>

National charters also appeared more attractive than state charters because the National Bank Act governs the scope of permissible national bank activities.<sup>102</sup> Because national banks are subject to this one body of law,<sup>103</sup> they "can sell the same product and

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97. See *H.R. 1306 Hearing*, *supra* note 86, at 8-9 (testimony of John Traier, Deputy Commissioner of Banking for the State of New Jersey, on behalf of the CSBS).

98. See *id.*; *Nationwide Cooperative Agreement*, *supra* note 90, at Section 6.2.

99. See *H.R. 1306 Hearing*, *supra* note 86, at 9 (testimony of John Traier, Deputy Commissioner of Banking for the State of New Jersey, on behalf of the CSBS).

100. See *id.*

101. See *id.* at 32 (statement of Anthony S. Abbate on behalf of the Independent Bankers Association of America). Additional incentives to choose a national charter over a state charter include the prestige of a national charter and the fact that state-chartered banks have the additional burden of answering to the state regulator where they are chartered.

102. See 12 U.S.C. § 24 (Seventh) (1994).

103. While national banks can engage in any activity allowed under the National Bank Act, under the Federal Deposit Insurance Corporation Improvement Act (FDICIA), activities of FDIC-insured state banks are limited to those permitted for national banks, unless the state bank complies with capital adequacy standards and the FDIC determines that the activity will not pose a risk to the safety and soundness of the bank. See *Federal Deposit Insurance Corporation Improvement Act of 1991*, 12 U.S.C.A § 1831a(a)(1) (West Supp. 1997). Specific exceptions exist to this general rule, however, for insurance underwriting and equity investments. See *id.* § 1831a(b)-(c) (state banks can neither engage in an insurance underwriting activity if it is impermissible for national banks, nor hold equity investments that are impermissible for national banks, except for investments in

services [in any state] without reference to state law,"<sup>104</sup> unless an exception exists giving states the ability to regulate an activity regardless of federal action.<sup>105</sup> If host state law governs a state bank interstate branch's activities, state banks would be forced to comply with several different sets of laws.<sup>106</sup> As a result, cost savings realized by combining banking operations would not include diminished monitoring costs.<sup>107</sup> Although state-chartered banks generally enjoy lower examination fees, broader affiliation powers, and regulators who are familiar with the local community and market,<sup>108</sup> a national charter could have appeared more attractive to banks wanting to engage in interstate branching.<sup>109</sup>

Due to these incentives to have a national charter for interstate branching purposes, commentators recognized that the dual banking system might be threatened.<sup>110</sup> If several state banks were to switch to a national charter, the state banking system might degenerate, weakening states' control over financial issues within their borders.<sup>111</sup> State banks are important to the banking industry

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majority-owned subsidiaries). Furthermore, prior to Riegle-Neal, thirty-five states already had laws permitting state banks to engage in the same activities allowed for national banks. See *infra* notes 132-37 and accompanying text. Therefore, in those states, national banks would not have had a great activity advantage over state banks without the Amendments Act. Nevertheless, the Amendments Act was necessary to answer the question of whether and when home or host state law applies to interstate branches. See *supra* notes 86, 97-101 and accompanying text.

104. *H.R. 1306 Hearing, supra* note 86, at 32 (testimony of Anthony Abbate on behalf of the Independent Bankers Association of America).

105. For example, the McCarran-Ferguson Act reverses the general rule of federal preemption and provides that state laws which "specifically relate[s] to the business of insurance" preempt conflicting federal laws regarding insurance. 15 U.S.C. § 1012(b).

106. See Mitchell, *supra* note 23, at 31. Because securities, insurance, lending, bank fee, and other banking laws can vary by state, compliance can be time intensive and create operational inefficiencies, "possibly to the extent of jeopardizing the economic viability of offering new products and services." Clyde Mitchell, *Interstate Branching and the International Scene*, N.Y. L.J., Aug. 20, 1997, at 3. Even under the Amendments Act, state and national banks with interstate branches will incur costs from monitoring compliance with varying host state laws on community reinvestment, consumer protection, fair lending, and intrastate branching, as well as other host state laws that apply to national banks. See 12 U.S.C.A. 1831a(j)(1) (West Supp. 4 1997).

107. See Mitchell, *supra* note 23, at 31.

108. See McConnell, *supra* note 61, at 2.

109. See *id.*

110. See *H.R. 1306 Hearing, supra* note 86, at 2 (opening statement of Representative Marge Roukema, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit).

111. See *id.* at 54 ("If [state-chartered banks] move toward a national charter, states will lose a great deal of their current ability to influence economic growth and productivity.")

because they help address customers needs by testing innovative services.<sup>112</sup> For example, ATMs, NOW accounts, electronic funds, adjustable rate mortgages, and even checking accounts originated in state banks.<sup>113</sup> Because most state banks operate on a smaller scale than national banks, limiting the risk to the state's economy and the federal deposit insurance fund, state banks are ideal for testing new banking activities.<sup>114</sup> If state legislatures dislike the effects of the new activities, they can repeal the enabling legislation.<sup>115</sup> Conversely, if states allow state-chartered banks to continue the activities, national banks will request permission to engage in the activities. Therefore, a healthy dual banking system is desirable because it promotes competition and innovation within the banking industry, which translates into better services for consumers.

### B. *The Amendments Act*

To keep state charters viable and competitive with national charters, the CSBS lobbied Congress to clarify whether home or host state law applies to state bank interstate branches.<sup>116</sup> The CSBS argued that the Amendments Act would (1) reduce federal preemption of state law, (2) maintain the competitiveness of state charters by creating a level playing field between state and national bank activities, and (3) preserve the dual banking system by ensuring that neither charter has an unfair advantage over the other.<sup>117</sup> Federal legislators agreed, arguing that if an incentive exists for state banks to switch to national charters for interstate branching purposes, then "a solely national bank system" would exist.<sup>118</sup> Contending that state

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(testimony of Senator Margaret Prentice, Ranking Member of the Washington State Senate Financial Institutions Committee).

112. See *Financial Services Competitiveness Act Hearings*, *supra* note 95, at 161 (prepared statement of Catherine A. Ghiglieri, Banking Commissioner of Texas, on behalf of the CSBS).

113. See *id.*

114. See *id.*

115. See *id.*

116. See *Which Laws Should Govern Out-of-State State-Chartered Banks*, Fed. Banking L. Rep. (CCH) No. 1695, at 3 (Mar. 21, 1997).

117. See *H.R. 1306 Hearing*, *supra* note 86, at 7-22 (testimony of John Traier, Deputy Commissioner of Banking for the State of New Jersey, on behalf of the Conference of State Bank Supervisors).

118. Bill McConnell, *Easier Route to Interstate Sought for State Banks*, AM. BANKER, at

banks would not be granted new powers, Representative Marge Roukema (R-NJ) stated that the Amendments Act "only allows state banks to exercise powers national banks could exercise. It gives parity to all banks so that state banks are not discriminated against in the growing interstate system while protecting the consumers' rights . . . ."119 Some Congressmen, however, worried that the OCC's continuing efforts to expand national bank powers and preempt state laws would negatively affect consumers.<sup>120</sup>

In response to these concerns, Congress removed the perceived unfair advantage for national banks by passing the Riegle-Neal Amendments Act of 1997,<sup>121</sup> which provides state banks equality with national banks in interstate branching.<sup>122</sup> First, the Amendments Act allows state banks to retain the activity powers of their home state charter at interstate branches to the extent that either a national bank interstate branch in the host state or a host state-chartered bank has the power to engage in such activities.<sup>123</sup> For example, a North Carolina-chartered bank with a branch in Virginia may engage in an activity allowed under North Carolina law if a national bank interstate branch located in Virginia or a Virginia-chartered bank may do so. If the Virginia-chartered bank can sell mutual funds, so can a North Carolina bank's interstate branch located in Virginia if its North Carolina charter allows. If a Virginia-chartered bank cannot sell mutual funds, but a national bank interstate branch located in Virginia can, then the North Carolina bank's interstate branch, if its North Carolina charter allows, can also sell mutual funds.

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2 (May 1, 1997) (quoting Representative Marge Roukema, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit).

119. *Interstate Banking Amendments Pass House, Now Headed for White House*, 68 Banking Rep. (BNA) 1235, (June 30, 1997) (quoting Representative Marge Roukema, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit).

120. See *H.R. 1306 Hearing*, *supra* note 86, at 4 ("The impact of the legislation on consumers is unclear. Consumers could be hurt by weaker standards.") (quoting Representative Bruce Vento, Ranking Minority Member of the Subcommittee on Financial Institutions and Consumer Credit); Pamela Atkins, *Senate Unanimously Approves Interstate Amendments Bill Aimed at Keeping State Banking Charters Viable Option for Banks*, 68 Banking Rep. (BNA) 1126, 1126 (June 16, 1997) ("This bill requires the Comptroller to report to us on all past and future state charter pre-emptions. We will keep a close watch to ensure that consumers aren't endangered.") (quoting Senator Alfonse D'Amato).

121. 12 U.S.C.A. §§ 1831a(j), 36(f)(1)(C) (West Supp. 4 1997).

122. See *id.* § 1831a(j); see also *supra* notes 117-19 and accompanying text.

123. See 12 U.S.C.A. § 1831a(j)(2).

Second, the Amendments Act provides that host state law applies to state bank interstate branches to the same extent it does to national bank interstate branches.<sup>124</sup> Federal law, however, may still preempt host state law, and if so, state bank interstate branches are not required to comply with the preempted state law.<sup>125</sup> To alert Congress of OCC actions involving the preemption of state laws, the Amendments Act requires the OCC to report annually to Congress any actions taken regarding the applicability of state laws to national banks.<sup>126</sup>

#### IV. SIGNIFICANCE OF THE AMENDMENTS ACT

The most significant aspect of the Amendments Act is its very existence—the uncertainty regarding which state’s laws apply to state bank interstate branches harbored by regulators, banks, and attorneys is, for the most part, no longer a concern.<sup>127</sup> However, the methods that Congress used to create this legal certainty—the individual provisions of the Amendments Act—have collateral significance to the dual banking system.

##### A. *Achieving Competitive Equality Versus Maintaining State Control Over Banking*

The overarching theme within the Amendments Act is the establishment of competitive equality between all banks in order to preserve the dual banking system.<sup>128</sup> Yet, as each individual provision of the Amendments Act illustrates, the structure through

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124. *See id.* § 1831a(j)(1).

125. *See id.* Absent federal preemption, 12 U.S.C.A. § 1831a(j)(1) gives host states some definite control over areas of special economic importance to states. *See id.*; *see also* OCC Interpretive Letter 572, State Law Requiring Consumer Transaction Accounts Preempted, [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,342, at 71,475 (Jan. 15, 1992) [hereinafter OCC Interpretive Letter 572] (discussing situations where federal law can preempt state law). When federal law preempts host state law, state bank interstate branches must comply with applicable home state laws. *See* 12 U.S.C.A. § 1831a(j)(1).

126. *See* 12 U.S.C.A. § 36(f)(1)(C).

127. *See supra* notes 86, 97-101 and accompanying text.

128. *See supra* notes 87-89, 99-115 and accompanying text.

which Congress achieved this goal conflicts with retaining the meaningful benefits of the dual banking system.

1. An insured [s]tate bank that establishes a branch in a host [s]tate may conduct any activity at such branch that is permissible under the laws of the home [s]tate of such bank, to the extent such activity is permissible . . . for a [national bank interstate] branch in the host state . . . .<sup>129</sup>

Perceiving that state bank interstate branches would be at a disadvantage if host state law governs their activities,<sup>130</sup> Congress authorized these branches, if their home state charter allows, to engage in activities that are permissible for a national bank interstate branch in a host state.<sup>131</sup> However, such power for state banks is not revolutionary. By enacting parity statutes, at least thirty-five states have recognized a need to ensure that state bank powers are at least equal to national bank powers.<sup>132</sup>

These parity laws, also called “wild card statutes,” generally allow state banks to engage in activities permissible for national banks without filing for FDIC approval.<sup>133</sup> The Amendments Act simply encourages states to use their parity laws to help their chartered banks’ interstate branches compete against both national bank interstate branches and host state banks. By promoting the use of parity laws, the Amendments Act moves state banks closer toward competitive equality with national banks.

Although parity laws could ensure equal competition between state and national banks as far as activities are concerned, some banking parity laws are unclear about what “constitutes a permissible national bank activity”<sup>134</sup> or whether the parity law preempts a

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129. 12 U.S.C.A. § 1831a(j)(2).

130. See *supra* notes 87-89, 99-109 and accompanying text.

131. See 12 U.S.C.A. § 1831a(j)(2).

132. See McConnell, *Easier Route to Interstate Sought for State Banks*, *supra* note 118, at 2 (“[F]ew states would see their banking laws trampled if the bill is passed. . . . 35 states already have parity laws on the books to keep state bank powers equal with national banks.”) (quoting John Bley, Chairman of the Interstate Task Force for the CSBS).

133. See Christian A. Johnson, *Wild Card Statutes, Parity, and National Banks—The Renaissance of State Banking Powers*, 26 LOY. U. CHI. L.J. 351, 360 (1995); see also *supra* note 103; *infra* notes 144-50 and accompanying text.

134. Johnson, *supra* note 133, at 371. Most parity statutes, however, expressly refer to

conflicting state law.<sup>135</sup> This problem, however, can be easily remedied. State legislatures can clarify their banking parity statutes and state banking regulators can issue regulations or interpretations of these laws.<sup>136</sup> In light of the expansion of national bank powers<sup>137</sup> and states' desire to attract and retain bank charters, states need to utilize banking parity statutes in order for state charters to compete and maintain parity with national charters. Otherwise, state banks may miss opportunities to expand their operations and to respond to the financial needs of customers.

Encouraging states through parity statutes to grant state banks the same activity powers as national banks, however, conflicts with Congress' objective of preserving a true dual banking system.<sup>138</sup> Congress believed that creating competitive equality between state and national banks would bolster the state charter as a viable choice for banks interested in interstate branching.<sup>139</sup> Congress achieved competitive equality between national and state charters by granting state interstate branches all the powers of their home charter to the same extent that those activities are permitted for national banks.<sup>140</sup> This provision of the Amendments Act, however, establishes the federal laws and regulations relating to permissible national bank activities as the standard for what state bank interstate branches can do. As a result, only charters of states that empower their banks to do at least, if not more, activities permissible for a national bank will seem attractive.<sup>141</sup> Therefore, to attract and retain bank charters, the Amendments Act pressures states to authorize activities similar to those allowed for national banks. This pressure diminishes the role of state regulators in shaping banking policy, which subverts the purpose of the dual banking system.

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federal law for the scope of permissible national bank activities. *See id.*

135. *See id.* Although about half of parity statutes specify that conflicting state laws are preempted, the remaining parity statutes either limit state bank activities to those that do not conflict with state law or are unclear about whether they preempt state law. *See id.*

136. *See id.* at 373.

137. *See id.* at 364.

138. *See H.R. 1306 Hearing, supra* note 86, at 2 (opening statement of Representative Marge Roukema, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit).

139. *See supra* note 119 and accompanying text.

140. *See* 12 U.S.C.A. § 1831a(j)(2) (West Supp. 4 1997).

141. *See infra* notes 157, 166, 176 and accompanying text.



2. An insured [s]tate bank that establishes a branch in a host [s]tate may conduct any activity at such branch that is permissible under the laws of the home [s]tate of such bank, to the extent such activity is permissible . . . for a bank chartered by the host state . . . .<sup>142</sup>

In order to create competitive equality between state bank interstate branches and national bank interstate branches while allowing host states to determine which activities beyond those exercisable by national banks are permitted within their borders, Congress provided that a state bank interstate branch can only engage in an activity allowed under its charter that is impermissible for a national bank if host state law also permits the activity.<sup>143</sup> This provision further restricts the permissible activities of state bank interstate branches beyond the limitations imposed through the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).<sup>144</sup> Prior to FDICIA, state-chartered banks could engage in activities<sup>145</sup> that were impermissible for national banks,<sup>146</sup> both as an agent and principal,<sup>147</sup> if permitted under state law.<sup>148</sup> In 1991,

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142. 12 U.S.C.A. § 1831a(j)(2).

143. *See id.*

144. *See* 12 U.S.C. § 1831a (1994).

145. An "activity" is defined as the "authorized conduct of business by an insured state bank." 12 C.F.R. § 362.2(a) (1997). Although defining activity broadly potentially restricts state banking activities, the FDIC, relying on legislative intent, acted to "prevent undue risk to the deposit insurance funds . . ." *FDIC Amends Rules Governing State Bank Investment and Activities*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,605, at 83,697 (Dec. 8, 1993). The FDIC has established a safe harbor regulation permitting an insured state bank, even if impermissible for national banks, to: (1) conduct any activity that the Federal Reserve Board has found to be closely related to banking; (2) conduct securities activities in a subsidiary; and (3) maintain certain stock holdings through a majority-owned subsidiary. *See* 12 C.F.R. § 362.3(b); *FDIC-Supervised Banks Notified of Amendments Affecting Investments and Activities*, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,617, at 83,847 (Dec. 10, 1993).

146. An activity is permissible for a national bank if the National Bank Act or other federal statute explicitly permits the activity, or if the OCC through regulations, an official circular, a bulletin, any order or written interpretation, or any valid staff interpretation, determines that the National Bank Act or other statute allows the activity. *See* 12 C.F.R. § 362.2(b); *FDIC Amends Rules Governing State Bank Investment and Activities*, *supra* note 145, at 83,694.

147. Acting as "principal" is defined as acting "other than as agent for a customer, . . . other than in a brokerage, custodial, advisory or administrative capacity, or . . . other than as trustee." 12 C.F.R. § 362.2(c). Examples of principal activities include real estate

Congress eroded this advantage of state-chartered banks by enacting FDICIA, which generally limits state-chartered banks' principal activities to those allowed for national banks.<sup>149</sup> Under FDICIA, in order for state banks to engage as a principal in activities not permissible for national banks, not only must state law permit the activity, but also state banks must now obtain FDIC approval to engage in the activity.<sup>150</sup> Approximately two hundred state banks have applied to the FDIC for permission to engage in state-authorized activities not permitted for national banks under federal law, and some have received such permission.<sup>151</sup>

Despite FDICIA's restrictions on principal activities of FDIC-insured state banks, state banks can still engage in agent activities without gaining FDIC approval to the extent allowed under state law, which may be more expansive than those activities allowed for national banks.<sup>152</sup> For example, a state may authorize its state-chartered banks to act as travel agents,<sup>153</sup> but a national bank may not do so.<sup>154</sup> If both the host and home states permit banks to act as

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development, insurance and securities underwriting, and issuing annuities. *See FDIC Amends Rules Governing State Bank Investment and Activities*, *supra* note 145, at 83,698. Conversely, providing safekeeping services or personal financial planning services is not considered a principal activity. *See id.*

148. *See* Johnson, *supra* note 133, at 360-61; MACEY & MILLER, *supra* note 60, at 169.

149. *See* Johnson, *supra* note 133, at 360-61.

150. *See* 12 U.S.C. § 1831a(a)(1) (1994); Johnson, *supra* note 133, at 360-61. The FDIC regulates national banks and state banks that elect to have federal deposit insurance. *See* 12 U.S.C. § 1814. FDIC approval involves determinations that the state bank meets certain capital requirements and that the activity does not pose a significant risk to the deposit insurance fund. *See* 12 U.S.C. § 1831a(a)(1)-(2); Johnson, *supra* note 133, at 360-61.

151. *See* Telephone Interview with Linda Camp, Counsel for the FDIC (Jan. 26, 1998).

152. FDICIA only restricts state banks' ability to engage in activities as principal. *See* 12 U.S.C. § 1831a(a). No limitations are put on state bank agent activities. *See FDIC-Supervised Banks Notified of Amendments Affecting Investments and Activities*, *supra* note 145, at 83,847. Still, the FDIC can indirectly regulate agent activities based on safety and soundness considerations. *See* 12 U.S.C. § 1818(a)(2).

153. States may authorize state banks to "operate insurance agencies, securities brokerage firms, real estate agencies, travel agencies, financial planning services, and certain other agencies" without FDIC consent. *FDIC-Supervised Banks Notified of Amendments Affecting Investments and Activities*, *supra* note 145, at 83,847.

154. *See* *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972). *Arnold Tours* might be decided differently today given that it was decided before *Chevron*, which mandates that courts defer to reasonable interpretations of the OCC where a provision of the National Bank Act is "silent or ambiguous with respect to the specific issue," unless such interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *See* *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

travel agents, then state bank interstate branches will have a competitive advantage over national banks. Additionally, proposed rule 12 C.F.R. Part 362 suggests that FDIC-insured state banks may have even more powers beyond those of national banks.<sup>155</sup>

Although FDICIA permits state banks to enjoy broader activity powers than national banks in some cases, the Amendments Act has restricted this ability even further for state bank interstate branches because now the laws of *two states* must permit the activity.<sup>156</sup> While Congress presumably included this restriction in the Amendments Act to allow states control over activities conducted by state bank branches within their borders, this provision further erodes a historical advantage of state banks over national banks.<sup>157</sup> Furthermore, this provision encourages BHCs to consolidate multiple state banks operating in different states into one bank chartered in the state that allows the most activities because then the bank would have a greater chance of being able to engage in those activities in states where it has interstate branches.

By further diminishing the activities advantage of state charters, the Amendments Act may in some circumstances contravene Congress' goal of preserving the benefits of the dual banking system. Prior to interstate branching, states' broader activity powers allowed states to serve as small laboratories for experimentation in new banking activities to address customers changing needs.<sup>158</sup> No state bank was at a competitive disadvantage because either all state banks within the same state could engage in an activity, or no state bank within that state could engage in the activity. However, after the Amendments Act, the impact of innovation on the dual banking system will depend on how states react to the authorization of new activities in other states.

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155. See Activities of Insured State Banks and Insured Savings Associations, 62 Fed. Reg. 47,969, 48,012 (1997) (to be codified at 12 C.F.R. pt. 362) (proposed Sept. 12, 1997). For example, under the proposed regulations, without the FDIC's consent, an insured state bank that is not a member of the Federal Reserve System may continue its securities activities in accordance with 12 C.F.R. §337.4 (1997) and avoid compliance with the Glass-Steagall Act. See *id.* at 48,015. Under these proposed rules, states may maintain part of their role as innovators and remain competitive with national banks.

156. See 12 U.S.C.A. § 1831a(j)(2) (West Supp. 4 1997).

157. See *supra* notes 145-48 and accompanying text.

158. See *supra* notes 112-14 and accompany text.

First, if only one state permits a new activity, then that new activity will be confined within that state. On the one hand, this scenario maintains state banks' roles as innovators while minimizing the risk to the deposit insurance fund. Yet, the Amendments Act creates a strong incentive for other states to permit the new activity so that their state banks' interstate branches remain competitive. Under this scenario, states no longer function as small laboratories to test the risk of new activities to the deposit insurance fund.<sup>159</sup> As the boundaries of experimentation increase to combat competitive disadvantages, so does the risk to the deposit insurance fund.

Likewise, coupled with FDICIA, 12 U.S.C.A. § 1831a(j)(2) results in decreased competition between state and federal regulators because it encourages state bank activity powers to mirror those of national banks. Even though states may still grant state-chartered banks broader powers than national banks, state banks still must pass FDICIA requirements, which implies that Congress is not willing to leave the safety and soundness of federally insured banks to state regulators. Combined, FDICIA and this provision of the Amendments Act reduce some historical advantages of state charters over federal charters that served to offset traditional advantages enjoyed by national banks. If this erosion of the state bank activities advantage and state regulatory power is viewed as significant, state banks could begin converting to national charters, weakening the dual banking system that the Amendments Act was supposed to reinforce.

3. The laws of a host [s]tate . . . shall apply to any [state bank interstate] branch in the host [s]tate . . . to the same extent as such [s]tate laws apply to a [national bank interstate] branch in the host [s]tate . . . . To the extent that host [s]tate law is inapplicable to a [state bank interstate] branch . . . home [s]tate law shall apply to such branch.<sup>160</sup>

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159. This concern could be ameliorated if states responded by only permitting interstate branches of its state banks to engage in the activity, thus confining the activity to the original authorizing state.

160. 12 U.S.C.A. § 1831a(j)(1).

Finally, Congress hoped to accomplish competitive equality between state and national bank interstate branches by granting host states the same control over state bank interstate branches as national bank interstate branches. As with national banks, the host state, for example, will control the state bank interstate branch's ability to branch intrastate.<sup>161</sup> Thus, host states still maintain a degree of control over all banks operating within their borders without hampering state bank interstate branches' ability to compete with national bank interstate branches.

Although principles of federal preemption dictate that states can exercise only limited control over national banks, historically states have had complete control over state banks and state bank interstate branches.<sup>162</sup> The Amendments Act usurps this control by providing that host state laws, other than those relating to banking activities, apply to state bank interstate branches only to the extent that such laws apply to national bank interstate branches. Consequently, now Congress and the OCC dictate the extent to which host state laws will control state bank interstate branches because Congress can pass laws that explicitly preempt state law, and the OCC has the power to determine whether a federal law implicitly preempts state law or whether a state law impermissibly discriminates against national banks.<sup>163</sup> For example, if the OCC interprets federal law as preempting a New Jersey consumer protection law, then a national bank may ignore the law. Consequently, under the Amendments Act, New York-chartered Chase Manhattan, our country's largest bank in regard to assets and one of the leading supporters of the Amendments Act, might be able

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161. *See id.*

162. *See* § 1831a(j)(1)-(2) (1994), amended by Riegle-Neal Amendments Act, Pub. L. No. 105-24, § 2, 111 Stat. 238 (1997).

163. Host state laws do not apply to state bank interstate branches "when [f]ederal law preempts the application of such [s]tate laws to a national bank; or when the [OCC] determines that the application of such [s]tate laws would have a discriminatory effect on the branch in comparison . . . to branches of a bank chartered by the host [s]tate." 12 U.S.C. § 36(f)(1)(A)(i)-(ii) (1994). The Amendments Act requires the OCC to report past preemption from 1992 to present and any future actions resulting in the inapplicability of state laws to national banks. *See* 12 U.S.C.A. § 36(f)(1)(C) (West Supp. 4 1997). Examples of state laws preempted through interpretations of the OCC include restrictions on Saturday operations, insurance licensing provisions, restrictions on alternative mortgage transactions, and registration and examination of national banks acting as municipal finance consultants. *See* OCC Interpretive Letter 572, *supra* note 125, at 71,473.

to operate in New Jersey “without complying with state consumer protection laws it believes are oppressive.”<sup>164</sup>

To achieve competitive equality, the Amendments Act reallocated some of host states’ power to govern state bank interstate branches to Congress and the OCC.<sup>165</sup> Yet, host state-chartered banks will be at a disadvantage with both national and state bank interstate branches in the host state when host state laws which are more restrictive than federal or home state laws are preempted. Therefore, a host state bank still may have an incentive to convert to a national charter in order to avoid strict state laws and to better compete with both national and state bank interstate branches. This incentive, however, directly conflicts with the Amendment Act’s purpose of preventing state banks from converting to national charters.<sup>166</sup> The Amendments Act may have lessened the fear that state banks would convert to national charters for interstate branching, but an incentive still exists. Nonetheless, the Amendments Act mitigates the incentive to convert to a national bank because a state bank could convert its charter to another state with less restrictive banking laws.

Contrary to the CSBS’s assertion that the Amendments Act will curtail federal preemption, 12 U.S.C.A. § 1831a(j)(1) magnifies the effect of federal preemption of state law by allowing state bank interstate branches, in addition to national bank interstate branches, to ignore host state law.<sup>167</sup> Adding to this problem, the OCC has increasingly interpreted federal law as preempting state law.<sup>168</sup> In light of the OCC’s proclivity toward federal preemption, state legislators fear that the OCC will also preempt state consumer laws

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164. Arthur Postal, *Interstate Legislation Slowed in Senate*, INT’L BANKING REGULATOR, May 2, 1997, available in 1997 WL 7965806.

165. See Stouffer, *supra* note 27 (“What good is a dual banking system if the states lose their power?”) (quoting Michelle Meier, Consumer Union Counsel for Government Affairs).

166. See *supra* notes 88-89, 101-11, 117-18 and accompanying text.

167. See *H.R. 1306 Hearing*, *supra* note 86, at 43 (testimony of Michelle Meier, Consumer Union Counsel for Government Affairs); *supra* note 117 and accompanying text.

168. See OCC Interpretive Letter 572, *supra* note 125, at 71,475 (listing examples of state law preemption by the OCC). For instance, in 1992, the OCC preempted a New Jersey lifeline banking law. See *id.* at 71,476 (reasoning that a New Jersey law providing that banks must offer customers the minimum deposit account services for a statutory set fee was preempted by the explicit language in 12 U.S.C § 24 (Seventh) authorizing national banks to “receive deposits”).

prohibiting ATM surcharges<sup>169</sup> or prepayment penalties on residential mortgages.<sup>170</sup> In response to this concern, Congress installed a safety valve in the Amendments Act that calls for an annual review of the OCC's preemption of state law.<sup>171</sup> However, this places upon Congress the burden of deciding whether to condone the OCC's increasing preemption and upon states the uncertainty of congressional response.

Despite the fact that Congress will review the OCC's actions, by diminishing states' control over state banking practices, the Amendments Act undermines the ability of states to protect their own citizens.<sup>172</sup> For example, when a state's law is preempted, customers of an interstate branch must rely on the bank's home state law or federal law, depending on whether the branch was established by a state or national bank, for protection against such things as unfair and deceptive trade practices.<sup>173</sup> Consumer protection advocates assert that if the OCC continues its aggressive preemption of state laws, states will be unable to protect consumers.<sup>174</sup> The home state, for example, may have empowered its chartered banks to engage in an activity "without putting in place the safeguards needed to deter against unfair sales practices and unfair competition with non-bank agencies."<sup>175</sup> Because some states have stricter regulatory schemes in some areas than other states, the Amendments Act will hopefully foster interstate cooperation in formulating strong state laws to protect bank customers, regardless of which state law controls.

The Amendments Act, however, also ignites competition among states to adopt liberal banking laws in order to attract bank charters.<sup>176</sup> If the goal of a state is to attract bank charters, then consumer protection laws will probably be lax rather than strict.

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169. See Stouffer, *supra* note 27.

170. See *id.* "A number of states prohibit mortgage lenders from charging borrowers when they unavoidably prepay their mortgage balance when they sell their home." *Id.*

171. See 12 U.S.C.A. § 36(f)(1)(C) (West Supp. 4 1997).

172. See *Financial Services Competitiveness Act Hearings, supra* note 95, at 340 (testimony of Mary Griffin, Consumer Union's Insurance Counsel).

173. See *id.*

174. See *H.R. 1306 Hearing, supra* note 86, at 78-79 (prepared statement of Michelle Meier, Consumer Union Counsel for Government Affairs).

175. *Id.* at 78.

176. See *id.* at 79.

Consequently, consumer protection groups worry that multi-million dollar banks, instead of individual citizens or consumer lobbying groups, will have greater influence with state legislatures.<sup>177</sup> Therefore, states face the challenge of balancing their citizens' interests in consumer protection with the desire to attract banks to their state charters.

### B. *Interstate Branching and Credit Card Interest Rates*

One of the questions raised by the breakdown of geographic banking barriers that Riegle-Neal and the Amendments Act fails to fully answer is which state's law controls the credit card interest rate which may be charged by interstate branches. Generally, banks "may . . . charge interest at the rate allowed by the laws of the [s]tate . . . where the bank is located."<sup>178</sup> Prior to interstate branching, this statutory language had been interpreted to allow national banks to export interest rates from their home state to customers located in other states even if the interest charged would be usurious under the laws of the state in which the customers reside.<sup>179</sup>

As the OCC has noted, the legislative history of Riegle-Neal indicates that "in the context of nationwide interstate branching, *it is the office of the bank or branch making the loan that determines which [s]tate law applies.*"<sup>180</sup> Furthermore, where the loan is "made"

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177. *See id.*

178. 12 U.S.C. § 85 (1994).

179. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). In *Marquette*, the Court held that a national bank with its main office in Nebraska, which was soliciting credit card customers in Minnesota, could charge Minnesota customers Nebraska's interest rates. *See id.* Relying on *Marquette*, in *Christiansen v. Beneficial National Bank*, 972 F. Supp. 681 (S.D. Ga. 1997), which involved a national bank's power to export its home interest rates on tax refund anticipation loans, the OCC filed an amicus brief stating that an interstate branch of a national bank could apply its home state interest rate. *See Home State Interest Rates Upheld*, REG. COMPLIANCE WATCH, July 28, 1997, available in LEXIS, CURNWS Library, ABBB File. Thus, national banks need not necessarily "become familiar with and comply with a hodgepodge of state usury laws throughout the United States." *Id.* Issues involving interest rates in the interstate branching context are not raised if a bank maintains a separate bank subsidiary for credit card operations.

180. Letter from Julie L. Williams, Chief Counsel, Office of the Comptroller of the Currency, to Jeremy T. Rosenblum, Partner, Ballard Spahr Andrews & Ingersoll 14 (Feb. 17, 1998) (visited Mar. 3, 1998) <<http://www.occ.treas.gov>> [hereinafter OCC Letter] (emphasis added in Letter) (quoting 140 CONG. REC. S12,789 (daily ed. Sept. 13, 1994) (statement of Sen. Roth (R-DE))).



depends on where the three “non-ministerial” loan functions—approval of the loan, disbursement of the proceeds, and extension of credit—are performed.<sup>181</sup>

Recently, the OCC concluded that where a “clear nexus” exists between the bank’s home state and the loans,<sup>182</sup> a bank principally conducting its credit card business from its home state “may continue to charge the interest rate permitted by its [home] state regardless of the state in which its customers are located, even though the bank now has a branch in the customer’s state.”<sup>183</sup> Thus, the *Marquette* principle continues in the interstate branching context.

In addition, the OCC has also ruled that if a bank engages in credit card services at a branch outside the bank’s home state, “the [b]ank may charge interest rates permitted by the law of the . . . state [in which the branch is located] no matter where [the customers] may reside,” as long as there is “a clear nexus between the branch and the loan.”<sup>184</sup> In fact, the OCC has indicated that if all of the “non-ministerial” functions of making a loan occur in a single host state, a

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181. See OCC Letter, *supra* note 180, at 8 (citing 140 CONG. REC. S12,789 (daily ed. Sept. 13, 1994) (statement of Senator Roth)).

182. See OCC Interpretive Letter 776, A National Bank May Export Interest Rates Permitted by the Law of the State in which Its Main Office Is Located to Customers in Another State where the Bank Has a Branch, [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-203, at 90,206-07 (Mar. 18, 1997) (where the bank “conducts virtually all of its credit card operations in and from its [home] state”). The OCC has indicated that performing one of the three non-ministerial loan functions in the home state might be a sufficient nexus for the bank to charge that state’s interest rate. *Cf.* OCC Letter, *supra* note 180, at 14.

183. *Interstate Banking Rules*, ABA BANK COMPLIANCE Sept. 1997, available in LEXIS, BANKNG Library, CURNWS File (citing OCC Interpretive Letter 776, A National Bank May Export Interest Rates Permitted by the Law of the State in which Its Main Office Is Located to Customers in Another State where the Bank Has a Branch, [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-203, at 90,203 (Mar. 18, 1997)).

184. OCC Interpretive Letter 782, Credit Card Interest Charged at Rate Allowed by State Where Bank Branch was Located, [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-209, at 90,226 (May 21, 1997) (where the bank “conducts virtually all of its credit card operations in and from [b]ank facilities [in the branch state]”). Thus, the OCC has established that, for purposes of 12 U.S.C. § 85, a bank is also “located” in a state where it operates a branch and may be able to charge that state’s interest rate in certain circumstances. See *id.*; OCC Interpretive Letter 686, A National Bank’s Branches Outside of the Home State of Its Main Office Were Able to Charge Interest at the Rate Allowed for the “Most Favored Lender” in the Branches’ State, [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-001, at 90,203-04 (Sept. 11, 1995). The OCC has indicated that performing one or two of the three non-ministerial loan functions in a host state might be a sufficient nexus for the bank to charge that state’s interest rate. *Cf.* OCC Letter, *supra* note 180, at 14.

national bank may not charge the interest rate permitted under the laws of its home state, rather must charge the interest rate of that host state.<sup>185</sup> However, the OCC has also stated that where the non-ministerial loan functions are performed in multiple host states, a national bank may *always* charge its home state interest rates.<sup>186</sup>

Despite these recent interpretations by the OCC, at least one question remains. If a significant portion of a bank's credit card operations take place in more than one host state, the bank may charge a host state's interest rate only if the host state satisfies the "clear nexus" test.<sup>187</sup> Although the OCC has indicated that the performance of "one or two" non-ministerial functions may constitute a sufficient nexus, exactly how little operations can occur in the host state remains to be seen.<sup>188</sup>

## V. CONCLUSION

By enacting the Amendments Act, Congress attempted to maintain state charters as a viable option for state banks interested in interstate branching and to ensure that the benefits of the dual banking system continue in the interstate environment.<sup>189</sup> To a large extent, Congress achieved its goal of competitive equality between state and national chartered banks and their respective interstate branches. Congress did not, however, achieve its objective of retaining the benefits of the dual banking system because this objective conflicts with Congress' desire to have competitive equality between state and national banks.<sup>190</sup> The Amendments Act

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185. See OCC Letter, *supra* note 180, at 14.

186. See *id.* at 9.

187. See *id.* at 14.

188. *Cf. id.* There are several OCC interpretive letters dealing with the "clear nexus" issue, but none are particularly instructive on when a nexus becomes "clear." See, e.g., OCC Interpretive Letter 782, *supra* note 184; OCC Interpretive Letter 776, *supra* note 182; OCC Interpretive Letter 707, The Interstate Merger of Two Banks Would Not Affect the Permissible Rates that May Be Imposed for Consumer Loans, [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-022, at 90,269-71 (Jan. 31, 1996); OCC Interpretive Letter 686, *supra* note 184.

189. See *supra* notes 116-21 and accompanying text.

190. Professors Butler and Macey contend that: (1) the federal government's ability to preempt state regulations; (2) the FDIC's ability to establish uniformity between national and state banks; and (3) banking parity statutes inhibit the dual banking system. See Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73

demonstrates that Congress cannot accomplish its goals of competitive equality, preserving state control over state banking practices, and maintaining state banks' role as innovators. Although a valiant effort, the Amendments Act exhibits that attempting to achieve all of these conflicting goals will only result in an endless tug of war.

The Amendments Act, as did FDICIA and state banking parity laws, further erodes the distinction between state and national banks and illustrates the trend of federal law setting the parameters for what state banks can do. Moreover, the Amendments Act shows that as geographic limitations on banking have dissipated under Riegle-Neal, the control that states can exert over banking practices within their borders has also diminished. As these trends continue, it begs the question of whether the need for a dual banking system still exists, given the reduced power and role of states.

Altogether, the Amendments Act illustrates that the traditional ability of states to control banking operations within their borders has become less important. Likewise, the location or headquarters of a bank has also become less relevant for bank customers who now use ATMs, direct deposit, internet banking, and who are most likely charged out-of-state credit card interest rates. Most importantly, the Amendments Act clarifies the applicability of home and host state laws to state-chartered banks operating across state lines, providing the certainty that banks, Congress, and banking regulators most desired.

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