Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks

David W. Regan
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Banking and Finance Law Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol72/iss3/8
Circumventing the McFadden Act: The Comptroller of the Currency’s Efforts to Broaden the Branching Capabilities of National Banks

INTRODUCTION

A Kentucky state bank may establish branches only within the city and county of its principal office. Under the constraints of the McFadden Act, national banks in Kentucky are subject to the same branching restrictions as state chartered institutions.

_American Fidelity Bank & Trust v First National Bank & Trust_ involved an interpretation of the Kentucky branching statute. In this case, the Comptroller of the Currency approved a national bank’s application to establish a branch within the same city, but across county lines. A rival state bank and the Commis-
sioner of the Kentucky Department of Banking and Securities challenged the approval in federal district court. The court ruled that Kentucky law authorizes a bank to branch within the same city, even if the branch would be located in a different county. The Court of Appeals for the Sixth Circuit affirmed the district court reasoning that the dual nature of our banking system and the McFadden Act require the preservation of competitive equality between state and national banks.

This case is not an isolated confrontation between the Comptroller and a state banking commissioner. For two decades the Comptroller of the Currency has aggressively sought to expand national bank branching authority in spite of the limitations of the McFadden Act. This Comment will examine various interpretations of state law by the Comptroller and subsequent litigation. First, an overview of the history and structure of dual banking will be presented to provide sufficient background to examine the Comptroller's actions. The Comment will then focus on the judicial treatment of rulings on new branch offices, armored cars, loan production offices and electronic funds transfers. Finally, the future of the McFadden Act will be examined in light of the changing environment of the commercial banking industry.

I. THE STRUCTURE OF COMMERCIAL BANKING

The United States has a unique commercial banking structure...
known as the dual banking system. Both the federal and state governments may issue banking charters, making each responsible for regulating the institutions. Three separate federal agencies, the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation, have regulatory authority over commercial banks. State governments, on the other hand, generally have a single department to charter and regulate banks, and each of the fifty states has relatively unique banking laws. As a result of this complexity, the dual system has been called a "patchwork quilt."

The various state banking statutes are characterized as unit

---


13 See L. Ritter & W. Silber, supra note 12, at 70.

14 The Comptroller of the Currency possesses by statute the power to grant charters to national banks and also has principal responsibility for the regulation and supervision of these banks. By statute, the Federal Reserve has a general regulatory and supervisory responsibility for the operations of all member banks—including national banks, since they are required by law to be members of the System. The third regulatory body, the Federal Deposit Insurance Corporation has principal supervisory responsibility over insured nonmember banks. In practice, the several State and the three Federal supervisory agencies have established arrangements that reduce substantially the effects of overlaps associated with joint regulatory responsibility.


15 Under Kentucky law, "[t]he department of banking and securities shall exercise all administrative functions of the state in relation to the regulation, supervision, chartering and licensing of banks." See KRS § 287.011(2) (Bobbs-Merrill 1981).

16 See notes 18-20 infra for a general discussion of types of banking laws.

banking,\(^{18}\) limited branching,\(^{19}\) or statewide branching.\(^{20}\) Kentucky, by statute, is currently a limited branching state as a bank may only establish a branch within the city and county where its principal office is located.\(^{21}\) Since Kentucky has 120 counties, most of which are rural, the statute effectively reduces the potential deposit base for most banks.\(^{22}\) Only Jefferson County (Louisville) has a population sufficient to provide substantial aggregate deposits.\(^{23}\)

II. THE HISTORY OF DUAL BANKING

The financial strain of the Civil War provided the impetus for the federal legislative foundation of the dual banking system.\(^{24}\) The need for money to finance the war effort and the absence of a national currency\(^{25}\) prompted congressional enactment of the National

---

\(^{18}\) A unit bank is an independent entity operating from a single building. "By definition, states with unit banking law disallow branch banking." B. GUP, FINANCIAL INTERMEDIARIES: AN INTRODUCTION 262 (2d ed. 1980). Ten states presently fall within this category. 1 FED. BANKING L. REP. (CCH) ¶3106 (1982).

\(^{19}\) States with limited branching permit branching only within designated, geographic areas, typically counties. See, e.g., K.R.S. § 287.180(2). See note 1 supra for the text of this provision. Some states allow de novo branching (establishing new offices), while other states only permit branching by merger with or acquisition of an existing institution. B. GUP, supra note 18, at 262-63. Twenty-one states have some form of limited branching. 1 FED. BANKING L. REP., supra note 18, at ¶ 3106.

\(^{20}\) "[S]tatewide branch banking [as the name implies,] refers to branching that is permitted throughout the state." B. GUP, supra note 18, at 262. States utilizing this form of branching may also distinguish between de novo or merger branching. Id. at 263. Eighteen states, Puerto Rico and the District of Columbia now authorize a form of statewide branching. 1 FED. BANKING L. REP., supra note 18, at ¶ 3106.

\(^{21}\) See KRS § 287.180(2).

\(^{22}\) Cf. FEDERAL DEPOSIT INSURANCE CORPORATION, ANNUAL REPORT 235-36 (1980). Kentucky had 345 commercial banks in operation at the end of 1980 and only 30 of these institutions had total deposits in excess of $100 million. Id.

\(^{23}\) "It is significant to note that the prestige of a bank and the customary means of measuring its relative performance are often based on the level and trend of its deposits." D. HAYES, BANK LENDING POLICIES: ISSUES AND PRACTICES 6 (1964).

As of December 31, 1982, only three Kentucky banks were ranked among the top 300 in the nation in terms of deposits and all were located in Jefferson County. First National Bank of Louisville was 98th, Citizens Fidelity Bank & Trust Co. was 119th, and Liberty National Bank & Trust Co. was 180th. 1 MOODY'S BANK AND FINANCIAL MANUAL a4-a5 (1983).

\(^{24}\) See E. WHITE, THE REGULATION AND REFORM OF THE AMERICAN BANKING SYSTEM 1900-1929 at 11 (1983) ("The adoption of the National Banking Act in the midst of the Civil War was largely prompted by the fiscal needs of the Union.").

\(^{25}\) During the years prior to the Civil War, banknotes were a common form of currency. A customer would leave gold or silver on deposit at a bank and receive a commen-
Currency Act.\textsuperscript{26} That legislation, as amended by the National Bank Act,\textsuperscript{27} was designed to provide a market for war bonds while creating a national currency\textsuperscript{28} The Act also established the Office of the Comptroller of the Currency within the Treasury Department,\textsuperscript{29} with authority to charter national banks.\textsuperscript{30} The legislation failed to entice state banks to adopt federal charters, so Congress then enacted a tax on state bank notes\textsuperscript{31} which resulted in a dramatic shift to federal charters.\textsuperscript{32} However, public accept-
The acceptance of demand deposits gave the state banks a life sustaining source of deposits, so state banks increased in number along with national banks, giving the country a dual system.\textsuperscript{33}

The national banking legislation passed during the Civil War did not expressly mention the power to branch.\textsuperscript{34} Early Controllers of the Currency interpreted this legislative omission as prohibiting branch banking by national banks,\textsuperscript{35} and the Supreme Court eventually agreed.\textsuperscript{36} This inability to branch placed national banks at a competitive disadvantage, as some states liberalized the branching authority for state chartered institutions.\textsuperscript{37}

within Congress' power to tax and provide a national currency. See Veazie Bank v. Fenno, 75 U.S. (8 Wall) 533, 549 (1869).

\textsuperscript{33} The acceptance of demand deposits enabled state banks "to make loans and create money, despite their inability to issue bank notes." L. Ritter & W. Silber, supra note 12, at 70.


However, the legislation imposing the 10% tax on state bank notes contained a reference to branching. See ch. 78, § 7, 13 Stat. 469, 484 (1865), repealed by ch. 202, 47 Stat. 1428, 1430. The statute permitted state banks changing to national charters to retain any branches established under state law. Ch. 78, § 7, 13 Stat. 469, 484 (current version at 12 U.S.C. § 36(b)(1) (1982)).

\textsuperscript{35} See R. Robertson, supra note 26, at 81-85; Glidden, Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying The Dual Banking System?, 1980 U. Ill. L.F 369, 376.

\textsuperscript{36} See First Nat'l Bank v. Missouri ex rel. Barrett, 263 U.S. 640, 657 (1924) (upholding Missouri's attempt to stop national bank from operating a branch bank).

\textsuperscript{37} Ginsburg, Interstate Banking, 9 Hofstra L. Rev. 1133, 1152 (1981). "State chartered banks in these states were thus able to follow their customers to the newly burgeoning suburbs, making themselves convenient to the public and gaining a competitive advantage over national banks." Id. (emphasis added) (citation omitted).

Commercial banks are in the business of lending money. P. Horvitz, Monetary Policy and the Financial System 175 (1979). In order to lend funds, banks must attract money in the form of deposits. Banks have traditionally relied upon demand deposits, and more recently upon time and savings deposits as their source of lending capital. Id. at 47.

In the years prior to the McFadden Act, depending upon the state law, a national bank sometimes faced drastically different branching restraints compared to the restraints imposed upon a state bank located in the same city. See generally First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 256-61 (1966) (a legislative history of the McFadden Act), reh'g denied, 385 U.S. 1032 (1967). In limited or statewide branching jurisdictions, the state chartered banks could branch throughout the city while national banks were restricted to one office. Id. National banks began changing to state charters to achieve increased branching authority. See Comment, Customer-Bank Communication Terminals and the McFadden Act: Definition of a 'Branch Bank,' U. Chi. L. Rev. 362, 373 (1975). In order to
This inequality of branching powers between state and national banks resulted in an increasing shift from national to state charters.\(^3\) In 1927 Congress passed the McFadden Act, which authorized national banks to branch within their home city if state law permitted state banks to do likewise.\(^3\) The debate over this legislation evidenced a classic struggle between rural and metropolitan economic interests.\(^4\) Even though this legislation liberalized branching laws for national banks, Representative McFadden insisted that the unit banking system was still superior,\(^4\) and that his actions were only meant to preserve the national banking system.\(^4\)

The chaotic bank failures during the Depression caused public disenchantment with the entire banking system.\(^4\) The failure of so many small unit banks substantiated the belief that branching would provide more stability.\(^4\) The Comptroller of the Currency and others within the banking industry began advocating that national banks be permitted to branch regardless of state law.\(^4\) As a result, several states liberalized their branching laws during the 1930's.\(^4\)
As more states permitted increased branching, national banks again faced the same competitive disadvantage evident prior to passage of the McFadden Act.\(^4\) In response, Congress amended the McFadden Act in 1933,\(^4\) authorizing national banks to branch within their respective states on the same basis as the state banks.\(^9\) In effect, Congress gave the legislatures of each state the power to determine the banking structure of their respective states.\(^4\) The McFadden Act, as amended in 1933, remains the most important federal legislation concerning the branching capability of national banks.\(^5\)

III. THE COMPTROLLER AS ADVOCATE FOR BRANCH BANKING

A. The Supreme Court Decisions of the Sixties

In the early 1960's, the Comptroller of the Currency openly stated his opposition to the McFadden Act.\(^12\) This controversial

\(^4\) See Ginsburg, supra note 37, at 1153-54.
\(^9\) The legislative history and congressional intent of this legislation is extremely well documented in First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. at 259-60. The Court recounts congressional debate which indicates that the legislation provides national banks only those branching powers enjoyed by state chartered banks where they are located. Id.
\(^5\) DEPARTMENT OF THE TREASURY, GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES: THE REPORT TO THE PRESIDENT 5-6 (1981) [hereinafter cited as PRESIDENT'S REPORT].
\(^5\) "Federal branching policy has remained essentially intact since the 1933 modification of McFadden." Id. at 186.
\(^7\) See note 11 supra. James J. Saxon was Comptroller of the Currency from Nov. 16, 1961 until Nov. 15, 1966. R. ROBERTSON, supra note 26, at 189. "Comptroller Saxon was without question a stormy and controversial figure." Id. at 159. Shortly after taking office, Saxon publicly proclaimed that the Comptroller's Office would be more receptive to applications for new bank charters and new branches. Id. at 148-49. He also announced "his intention to seek major legislation that would relieve the national banking system of the restraints imposed upon it as a consequence of a previous generation's struggle with the problem of bank failures in an unstable economy." Id. at 149.

The officers of the larger national banks generally supported the proposals of Comptroller Saxon, but the smaller banks feared his policies would endanger the future of unit banks. Id. at 160. As a result, a Congressional hearing was "conducted to investigate the Comptroller's alleged nefarious activities in disregarding state laws on branching and in refusing to cooperate with state authorities in dividing up choice new branching sites between state and national banks." Id. (citing Conflict of Federal and State Banking Laws: Hearings Before the House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963)).
stance resulted in a legal battle over the branching of national banks. In First National Bank v. Walker Bank & Trust Co., the Comptroller had approved a de novo branch for a national bank even though Utah law permitted branching only by acquisition. After reciting extensive legislative history of the McFadden Act, the Supreme Court concluded "that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." Accordingly, the Court held that national banks in Utah could branch only by acquisition as specified in the Utah statute.

During the same time period, the Comptroller issued a ruling which authorized national banks to use armored car messenger services. Consistent with this ruling, the Comptroller permitted a national bank in Florida to operate an armored car messenger service. Since Florida was a unit banking state at that time, the state banking supervisor advised the bank that the operation violated state law. In the ensuing litigation, the bank and the Comptroller won a declaratory judgment in federal district court, but the court of appeals reversed. The Supreme Court affirmed the court of appeals, restating with approval the Walker Bank policy of competitive equality.

---

54 *Id.* at 255. See note 19 supra for a distinction between de novo and acquisition branching.
55 See 385 U.S. at 256-61.
56 *Id.* at 261.
57 *Id.* In so doing, the Court specifically rejected the Comptroller's interpretation that the Utah statute expressly authorized branching and that a subsequent limit on branching did not apply to national banks. *Id.*
59 *Id.* at 125-26.
60 *Id.* at 124-25. See note 18 supra for a definition of unit banking.
61 396 U.S. at 129. The bank owned and operated the armored car in which a bank employee worked as a teller. First National received about $1 million per week in deposits through the car. *Id.* at 128.
63 396 U.S. at 133. "The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation." *Id.*
The Court ruled that federal law must be used to define a "branch," and decided that the armored car fell within the definition. Since Florida law prohibited branching, national banks in Florida were prohibited from using this type of service.

B. The Comptroller and Loan Production Offices

The loan production office (LPO) is one mechanism banks use to evade the geographic restrictions of the McFadden Act. Initially only money center banks operated this type of facility, but LPOs are now widespread. In Kentucky, at least one Louisville bank maintains loan production offices in Lexington despite state branching restrictions.

After the Supreme Court ruled federal law controls the definition of a "branch" to include an armored car.

Id. at 134. Federal law defines "branch" as including "any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (1982).

396 U.S. at 136-37. The armored car received deposits. The Supreme Court rejected the Comptroller's interpretation that the contractual arrangement between the bank and the customer precluded "deposits" until the money actually reached the bank. The Court refused to accept form over substance. Id.

Contra id. at 138-39 (Douglas, J., dissenting) (Congress did not intend the definition of a "branch" to include an armored car).

Id. at 138. Even though the services were of obvious utility, the Court had no choice in its ruling. Only Congress and the Florida legislature could formulate legislative policy. Id.

"Loan production office is the generic term for 'bank offices at locations other than the main or branch office at which employees solicit and originate loans for financial approval at the main or branch office.' " Moffitt & Rigsby, Loan Production Offices: The Beginning of the End for the McFadden Act?, 10 STETSON L. REV. 427, 427 (1981) (quoting Wood, Branch Banking and the Loan Production Office, 18 WASHBURN L.J. 46, 46 (1978)). These offices give banks a local presence in markets where state law prohibits intrastate or interstate banking.

See, e.g., Ginsburg, supra note 37, at 1186-88. Actually call officers conducted the first loan production activity across geographic barriers. These officers were the equivalent of traveling sales people who visited larger businesses throughout the nation. The LPO simply placed the call offices on permanent location outside of the bank's branching market. Id. at 1186-87.

"The Independent Bankers Association of America estimates there are 350 LPOs throughout the country." PRESIDENT'S REPORT, supra note 50, at 186 n.4.

See Lexington Herald-Leader, Aug. 10, 1983, at A13, col. 1 (advertisement). This advertisement offers FHA home improvement loans at three Lexington locations. The lender is Mid-America Financial Services, which the advertisement calls "a Loan Production Office of Bank of Louisville." Id.

See note 1 supra for the text of the Kentucky provision.
tion of a branch bank,\(^\text{72}\) the Comptroller codified within the federal regulations an earlier interpretive ruling that a loan production office is \textit{not} a branch as defined in the McFadden Act.\(^\text{73}\) "The definition of branch is crucial because the legality of LPOs under state law depends upon whether the facility is a branch"\(^\text{74}\) under the McFadden Act.

Only a few court decisions have challenged this interpretation. A federal district court in the District of Columbia declared "the Comptroller's ruling to be incorrect and ordered him to rescind the ruling and to refrain from further implementation of it."\(^\text{75}\) In compliance with the court order, the Comptroller withdrew the ruling in 1979.\(^\text{76}\) The court of appeals reversed the decision based on laches,\(^\text{77}\) but the court did not endorse the district court's decision on the merits.\(^\text{78}\) The Comptroller subsequently reissued the interpretive ruling.\(^\text{79}\)

A federal court in Oklahoma also rejected the Comptroller's LPO ruling.\(^\text{80}\) The court declared the Comptroller's ruling to be

\(^{72}\) See First Nat'l Bank v. Dickinson, 396 U.S. at 137.


\(^{74}\) Moffit & Rigsby, supra note 67, at 431. If the LPO is termed a branch, "it is subject to the limitations imposed by the McFadden Act as to branch banking. If not, then arguably a national bank is free to establish LPOs without concern as to a state's branch banking restrictions." Id.

\(^{75}\) See Independent Bankers Ass'n of America v. Heimann, 627 F.2d at 487.

\(^{76}\) Id. at 488.

\(^{77}\) Id. The Independent Bankers Association of America (IBAA) waited twelve years before challenging the ruling. Id.

\(^{78}\) "In deciding this case on laches, we do not mean to endorse the district court's resolution of IBAA's claims on the merits. On the contrary, we have serious questions about the result." Id. at 488 n.

\(^{79}\) See 12 C.F.R. § 7.7380 (1983), which states in pertinent part:

(b) Origination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office of the bank does not violate 12 U.S.C. 36 [McFadden] and 81: Provided, That the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

(emphasis in original).

The Federal Reserve adopted the same position. See 12 C.F.R. § 250.141 (1983). But see 1 FED. BANKING L. REP., supra note 18, at \footnote{3169.757, 3169.294 (the Attorney General of Arkansas and the Georgia Superintendent of Banks interpreted LPOs to be branches).}

erroneous and contrary to the intent of both the McFadden Act and the Supreme Court decision in *First Nat'l Bank v. Dickinson.*

The legal status of a national bank's LPOs remains unsettled. As a result, the Comptroller has circumscribed the permissible activities of LPOs to include soliciting loans, providing information on loan terms and rates, interviewing and counseling on disclosure and helping with loan application procedures. However, the Comptroller specifically advised that delivering loan proceeds, providing checking or savings account information and accepting loan payments at the LPO are not authorized by the regulations.

C. The Comptroller and Electronic Funds Transfers

The present and potential effects of electronic funds transfers on commercial banking are extremely significant. The industry adopted the new technology at an astounding pace. For example, since the initial deployment of automated teller machines (ATMs) in 1969, commercial banks have installed thousands of them.

---

1. *Id.*
2. Ginsburg, supra note 37, at 1188.
4. *Id.* (citing 12 C.F.R. § 7.7380).
5. Electronic funds transfer (EFT) technology may be divided into three categories: automated clearinghouses (ACHs), point-of-sale (POS) systems, and automated teller machines (ATMs). ACHs use computers to eliminate paper transactions between financial institutions. POS systems are terminals at a retail store which permit customers to debit their accounts with bank cards. The POS terminal is "on-line" (linked directly to the bank's computer) so the customer's account is debited immediately. ATMs are usually "off-line" and are depositories or dispensaries of funds. Note, *Interstate Banking: That Someday is Today,* 21 WASHBURN L.J. 266, 276 n.86 (1981-82) (citing K. COLTON & K. KRAEMER, COMPUTERS AND BANKING 3-4 (1980)). This Comment will focus on ATMs.
6. Although most EFT technologies are no more than 15 years old, they are already having a significant impact on payment systems, banks and other financial institutions. Within the next two decades, it is possible that EFT will transform the way Americans carry out their day-to-day commercial activities and personal monetary transactions. [1982-83] FED. BANKING L. REP. (CCH) ¶ 99,135 (discussing an Office of Technology Assessment study of EFT and public policy). *Accord Retail Banking,* supra note 25, at 3 (since the late 1960s experts in EFT technology have been predicting a checkless or even cashless society).
7. In 1969, the first ATM in the nation was installed in New York City by Chemical Bank. Note, *supra* note 85, at 276 n.87.
8. Johnson, *Planning for Retail Electronic Banking,* THE BANKER'S MAG., Sept.-Oct. 1983, at 28-29. About 40,000 ATMs have been installed by financial institutions throughout the nation, and experts believe the number will increase to 100,000 within five years. *Id.*
Customers appreciate the convenience, while lower costs impress the bankers.9

Following the lead of other regulators,90 the Comptroller has aggressively supported technological innovations. In a December 1974 ruling, he stated that national banks would be given the widest latitude in experimenting with ATMs.91 This ruling permitted national banks to install off-premises customer-bank communication terminals92 (CBCTs) without regard to state restrictions on branching.93 The Comptroller modified this stance within six months due to state banking opposition.94 Under the new interpretation, CBCTs were limited "to within 50 miles of the bank's office or branch . . . unless the CBCT was made available for sharing with other financial institutions."95

9 Sanger, Staking Out Automatic Tellers, Barron's, June 20, 1983, at 8, col. 1. The ATM cost per transaction is between 15 and 50 cents, while the cost of each transaction made by a teller is at least 50 cents and can be more than two dollars. Id. at 8, col. 2.


92 The Comptroller may have created the name "customer bank communication terminal" because it did not connote a "branch" as much as automated teller machine. Cf. Comment, supra note 37, at 365.

Until the Comptroller's ruling, the CBCT was generally known as an 'ATM' or 'automated teller machine.' But the term 'teller' suggests that an independent transaction occurs at the site of the terminal; the Comptroller therefore chose a new name that emphasizes the communications link between the bank and the CBCT.

Id. at 367 (citation omitted).

Cf. Kirby, The Name's The Thing: Financial Communications Service, Not Automated Teller Machine, 91 BANKING L.J. 135 (1974) (ATMs are simply "mechanical device[s] that fall] into exactly the same functional category as the United States mails, telegraph, telephone, and other forms of data communication whereby portions of banking transactions and have for many years been conducted by many individuals") (emphasis in original), quoted in Comment, supra note 37, at 367 n.20.

93 The CBCTs would still be subject to federal regulation which would probably be more permissive than corresponding state regulation. Comment, supra note 37, at 365.

94 RETAIL BANKING, supra note 25, at 127.

95 Id. This action excluded any type of national or regional network owned exclusively by one bank. Interestingly enough, the Comptroller had no express statutory authority to
Regardless of the terminology or geographic limits, state banking officials quickly perceived the significance of the ruling. State regulators soon filed suits to void the Comptroller's action as contrary to the McFadden Act. In Independent Bankers Association of America v. Smith, one of the first challenges to reach the appellate level, the District of Columbia Court of Appeals rendered an exhaustive opinion which examined the Comptroller's ruling in the context of previous Supreme Court decisions on branching by national banks. The court held that CBCTs are branches under the McFadden Act. As a result, "for each CBCT a national bank wishes to establish it must (1) file a branch application with the Comptroller, (2) secure the Comptroller's approval and (3) satisfy the capital and surplus requirements for branches found" in federal and state law.

Several other circuits followed the rationale of Independent Bankers, and the clear weight of authority is that all CBCTs are branch banks. The Supreme Court has consistently denied certiorari in these cases.

The proponents of expanding the use of CBCTs are seriously concerned about this line of cases. Subjecting the automated

*impose such a geographic limitation. He relied only on his broad regulatory authority over national banks. Id. at 128.*

*Contrary to the Comptroller's opinion, various state officials felt that CBCTs were branches within the definition of the McFadden Act. See generally Peck & McMahon, supra note 90, at 1658-68. See note 64 supra for the definition of "branch" under the McFadden Act.*

*534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976).*

*See id. at 930-51. See notes 53-66 supra and accompanying text for a discussion of previous Supreme Court decisions on branching by national banks.*

*534 F.2d at 948.*

*Id.*


*See Peck & McMahon, supra note 90, at 1675-76.*

*See, e.g., Colorado ex rel. Kostman v. First Nat'l Bank, 428 U.S. at 941. See also Peck & McMahon, supra note 90, at 1675-76 (all federal appellate panels that have considered the question are in agreement and thus the Supreme Court may not be disposed to grant certiorari).*

*See, e.g., Retail Banking, supra note 25, at 122-28.*
teller to the same capital requirements as a branch bank creates absurd results. Some states have responded with legislation or regulations which relieve the problems of Independent Bankers. For example, the Kentucky Commissioner of Banking and Securities stated in a series of regulations that "remote service units [CBCTs or ATMs] shall not be considered to be a branch office." Such changes preclude a challenge under the McFadden Act and ease the installation of CBCTs.

IV THE MCFADDEN ACT IN A CHANGING ENVIRONMENT

The Comptroller's activist role has provoked opposition in Congress, which recently enacted legislation sharply limiting the Comptroller's formal rule-making power under the McFadden Act. Regardless of the Comptroller's level of authority, however, the banking community will face a dramatically different environment in the future. Even the most aggressive and far-sighted of Comptrollers could not possibly have imagined the changes.

Retaining the restrictions of the McFadden Act may result in

---

1983-84] BRANCHING OF NATIONAL BANKS 721

teller to the same capital requirements as a branch bank creates absurd results. Some states have responded with legislation or regulations which relieve the problems of Independent Bankers. For example, the Kentucky Commissioner of Banking and Securities stated in a series of regulations that "remote service units [CBCTs or ATMs] shall not be considered to be a branch office." Such changes preclude a challenge under the McFadden Act and ease the installation of CBCTs.

IV THE MCFADDEN ACT IN A CHANGING ENVIRONMENT

The Comptroller's activist role has provoked opposition in Congress, which recently enacted legislation sharply limiting the Comptroller's formal rule-making power under the McFadden Act. Regardless of the Comptroller's level of authority, however, the banking community will face a dramatically different environment in the future. Even the most aggressive and far-sighted of Comptrollers could not possibly have imagined the changes.

Retaining the restrictions of the McFadden Act may result in

---

103 See 12 U.S.C. § 36(d) ("The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.").

104 Cf. Retail Banking, supra note 25, at 122-28. The authors suggest that applying the capital requirements of a branch to a point-of-sale terminal creates ridiculous results. If a bank wanted to install 25 to 50 point-of-sale terminals in a retail store, the capital requirement would be $5 to $10 million. Id. at 125. But, in a city with a population in excess of 50,000, the capital requirement for establishing a national banking association is $200,000. 12 U.S.C. § 51 (1982). Branches of national banks are subject to the same capital requirements as national banking associations. 12 U.S.C. § 36(d).


competitive equality between state and national bank branching, but the commercial banking industry as a whole is facing increasing competition from bank-like institutions not covered by the statute. Commercial banks are increasingly becoming part of a broader financial services industry Congress accelerated an already irreversible trend with the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980, which authorized federal savings and loan associations, credit unions and other thrifts to engage in activities previously within the exclusive domain of commercial banks. The thrift industry is now directly competing with banks but is not subject to the constraints of the McFadden Act. As a result, the doctrine of competitive equality is becoming obsolete.

Several nondepository institutions have entered the financial service industry Brokerage firms offer the equivalent of checking accounts but pay market interest rates. Sears, Roebuck & Company is establishing a nationwide network of financial service centers within their department stores. American Express, strengthened by a merger with Shearson, also has an impressive interstate network. Bankers are beginning to view these institu-

111 The law is well settled that competitive equality is the basis for the McFadden Act. See First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 1032 (1966).
113 The bill authorized the savings and loan associations (S & Ls) to begin commercial lending. S & Ls were previously restricted to mortgage lending. S & Ls, credit unions and other thrifts received the express authority to offer checking accounts. Prior to the legislation, commercial banks were the primary holders of demand deposits. Other provisions call for a phased-in decontrol of interest rate ceilings on deposits. Id.
115 President's Report, supra note 50, at 78-79.
116 "And then there are new vehicles like Merrill Lynch's Cash Management Account, which alone has acquired more than 400,000 high-balance accounts, with more than 10,000 new names coming in each week." Osborn, The Tarnished Dream of Interstate Banking, Institutional Investor, Nov. 1981, at 46.
117 Sears plans to operate 100 of its Sears Financial Network centers by the end of this year—600 by the end of 1986." Banker's Forum, ABA Banking J., Aug. 1983, at 1.
118 Id.
American Express even dispenses cash and travelers' checks from ATMs at hundreds of locations throughout the country. These developments are further evidence of the demise of the doctrine of competitive equality.

The "nonbank bank" is another of the recent innovations defying geographic limitations, and the Comptroller's office is at the center of this controversy. A nonbank bank is an institution which accepts deposits but does not make commercial loans. Dimension Financial, headquartered in Denver, is seeking the Comptroller's approval of 31 nonbank charters in 25 states, one of which will be located in Louisville. Dimension plans to offer tax shelters, investment advice and computer based portfolios, as well as nonfinancial services. Indeed, so many nonbank charters were being filed that the Comptroller imposed a moratorium on new applications until January 1, 1984. In the meantime, the

---

119 Id. at 2. The president of a small rural bank in Walton, N.Y. said, "I'm not afraid of the big city banks at all—but Sears has me quite worried." Id. People in rural areas often transact a great deal of business with stores such as Sears, while only infrequently dealing with large city banks. Id.

120 American Express Expands System of Teller Machines, The New York Times, May 19, 1983, at D5, col. 1. The Express Cash system permits American Express card holders to withdraw up to $500 per week from ATMs at 704 banks throughout the country. The company plans to increase the system by 504 machines within the United States and set up a similar program with European banks. In addition to sharing bank ATMs, American Express has its own network of machines to dispense traveler's checks; 77 machines are located in major hotels and airports in 41 cities throughout the United States, Canada and Puerto Rico. Id.


122 The federal bank holding company statute describes a bank as an institution that accepts deposits and makes commercial loans. 12 U.S.C. § 1841(c). The fact that the statute reads "and" instead of "or" has created the so-called "Gulf & Western Loophole", named after the company that apparently first used it. Entrepreneurs Want an Interstate Dimension with Nonbank Banks, supra note 121, at 30.

123 Id.


125 Id. at E3, col. 1.

126 The initial moratorium was scheduled to expire on Jan. 1, 1984, but the Comptroller has announced his intention to extend the ban for an additional three months. Jacobsen, U.S. to Extend Ban on "Non-Bank" Banks, Lexington Herald-Leader, Nov. 13, 1983, at B5, col. 1. This extension is designed to give Congress time to examine the nonbank issue within the context of a comprehensive banking reform measure expected to be introduced in late 1983. Id.
Comptroller's office is conducting regional hearings on the Dimension plan. Approval of the plan will place the Comptroller in the familiar position of defendant in a federal suit challenging his ruling. Given the Comptroller's past record, his acceptance of the plan is likely.

**CONCLUSION**

Even though the Office of the Comptroller has not always been successful in court, the agency has played a highly visible role in the fight to reduce the McFadden Act's restriction on branching. In retrospect, the Comptroller was an effective force in maintaining and increasing the evolutionary trends of commercial branch banking. This trend was only a part of the rapid technological and substantial structural changes enveloping the entire financial services industry. As a result, the pressure to repeal the McFadden Act is reaching unprecedented levels.

Further Congressional acquiescence on this issue could render repeal of the statute moot. The McFadden Act as amended does not.

---

127 Kentucky banking officials were scheduled to testify. Pitts, supra note 124, at col. 3.

128 An Illinois bank and two trade associations have already filed suit in federal district court to block the application. Ringer, *Illinois Trade Groups, Bank Sue to Stop Chicago Dimension Bank*, American Banker, July 6, 1983, at 14, col. 1. "If the application is approved, Dimension with an assist from the Comptroller, will have taken the law into its own hands and bent it beyond recognition." Id. (quoting James Herrington, President of the Independent Bankers Association of America).

129 The Comptroller's aggressive stances on armored car services, loan production offices and electronic banking are evidence of a propensity to support innovative banking techniques.

130 "The federal judicial decisions relating to branch banking made during the 1970's were in large part a rejection of the Comptroller's quest to expand the more traditional interpretation of the McFadden Act." Moffitt & Rigsby, supra note 67, at 438.

131 The Carter Administration issued a comprehensive report calling for liberalization of the existing geographic restrictions on commercial banking. The report recommended unlimited branching for traditional brick-and-mortar facilities within natural market areas such as standard metropolitan statistical areas (SMSAs). The report also advised immediate deployment of EFT terminals within SMSAs, to be followed by nationwide EFT networks. Finally, the study recommended that interstate acquisitions of failing institutions be permitted. See President's Report, supra note 50, at 32-41.

not expressly prohibit interstate branching but ties the branching authority of national banks to state law. Therefore, if one state’s law permits an out-of-state bank to branch within its borders, interstate banking would be a reality in full compliance with the McFadden Act. Several New England states have passed legislation permitting out-of-state banks to branch within their borders as long as reciprocity is provided. Theoretically, the more states which adopt similar language, the less impact the McFadden Act has as a geographic restraint on the branching authority of national banks. Whether the repeal of the McFadden Act comes in whole or in part, the demise of the statute is inevitable. The expansion of branch banking that Representative McFadden so disdained is becoming a reality in spite of his legislative legacy.

David W. Regan

---
