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July 30, 2008

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: OTS-2008-2004

Re: Unfair or Deceptive Acts or Practices; Overdraft Service Practices

Dear Sir or Madam:

I am writing on behalf of Bank Mutual, a federal savings bank. With \$3.6 billion in assets, Bank Mutual is the fourth largest financial institution headquartered in Wisconsin. We operate 77 bank offices throughout the State and one office in Minnesota. In particular, I would like to address that portion of the proposed regulations dealing with overdraft service practices.

While we agree with the comment letters submitted by many in our industry who advise that the proposed regulation is conceptually ill-advised, we also respectfully recommend that, if the OTS nevertheless deems it appropriate to enact these rules, it should expressly state that they preempt all state laws that would purport to allow the private or public enforcement of unfair trade laws insofar as they relate to overdraft fees.

It has been OTS's long-standing position that it occupies the entire field of federal savings associations' deposit-related activities.⁽¹⁾ This includes the specific preemption of any state laws purporting to impose requirements on checking accounts.⁽²⁾ Part and parcel of field preemption is that the OTS also maintains the "exclusive" authority to regulate federal savings associations,⁽³⁾ thus precluding public or private enforcement of deposit-related laws or regulations. The OTS has concluded that these precepts mean that, in the event a federal thrift

violates federal law that is preemptive of state law, an aggrieved consumer's sole avenue to seek and obtain relief is through the OTS consumer complaint process.⁽⁴⁾

Federal preemption has been consistently applied to prohibit state attempts to regulate loan or deposit-related fees including, for example, state restrictions on discount points,⁽⁵⁾ prepayment fees,⁽⁶⁾ loan modification fees,⁽⁷⁾ ATM fees,⁽⁸⁾ or gift card fees.⁽⁹⁾ In the instant case, the proposed regulations really do nothing more than define the circumstances under which federal associations may charge overdraft fees. As such, we do not believe there is any question that the OTS has exclusive authority to regulate federal savings associations in this area. Concomitant with this conclusion is that any public or private causes of action seeking relief against a federal savings association for past or present overdraft service practices – now deemed unfair – would be similarly precluded.

While these conclusions seem clear, we are nevertheless concerned that the proposed regulation, utilizing OTS authority under the Federal Trade Commission Act to redefine current industry-wide practices as unfair, will result in costly litigation. This is for several reasons.

First, virtually every state has enacted a “mini-FTC Act” that allows public and/or private causes of action for unfair or deceptive acts or practices. In Wisconsin, for instance, it is illegal to engage in unfair trade practices.⁽¹⁰⁾ The Department of Agriculture and Consumer Protection may directly issue orders defining certain business practices as unfair.⁽¹¹⁾ Alternately, the Attorney General may file a complaint with the Department alleging that certain persons are engaging in unfair business practices.⁽¹²⁾ Once an order has been issued defining a business practice as unfair, any person aggrieved by a future violation may file a lawsuit and may be awarded double damages, costs, and reasonable attorney's fees.⁽¹³⁾ After the overdraft service practices in question have been defined at the federal level as unfair, one can certainly anticipate similar actions at the state level. It is not unreasonable to think that attorney general enforcement actions or private lawsuits will be attempted to be made against federal savings associations.

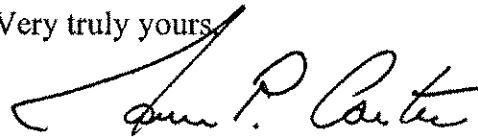
The potential for litigation is heightened due to the fact that it is not entirely clear the extent to which federal law preempts state regulation of unfair and deceptive practices. The OTS does not preempt, for example, contract law, commercial law, tort law, or criminal law.⁽¹⁴⁾ Plaintiffs' counsel will undoubtedly claim that the law of unfair and deceptive trade practices, insofar as it contains elements common to commercial, tort, and criminal law, is not preempted by

federal law and that lawsuits should be permitted to proceed. This is exacerbated by an OTS Chief Counsel Letter which, while distinguishable from the present situation, opined that Indiana's Deceptive Acts and Practices Statute falls within the category of traditional contract and commercial law and was not therefore preempted by federal law.⁽¹⁵⁾

Finally, OTS regulations prescribe that state law is not preempted in those instances where it furthers a vital state interest and is not otherwise contrary to the purposes stated in the Home Owners' Loan Act,⁽¹⁶⁾ that is, the establishment and regulation of federal savings associations giving primary consideration to the best practices of thrift institutions in the United States.⁽¹⁷⁾ In my review of federal law, I note that the vast majority of OTS Chief Counsel Opinions and case law deal with state law that directly conflicts with federal law or unduly interferes with a federal institution's activities. There is a paucity of authority, however, that addresses preemption where state law may, in fact, be consistent with federal law. Accordingly, notwithstanding that one of the purposes of federal preemption is to prevent duplicative regulation,⁽¹⁸⁾ we believe that arguments will still be made that state law governing unfair and deceptive acts in the area of overdraft service practices is not preempted by federal law in that such state law both furthers a vital state interest (i.e., consumer protection), and is not contrary to establishing best practices for thrift institutions (in that it is consistent with federal law).

Although the federal preemption of state law provided by the Home Owners' Loan Act is firmly established, thrifts still contend with efforts by states and other parties to contest such preemption. By establishing a set of regulations under the auspices of unfair and deceptive trade practices, we believe that, absent clarifying language from the OTS, federal thrifts are being set up as targets of a new wave of litigation. We believe it is entirely appropriate for and encourage the OTS to assert its exclusive regulatory authority in this regard.

Very truly yours,

A handwritten signature in cursive script, appearing to read "James P. Carter". The signature is written in dark ink and is positioned above the typed name.

James P. Carter
Vice President
Corporate Counsel

FOOTNOTES

- (1) 12 C.F.R. §557.11(b).
- (2) 12 C.F.R. §557.12(b).
- (3) See §5(a) of HOLA, 12 U.S.C. §1464(a), under which OTS is authorized to “provide for the... examination, operation, and regulation of” federal savings associations. See also OTS Ops. Chief Counsel, March 7, 2006 (“OTS has comprehensive and exclusive authority to enforce laws against federal savings associations and their operating subsidiaries”) and opinions cited therein.
- (4) See OTS Ops. Chief Counsel, March 10, 1999. In ruling that provisions of California’s Unfair Competition Act were preempted, the opinion stated: “that preempting application of the UCA... should have little practical effect on an allegedly aggrieved party’s ability to seek and obtain relief. In instances of perceived “unfair” or “misleading” advertising, an aggrieved party can invoke the OTS’s advertising regulation... and initiate the OTS’s consumer complaint process...”
- (5) OTS Ops. Chief Counsel, August 25, 1997.
- (6) Meyers v. Beverly Hills Federal Savings & Loans Ass’n, 499F.2d 1145 (1974).
- (7) OTS Ops. Chief Counsel, January 1, 2003; OTS Ops. Chief Counsel, January 30, 2003.
- (8) OTS Ops. Chief Counsel, November 22, 1999.
- (9) OTS Ops. Chief Counsel, June 9, 2006.
- (10) Wis. Stat. §100.20(1).
- (11) Wis. Stat. §100.20(2) and (3).
- (12) Wis. Stat §100.20(4).
- (13) Wis. Stat §100.20(5).
- (14) 12 C.F.R. §557.13(a).
- (15) OTS Ops. Chief Counsel, December 24, 1996.
- (16) 12 C.F.R. §557.13(b).
- (17) See §5(a) of the HOLA, 12 U.S.C. §1464(a). See also 12 C.F.R. §557.11(a)(2).
- (18) 12 C.F.R. §557.11(b).