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Wild Card Statutes, Parity, and National Banks - The Renascence of State Banking Powers

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TABLE OF CONTENTS

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I. INTRODUCTION

Over the last 100 years, the United States has developed what is commonly referred to as a "dual banking system."[1] Under this system, a bank is chartered, examined, and regulated as either a national bank, under the National Bank Act,[2] or as a state chartered bank under any one of fifty different state banking laws.[3]

1. *See generally* Edward L. Symons, Jr., *The United States Banking System*, 19 BROOK. J. INT'L L. 1 (1993) (detailing the history of the United States banking industry). For a general history of commercial banking, see BENJAMIN J. KLEBANER, COMMERCIAL BANKING IN THE UNITED STATES: A HISTORY (1974); JAMES J. WHITE, TEACHING MATERIALS ON BANKING LAW 1-34 (1976); *see also* Melanie L. Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 AM. U. L. REV. 633 (1980) (discussing regulation of depository institutions).

2. National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C. (1988 & Supp. V. 1993)) (repealing the National Bank Act of 1863, ch. 58, 12 Stat. 665).

3. *See* Symons, *supra* note 1, at 9. Depository institutions can also be regulated

State chartered banks ("State Banks") have traditionally been an important part of the dual banking system, often leading the way in banking innovations.[4] State banking regulators have also developed new approaches for regulating and examining financial institutions.[5] Finally, State Banks provide state legislatures with a degree of control over their banking systems that the state legislatures do not have over national banking associations chartered by the federal government ("National Banks").[6]

During the last decade, however, State Banks have experienced difficulty in remaining competitive with National Banks. The primary impetus for this lack of competitiveness is the increasingly broad powers granted to National Banks by the Office of the Comptroller of the Currency (the "OCC"), which has allowed National Banks to engage in non-traditional banking activities such as financial derivatives and insurance brokerage.

An obvious solution for State Banks would be to increase their powers to correspond to those enjoyed by National Banks. State legislatures have attempted to speed up that process by passing "wild card" or "parity" statutes. A "wild card" or "parity" statute enables a state banking regulator to grant a State Bank the same banking powers enjoyed by a National Bank. These statutes provide an efficient, fast, and flexible tool for state banking regulators to expand state banking powers to match those granted to National Banks.[7] A number of obstacles, however, have prevented state legislatures and banking regulators from taking full advantage of wild card statutes, including: (1) safety and soundness considerations; (2) bureaucratic inertia; and (3) limitations potentially imposed by state laws.

This Article proposes that judicious use of "wild card" statutes would provide state banking regulators with the powers necessary to enable their State Banks to compete on an equal footing with National Banks without endangering the institutions' safety and soundness.

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under other federal regulations. *See generally* Fein, *supra* note 1 (discussing the regulation of banks, savings and loans, credit unions, and other depository institutions).

4. *See infra* part III.A.

5. *See infra* part III.A.

6. *See infra* part III.A.

7. State laws utilizing federal laws as a standard for state action are not unknown in other areas. The most prominent example is a state's "long arm" statute. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973) (providing that a court "may exercise jurisdiction on any basis not inconsistent with the Constitution . . . of the United States"). Other examples include state securities "Blue Sky" laws and state income tax codes.

This Article initially discusses the dual banking system in the United States and the pressures to expand state banking powers.[8] This Article then describes wild card statutes and their current use by state banking regulators, focusing on the more fruitful areas of wild card application.[9] It then scrutinizes some potential difficulties in their application, and proposes a model wild card statute.[10] Finally, this Article concludes that State Banks can remain competitive with National Banks.[11]

To ensure this outcome, however, State Banks must urge their banking regulators to utilize the powers provided by their respective wild card statutes. Additionally, State Banks must encourage state legislatures to clarify the activities authorized thereunder.

II. THE DUAL BANKING SYSTEM AND BANKING POWERS

A. Generally

The dual banking system in the United States is a complex historical outgrowth of state and federal regulations governing commercial banks.[12] The result is a system in which two commercial banks can service the same customers, be the same size and be located in the same city, and yet be authorized to exercise different banking powers.

As of the end of 1993, approximately 11,300 commercial banks held approximately $3.9 trillion in assets and $3.0 trillion in deposits.[13] Roughly 8,000 of these commercial banks were State Banks, holding $1.8 trillion of the assets and $1.4 trillion of the deposits.[14] The remaining 3,300 commercial banks were National Banks holding $2.1 trillion in assets and $1.6 trillion in deposits.[15]

The end result of the dual banking system is a non-uniform system in which commercial banks may enjoy different banking powers

8. *See infra* parts II and III.

9. *See infra* parts IV and V.

10. *See infra* parts VI and VII.

11. *See infra* part VIII.

12. Unless otherwise indicated, "commercial bank(s)" includes both commercial banks and savings banks, but excludes savings and loan institutions, investment banks, and other depository or nondepository institutions. A discussion of the effect of wild card statutes on these other non-bank financial institutions is beyond the scope of this Article.

13. *See* CONFERENCE OF STATE BANK SUPERVISORS, THE STATE OF THE STATE BANKING SYSTEM 7-8 & figs. 1-3 (1994).

14. *See id.*

15. *See id.*

depending upon whether they are state or federally chartered.[16] Compounding this complexity is the fact that both federal and state commercial banks are subject to a patchwork of laws and regulations.[17]

B. National Banking Powers

National Banks have existed in one form or another since the founding of the United States.[18] National Banks did not become a fixture of the American banking system, however, until Congress provided for the chartering of National Banks under the National Bank Act of 1864.[19] Although subject to significant revision and amendment since that time, the National Bank Act continues to govern National Banks.[20]

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16. *See* ROBERT E. LITAN, WHAT SHOULD BANKS DO? (1987); *see also* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 20 (1977) ("[I]t should be evident that the existence of 51 lawmaking bodies in addition to the federal government has created great diversity among the powers conferred on banks and the restrictions imposed on them.").

17. Commentators continue to lament the state of the United States' regulation of financial institutions:

> Nevertheless, we continue the vestigial debates about such parochial matters as the dual banking system, branching, interstate banking, and section 4(c)(8) bank holding company powers and restrictions. These and other topics still dominate the financial and depository scene here in the United States, bearing little or no relationship to the realities of the financial world at large.

Paul Nelson, *Banking Regulation in the Nineties: Fighting Tomorrow's Battles with Yesterday's Tools*, 9 ANN. REV. BANKING L. 369, 370 (1990) (footnote omitted).

18. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 720-25 (1957). The federal government chartered two National Banks between 1791 and 1816, although both charters were eventually repealed. *See* Symons, *supra* note 1, at 6-7. For a discussion of the history of the First and Second Bank of the United States, see HAMMOND, *supra*, and Symons, *supra* note 1, at 6-7. The nation's first bank was actually the Bank of North America, chartered by the Confederation Congress in 1781. *See* HAMMOND, *supra*, at 48-51. The Bank of North America subsequently obtained a state charter from Pennsylvania in 1782. *Id.*

19. National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C. (1988 & Supp. V 1993)) (repealing the National Bank Act of 1863, ch. 58, 12 Stat. 665). Congress appears to have modeled the National Bank Act on various state bank chartering laws, particularly the New York Free Banking Act of 1838. *See* Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 689-90 (1983).

20. In certain matters, however, Congress and the courts have defaulted to state law. *See, e.g.*, 12 U.S.C. §§ 92a(f), (i) (1988) (mandating that trust department operations must not contravene state law); *id.* § 36(c) (branching); First Nat'l Bank v. Missouri, 263 U.S. 640, 656 (1924) (explaining that state law governs National Banks to the extent that it does not conflict with federal statutes, discriminate against National Banks, or unduly burden their operation).

National Banks are regulated by the OCC, an office within the United States Treasury Department.[21] The OCC is specifically empowered to charter National Banks,[22] examine them,[23] and promulgate regulations governing them.[24] Courts have been reluctant to disturb OCC decisions because of the broad delegation of authority granted to the OCC by Congress in the National Bank Act.[25]

Section 24 of the National Bank Act enumerates the powers granted to National Banks to conduct a banking business, including the power to engage in activities incidental to the business of banking.[26] A National Bank must obtain the express consent of the OCC before it may engage in activities not expressly provided for in either statute or regulation.[27] Most of the growth in the powers of National Banks has been based upon the incidental banking power provided by the National Bank Act.[28] Congress, in contrast, has expressly granted few

21. 12 U.S.C. §§ 21, 24 (Seventh) (1988 & Supp. V 1993), *as amended by* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2226-27, 2241.

22. *Id.* § 27 (1988), *as amended by* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2227.

23. *Id.* §§ 26, 481 (1988 & Supp. V 1993). The OCC is expressly precluded from examining state member banks, regardless of any affiliation with a National Bank. *See id.* § 481.

24. *Id.* § 93a (1988).

25. *See* Michael P. Malloy, *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 TEMP. L. REV. 723, 733-36, 771-77 (1988); *see also* First Nat'l Bank v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980) (recognizing the Comptroller's wide discretion); Investment Co. Inst. v. Conover, 790 F.2d 925, 935 (D.C. Cir.) (recognizing that the OCC has primary responsibility for interpreting the statute), *cert. denied*, 479 U.S. 939 (1986).

26. Section 24 provides as follows:

> [A] national banking association . . . shall have power . . . to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock; *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

12 U.S.C. § 24 (Seventh).

27. *Id.*; *see id.* § 92a (1988).

28. Judicial and administrative rulings have identified 80 specific activities that are

new powers.[29]

C. *State Banking Powers*

States also have authorized the chartering of banks since the founding of the United States.[30] Each of the fifty states, the District of Columbia, and Puerto Rico, has its own particular banking act providing for the authorization, chartering, regulation, and examination of its State Banks.[31] Because of this disparity, "[v]olumes could be written about the lack of uniformity among the [state banking] laws of the fifty states."[32]

State banking statutes typically grant State Banks the power to engage in general banking business and to engage in activities generally related or incidental to the banking business.[33] As is the case with National Banks, State Banks generally are not permitted to engage in an activity that is not specifically enumerated.[34] The Illinois Supreme Court provided a typical formulation of this rule when it stated:

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considered to be within the parameters of the "banking business" or incidental powers. 1 HARVEY L. PITT ET AL., THE LAW OF FINANCIAL SERVICES 16-22.9 (Supp. 1994).

29. For a history of proposed but unpassed federal bank laws since the 1980s, see Emeric Fischer, *Banking and Insurance—Should Ever the Twain Meet?*, 71 NEB. L. REV. 726 (1992).

30. As one commentator explains:

> Until 1837 bank charters were issued only by special legislative acts. . . . The State of New York passed the Free Banking Act in 1838 which allowed anyone to obtain a charter so long as the applicant complied with minimum capital requirements and submitted to supervision and control. By 1860 eighteen states adopted free banking.

Fischer, *supra* note 29, at 733-34 (footnotes omitted).

31. For a comprehensive survey of state banking laws and regulation, see CONFERENCE OF STATE BANK SUPERVISORS, A PROFILE OF STATE CHARTERED BANKING (15th ed. 1994) [hereinafter PROFILE].

32. Howard H. Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 580 (1966) [hereinafter Hackley Part I]; *see* Howard H. Hackley, *Our Baffling Banking System Part II*, 52 VA. L. REV. 771 (1966). *See also* Scott, *supra* note 16, at 20 ("Banking has seen none of the standardization associated with, for example, the Uniform Commercial Code.").

33. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 205, §§ 5/3, 5/5 (West 1993 & Supp. 1994).

34. *See* Symons, *supra* note 1, at 24 ("If an activity is not within the business of banking, it must be expressly granted by statute to be a bank power."). *See generally* Security Trust & Sav. Bank v. Marion County Banking Co., 253 So. 2d 17 (Ala. 1971) (stating that a bank has no right to operate branch banks without statutory authorization); Independent Ins. Agents v. Department of Banking & Fin., 285 S.E.2d 535 (Ga. 1982) (holding that banks cannot operate insurance agencies under a statutory grant of "incidental powers"); Iowa Credit Union League v. Iowa Dep't of Banking, 268 N.W.2d 165 (Iowa 1978) (finding that credit unions cannot engage in the share-draft business without express statutory authorization).

> "The rule long recognized and frequently announced by this court is, that a bank . . . has only such powers as are expressly conferred by the statute under which it is organized and such powers as are necessarily implied from the specific grant of power. Every power that is not clearly granted is withheld. Enumeration of powers granted implies exclusion of all others, and any ambiguity in the terms of the grant of power must operate against the corporation and in favor of the public. If a power claimed is withheld, the withholding of such power is to be regarded as a prohibition against its exercise."[35]

Because a State Bank may not engage in an activity unless such an activity is expressly approved by statute, State Banks must obtain express or implicit legislative approval prior to engaging in new activities.

Although Congress generally permits each of the states to regulate its own State Banks, it has preempted state laws in several respects.[36] Some examples of federal preemption include the power to regulate usury rates;[37] the power to extend credit to executive officers, directors, and "principal persons;"[38] and the imposition of uniform standards with respect to electronic fund transfers.[39] One of the most important state law preemptions provides that State Banks insured by the Federal Deposit Insurance Corporation (the "FDIC") may not engage in activities not otherwise permitted a National Bank.[40]

D. Other Federal Regulators

Although the OCC and state banking regulators are typically the primary regulators for commercial banks, both the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") and the FDIC also have regulatory authority over many commercial banks.

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35. State Bank v. Benzing, 48 N.E.2d 333, 339 (Ill. 1943) (quoting Knass v. Madison & Kedzie State Bank, 188 N.E. 836, 840 (Ill. 1933)).

36. This preemption doctrine originated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (finding that Maryland could not condition the circulation of notes in Maryland by the Second National Bank on the payment of a stamp tax or annual fee).

37. *See* 12 U.S.C. § 86 (1988) (preempting usury laws for state institutions for certain periods of time).

38. *Id.* § 375b (Supp. V 1993), *as amended by* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2233; *id.* § 1828(j)(2) (1988 & Supp. V 1993).

39. 15 U.S.C. §§ 1643a-1693r (1988 & Supp. V 1993).

40. *See infra* notes 54-60 and accompanying text.

1. The Federal Reserve Board

Under the Federal Reserve Act,[41] Congress empowered the Federal Reserve Board to manage the nation's money supply and to supervise State Banks which are members of the federal reserve system ("State Member Banks"),[42] National Banks, and bank holding companies.[43] State Member Banks are subject to examination by both federal and state bank examiners.[44]

State Member Bank status generally does not diminish a bank's available banking powers under state law.[45] As a condition of membership in the Federal Reserve System, however, the Federal Reserve Board may prevent a State Bank from later changing the general character of its business or the scope of its powers without first obtaining approval from the Federal Reserve Board.[46]

2. The FDIC

The FDIC exercises residual supervisory authority over National Banks and State Member Banks.[47] The FDIC also directs supervisory

41. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C. (1988 & Supp. V. 1993)).

42. 12 U.S.C. § 321 (1988); *see also id.* § 248 (1988 & Supp. V 1993). For a discussion of the Federal Reserve System, see CARTER GOLEMBE & DAVID S. HOLLAND, FEDERAL REGULATION OF BANKING, 1986-87, at 8, 27-31 (1986); WHITE, *supra* note 1, at 45-65; Alfred C. Aman, Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837, 841-51 (1989). The Federal Reserve Board is also authorized to establish reserve requirements for all federally-chartered or federally-insured depository institutions. *See* 12 U.S.C. § 461 (1988 & Supp. V 1993).

43. The Federal Reserve regulates bank holding companies pursuant to the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50 (1988 & Supp. V 1993). *See generally* F. SOLOMON ET AL., BANKING LAW §§ 86-88 (1995) (discussing the Bank Holding Company Act). The Federal Reserve Board also permits bank holding companies to exercise powers that are closely related to the business of banking. *See* 12 U.S.C. § 1843(c)(8) (1988). A discussion of the activities and powers authorized for bank holding companies is beyond the scope of this Article.

44. 12 U.S.C. § 483 (1988 & Supp. V 1993).

45. *Id.* § 330 (Supp. V 1993) ("[A]ny bank becoming a member of the Federal reserve system shall retain its full charter and statutory rights as a State bank . . . and may continue to exercise all corporate powers granted it by the State in which it was created."). The Federal Reserve's banking regulations can be found in 12 C.F.R. §§ 200-299 (1994).

46. *See* 12 C.F.R. § 208.7(a)(1) (1994). For a comprehensive discussion of the Federal Reserve Board's power to regulate State Banks, see Keith R. Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 23 U.S.F. L. REV. 317 (1989) and Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1191 (1990).

47. 12 U.S.C. § 1811 (Supp. V 1993). State Member Banks are required to maintain

authority over State Banks which elect to obtain federal deposit insurance, even if they are not members of the Federal Reserve System ("State Nonmember Banks").[48] The FDIC has claimed the authority to regulate the scope of powers that a State Nonmember Bank may exercise under Section 6 of the Federal Deposit Insurance Act.[49] Section 6 requires the FDIC to determine, before approving deposit insurance, "whether or not [the applying bank's] corporate powers are consistent with the purpose of [the FDIC Act]."[50]

The FDIC is also able to exercise regulatory authority over State Banks for which it insures deposits ("Insured State Banks") by virtue of its power to terminate deposit insurance.[51] Justifications for the FDIC terminating deposit insurance include: (1) determining that an Insured State Bank has engaged in unsafe or unsound practices[52] or (2) preventing an Insured State Bank from changing the general character of its business without FDIC approval.[53]

The passage of Section 303 of the FDIC Improvement Act of 1991[54] drastically increased the importance of FDIC regulation with respect to state banking powers.[55] Section 303 generally limits the activities and equity investments of Insured State Banks to those activities and equity investments that are permissible for National Banks.[56] Section 303, however, also provides the FDIC with the authority to permit State Banks to engage in certain banking activities not authorized for National Banks upon a showing that "the activity would pose no significant risk to the appropriate deposit insurance fund" and that the

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deposit insurance. *Id.* § 1814 (Supp. V 1993).

48. *See id.* § 1815 (1988 & Supp. V 1993). There are currently more than 12,000 FDIC-insured banks in the United States. FDIC, 1990 ANNUAL REPORT 16 (1991).

49. *See* FDIC, Powers Inconsistent with Purposes of Federal Deposit Insurance Law, 50 Fed. Reg. 23,964, 23,967-68 (1985) (to be codified at 12 C.F.R. pt. 332) (proposed June 7, 1985); *see also* Wilmarth, *supra* note 46, at 1195-1200 (discussing FDIC regulatory powers regarding expanded banking powers).

50. 12 U.S.C. § 1816 (Supp. V 1993).

51. *See id.* § 1818 (1988 & Supp. V 1993).

52. *Id.* § 1818(a) (Supp. V 1993).

53. 12 C.F.R. § 333.2 (1994).

54. FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 303, 105 Stat. 2349 (codified at 12 U.S.C. § 1831a (Supp. V 1993)) [hereinafter FDICIA].

55. FDICIA, *supra* note 54, § 303. Two commentators have suggested that this section may be the beginning of the end of the dual banking system. Kirk K. Van Tine & Robert G. Boggess II, *"Financial Services Modernization:" A Cure for Problem Banks?*, 69 WASH. U. L.Q. 809, 827 (1991).

56. FDICIA, *supra* note 54, § 303. For a summary of this section, see M. L. FEIN, *FDICIA Imposes New Limits on State Banks*, *in* THE FDIC IMPROVEMENT ACT OF 1991: WHAT BANKS AND THRIFTS NEED TO KNOW NOW, at 59-67 (PLI Com. Law & Practice Course Handbook Series No. A4-4375, 1992).

State Bank is in compliance with applicable capital standards.[57]

The FDIC has issued regulations that provide guidance as to what constitutes a permissible activity or equity investment by a National Bank for purposes of Section 303,[58] identifying approximately 30 permissible equity investments and 250 permissible activities.[59] In addition, in at least one instance, the OCC has issued an interpretive ruling to a State Bank for the purposes of Section 303, to confirm that a particular activity was permissible for a National Bank.[60]

The development of the dual banking system has created a banking regulatory scheme that is not only complex, but is also non-uniform between National and State Banks. This complexity and non-uniformity is only increased by the overlay of Federal Reserve Board and FDIC regulation. Because of this, National and State Banks are often unable to compete fully on an even basis, even though they may be located in the same city.

III. PRESSURES TO EXPAND STATE BANKING POWERS

A variety of economic and political forces are currently pressuring state legislatures and banking regulators to expand state banking powers. The expansion of national banking powers and interstate banking, coupled with the incentive for states to attract and to retain banking institutions, provides states with further inducement to look to such tools as wild card statutes to ensure parity between their State Banks and National Banks.

57. FDICIA, *supra* note 54, § 303. This section also provides certain limited exceptions from this rule, regarding insurance underwriting and equity investments. *See* 12 U.S.C. §§ 1831a(b), (c) (Supp. V 1993).

58. 12 C.F.R. § 362 (1994). For a summary of this regulation see *State Bank Powers: FDIC Sets Boundaries for Controlling State Bank Investment Powers*, 12 Banking Pol'y Rep. (P-H) No. 24, at 7 (Dec. 20, 1993).

59. FDIC, EQUITY INVESTMENTS PERMISSIBLE FOR NATIONAL BANKS AND ACTIVITIES PERMISSIBLE FOR NATIONAL BANKS AND THEIR SUBSIDIARIES (1993) [hereinafter FDIC]. For a summary of the more important National Bank powers listed by the FDIC, see *National Bank Powers: Activities Permissible for National Banks*, 12 Banking Pol'y Rep. (P-H) No. 16, at 10 (Aug. 16, 1993).

60. *See* Letter from William P. Bowden, Jr., Chief Counsel, OCC, to J.P. Morgan & Co. Inc. (June 30, 1993) (on file with the author) (stating that National Banks may engage in physical commodity transactions). It is unclear whether the OCC will issue additional interpretations for purposes of this section.

A. The Role of State Banks

Although commentators have repeatedly questioned the value of the dual banking system,[61] State Banks have historically proven to be an important source of innovation and development for the banking industry. State Banks also provide state legislatures with a degree of control over their banking systems that they do not enjoy with National Banks. Finally, a state banking charter provides commercial banks with an alternative regulator to the OCC.

State Banks have historically developed important new services and innovations in the banking industry in the areas of checking, real estate lending, branch banking, reserve requirements, and a variety of other areas.[62] Although state legislatures generally cannot grant banking powers greater than those enjoyed by National Banks,[63] legislatures and regulators are still able to develop new approaches to the regulation and the examination of their State Banks.

Another important rationale for the existence of State Banks is the opportunity it provides states to regulate their own financial institutions. Due to the importance of credit and banking for a state's communities,[64] states have a vested interest in determining how their financial institutions are examined and regulated. Although a state may not examine or regulate a National Bank,[65] State Banks provide an opportunity for a state to encourage and to control the development of banking.

Finally, State Banks provide commercial banks with an alternative regulator to the OCC. Because a regulator has a tremendous influence over the operation and business of a commercial bank, the choice between two banking regulators provides an important check and balance on arbitrary or capricious regulation by the OCC.[66]

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61. *E.g.*, Jonathan R. Macey & Geoffrey P. Miller, *America's Banking System: The Origins and Future of the Current Crisis*, 69 WASH. U. L.Q. 769 (1991) (critiquing dual banking system). Regardless of one's opinion regarding dual banking, there appears to be little possibility for significant change. *See* Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 BROOK. L. REV. 1, 1-2 (1987) ("Politicians may complain . . ., but questioning the underlying premise of the dual banking system has traditionally been outside the borders of permissible political discourse.").

62. Wilmarth, *supra* note 46, at 1156.

63. See *supra* notes 54-60 and accompanying text.

64. State banks hold approximately $1.4 trillion in deposits, underscoring their importance to business communities. *See supra* notes 13-14 and accompanying text.

65. National Banks are examined by the OCC. *See supra* notes 21-24 and accompanying text.

66. Scott, *supra* note 16, at 12; Wilmarth, *supra* note 46, at 1155.

B. Expanding National Banking Powers

Although the banking industry remains highly regulated, the recent trend from the federal government since the early 1960s[67] has been to deregulate National Banks by expanding their banking powers.[68] As state banking regulators confront this trend, they are faced with the possibility that the National Banks operating within their states may enjoy significantly greater banking powers than those enjoyed by their State Banks.

Beginning in the early 1960s, during James J. Saxon's tenure as Comptroller of the Currency, the OCC began to permit National Banks to engage in a growing host of banking activities that were previously considered impermissible. In 1963, Saxon stated that "[t]here is little disagreement with the view that commercial banks require greater latitude in operations if they are to meet current and future needs for banking services."[69] From 1961 to 1966, the OCC authorized a substantial list of national banking powers: "[N]ational Banks . . . [were authorized] . . . to establish and operate collective investment funds, underwrite revenue bonds, operate insurance and travel agencies, establish operations subsidiaries, open loan production offices without regard to state branching laws, and offer personal property leasing and data processing services."[70] Although many of these earlier authorizations were later reversed,[71] the OCC has continued to expand national banking powers. At least one Comptroller following Saxon

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67. Three influential articles from the 1960s argued for expanding national bank powers based upon the incidental banking powers. *See* Richard S. Beatty, *What are the Legal Limits to the Expansion of National Bank Services?*, 86 BANKING L.J. 3 (1969); H. Harfield, *Sermon on* Genesis *17:20;* Exodus *1:10 (A proposal for testing the propriety of expanding bank services)*, 85 BANKING L.J. 565 (1968); Ralph F. Huck, *What is the Banking Business?*, 21 BUS. LAW. 537 (1966).

68. As one commentator explained:

> [T]he trend in Congress and the federal bank agencies has been to emphasize bank deregulation as a means of promoting a fair and efficient allocation of capital resources. Deregulation encompasses two objectives, the elimination of interest ceilings on deposit accounts and the expansion of bank powers to enhance service competition.

Jeffrey D. Dunn, Comment, *Expansion of National Bank Powers: Regulatory and Judicial Precedent Under the National Bank Act, Glass-Steagall Act, and Bank Holding Company Act*, 36 SW. L.J. 765, 767 (1982). However, Congress has been almost absent in any express expansion of national banking powers. *See* Wilmarth, *supra* note 46, at 1171-77.

69. James J. Saxon, *Bank Expansion and Economic Growth: A New Perspective*, 8 ANTITRUST BULL. 597, 599 (July-Aug. 1963). *But see* Hackley Part I, *supra* note 32, at 597-632 (discussing the Federal Reserve Board's opposition to such expansion).

70. *See* Wilmarth, *supra* note 46, at 1157-58.

71. *Id.* at 1158 (listing collective investment funds, insurance and travel agencies, and underwriting revenue bonds).

has suggested that the only restraint on national banking powers should be whether or not there is a potential risk to the solvency of the bank.[72]

A review of the significant activities and powers expressly granted by the OCC to National Banks during the last decade alone illustrates the continued expansion of national banking powers. The OCC now permits National Banks to trade and to deal in financial derivatives[73] and to sell various types of insurance products,[74] annuities,[75] and mutual funds.[76] The OCC also permits National Banks to offer various non-banking services,[77] to operate common trust funds,[78] and to permit other businesses to operate on their premises.[79]

Although state banking powers have expanded in certain areas,[80] State Banks remain at a disadvantage to National Banks.[81] To reach all State Banks, fifty different legislatures or regulatory agencies must act,

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72. Beatty, *supra* note 67, at 24 (referring to William Camp, successor to Saxon as Comptroller of the Currency).

73. *See infra* part V.A.

74. *See infra* notes 182-91 and accompanying text.

75. *See infra* notes 192-96 and accompanying text.

76. *See* National Bank Sale of Units in Unit Investment Trust Under Glass-Steagall Act, OCC Interpretive Letter No. 363, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,533, at 77,828 (May 23, 1986).

77. *See* Expansion of Current Messenger Operations, OCC No Objection Letter No. 89-04, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,061, at 71,171 (July 11, 1989); Establishment of Operating Subsidiary Offering Real Estate Appraisal Services for Bank, OCC Interpretive Letter No. 467, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691, at 78,086 (Jan. 24, 1989); National Banks Selling Tax Auditing Representation Services to Customers, OCC Interpretive Letter No. 437, [1988-1989 Transfer Binder] Fed. Banking. L. Rep. (CCH) ¶ 85,661, at 78,042 (July 27, 1988); National Banks Acting as Finders Introducing Potential Buyers of Real Estate to Sellers, OCC Interpretive Letter, 1987 WL 149774 (Aug. 20, 1987).

78. *See* Operation of Common Trust Funds, OCC Investment Securities Letter No. 52, [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,325, at 71,453 (July 26, 1991).

79. *See* Conduct of Securities Brokerage Business by Unaffiliated Tenants on Bank Premises, OCC Interpretive Letter No. 533, [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,244, at 71,324 (Oct. 5, 1990); Leasing Lobby Space by National Bank Subsidiary to Travel Agencies, OCC Interpretive Letter No. 399, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,623, at 77,958 (Oct. 29, 1987).

80. For a discussion of innovations developed by State Banks, see Wilmarth, *supra* note 46, at 1177-81. Approximately 41 states permit, to some degree, their State Banks, either directly or through a subsidiary, to engage in securities brokerage; 17 permit general securities underwriting; 30 permit insurance brokerage; 6 states permit some insurance underwriting; 27 permit real estate development; 26 permit real estate equity participation; and 17 permit real estate brokerage. *See* PROFILE, *supra* note 31, at 275-76.

81. State Banks, however, may be permitted to engage in certain activities that are not permissible for National Banks. *See supra* notes 54-60 and accompanying text.

as opposed to only one—the OCC—for National Banks. Laws or rules passed or adopted by the various states are often non-uniform,[82] and even if the same or similar language is used, it may still be subject to varying interpretations. One commentator has noted that "allowing bank powers to expand only on a state-by-state basis will result in non-uniformity and legal uncertainty."[83]

C. Political Pressures

Differences between state and national banking powers place political pressures on state banking regulators to expand state banking powers.[84] Even the current Comptroller of the Currency has acknowledged these realities, noting that "[t]he decision on what kind of charter a bank wants is purely a business decision, and banks are free to choose whichever regulator they think will give them the best deal for whatever reason."[85] State Banks often request permission from their banking regulators to exercise the same banking powers as those enjoyed by National Banks.[86] Banking regulators may become concerned that a failure to grant State Bank requests might lead a State Bank to convert to a National Bank charter.[87] The conversion of even one major bank can alter the dynamics of a state banking department.[88]

State bank regulators also strive to ensure that their State Banks remain competitive as a means of persuading National Banks to convert to a state charter.[89] The conversion of a National Bank to a State

82. *See supra* notes 31-32 and accompanying text.

83. Paul Tannenbaum, Note, *Banking Reform and State Law Preemption*, 63 U. COLO. L. REV. 811, 837 (1992).

84. *See* Scott, *supra* note 16, at 36 (generally discussing competition among banking agencies and its effect on the dual banking system); Symons, *supra* note 1, at 23 ("At various times one regulator has displayed a greater willingness to change, with the result being that the different approach of another regulator has turned out to be valuable and subsequently adopted by other bank agencies."). *But see* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 706 (1988) (arguing "against the notion that there is effective competition among regulators.").

85. Steven Lipin, *Continental Bank Is Seeking to Change to State Regulator*, WALL ST. J., Nov. 22, 1993, at B6B (quoting Eugene Ludwig, current Comptroller of the Currency).

86. Almost all wild card statutes require State Banks to obtain permission from the regulator to engage in wild card activity. *See infra* note 108 and accompanying text.

87. One commentator suggested this was one of the primary motivations for passing wild card statutes. *See* Scott, *supra* note 16, at 36.

88. The conversion of Wells Fargo Bank from a California State Bank to a National Bank reduced the California State Banking Department revenues by 30%. *See id.* at 31. Chase Manhattan Bank's conversion to a National Bank in 1965 created similar pressures. *Id.*

89. *See* Dean Calbreath, *Vexed by Regulators, Bank Will Switch to State Charter*, SAN

Bank could result in added prestige, funding, and staff for a state banking authority.[90]

Thus, historical evidence suggests that ignoring such political pressures could prove problematic for a state banking system. During James Saxon's brief tenure as Comptroller, a strong conversion trend in favor of National Banks clearly emerged, forcing state banking regulators and legislatures to adapt.[91]

D. Legislative Inertia

State banking regulators also face difficulties in convincing legislators to pass legislation on a timely basis in order to maintain parity of state banking powers with expanding national banking powers.[92] Legislators may not meet frequently enough, and the number of changes that would be necessary to equalize the treatment may be too much to legislate on a timely basis. Although legislatures may eventually respond to a need to expand a particular banking power, their response may occur months or even years after National Banks began to exercise that power.

FRANCISCO BUS. TIMES, Sept. 24, 1993, at 6; Steve Klinkerman, *Continental Files to Do U.S.-State Charter Flip*, AM. BANKER, Nov. 22, 1993, at 1 (stating that Continental Bank estimates it would save over one million dollars annually in examination fees by converting to a state charter); P. Thomas Parrish, *Five Reasons to Get a State Charter*, AM. BANKER, Nov. 24, 1992, at 4.

Continental Bank, Marine Midland, and Key Bank have recently converted from national to state banking charters. *See* Lipin, *supra* note 85, at B6B (discussing Continental Bank and Marine Midland conversions); *cf.* R. Meredith, *Wells Planned Switch to a Thrift Charter: Dropped Idea When Regulators Balked*, AM. BANKER, Oct. 29, 1993, at 1 (relating that Wells Fargo, a National Bank, has even considered switching to a Thrift Charter). Some suggest that the recent conversion of Continental and Marine Midland to state charters "'may represent the start of a trend in which large institutions seek greater comfort with state banking regulators.'" *See* Klinkerman, *supra*, at 1 (quoting Thomas Brooks, a partner at Vedder, Price, Kaufman & Kammholz).

90. State Banks typically pay for the examination costs of their state banking regulator. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 205, § 5/48(3) (West Supp. 1994) (providing a fee schedule).

91. *See* Scott, *supra* note 16, at 23-30.

92. Commentators have suggested that this legislative inertia has been one of the primary motivations behind the passage of wild card statutes. *See* SOLOMON ET AL., *supra* note 43, at 4-23; Butler & Macey, *supra* note 84, at 705-06 ("State legislatures . . . have apparently enacted these statutes to provide themselves with a means of responding to changes in national bank powers that may occur while the legislature is not in session."); Scott, *supra* note 16, at 36 (stating that wild card statutes eliminate the "vicissitudes and costs of the legislative process").

E. Interstate Banking

The continual expansion of interstate banking adds pressure on state banking regulators to expand state banking powers. Thirty-eight states currently permit nationwide interstate banking,[93] with five states approving interstate branching.[94] On the federal level, interstate banking may already be a reality,[95] even without considering interstate banking legislation recently passed by Congress.[96]

Empirical studies suggest that interstate banking and branching will bring about greater competition and consolidation in the banking industry,[97] although small institutions will continue to compete effectively.[98] State regulators, however, will be under continuing pressure to authorize banking powers similar to those enjoyed by National Banks and by State Banks chartered in other states which enter their markets as a result of interstate banking. As large holding companies and National Banks cross state lines, State Banks will face competition capable of exercising national banking powers.[99]

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93. *See* CONFERENCE OF STATE BANK SUPERVISORS, *supra* note 13, at 16-17.

94. *Id.* Interstate banking generally refers to a bank holding company chartering more than one bank in different states. Interstate branching refers to a bank setting up a branch in another state. *See* David F. Freeman, *Interstate Banking Restrictions Under the McFadden Act*, 72 VA. L. REV. 1119, 1119 (1986) (discussing branching); Helen R. Friedli, *Changing Times in Interstate Banking*, 1986 COLUM. BUS. L. REV. 97 (1986) (discussing interstate banking).

95. Robert G. Ballen & Joseph P. Savage, *Interstate Bank Branching: Are the Walls Starting to Crumble?*, 111 BANKING L.J. 149 (1994) (summarizing direct and indirect branch banking by National Banks); *see also* First Fidelity Bank, N.A., Philadelphia, Pa. & First Fidelity Bank, N.A., Newark, N.J., OCC Corporate Decision No. 94-04, [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,967 (Jan. 10, 1994) (approving merger resulting in branches in two adjacent states); American Sec. Bank, N.A., Washington, D.C. & Maryland Nat'l Bank, Baltimore, Md., OCC Corporate Decision No. 94-05, [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695, at 84,266 (Feb. 4, 1994) (same).

96. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101(a), 108 Stat. 2338 (to be codified in scattered sections of 12 U.S.C.).

97. *See* Jeffrey D. Ayers & Gary L. Jones, Empirical Research Project, *Regional Banking—A Viable Alternative? An Empirical Study*, 9 J. CORP. L. 815, 834-35 (1984); Donald R. Fraser, *Structural and Competitive Implications of Interstate Banking*, 9 J. CORP. L. 643, 649-53 (1984) (summarizing studies discussing consolidation of interstate banking industry).

98. *See* Ayers & Jones, *supra* note 97, at 838-40 (citing evidence from other states where well-managed small institutions continue to compete effectively despite branch banking, and arguing that small institutions' "established position in the community gives them a decided competitive advantage over possible new entrants").

99. For example, BankAmerica Corporation, a bank holding company with a net worth of approximately $200 billion, currently controls National Banks in Alaska, Idaho, New Mexico, Texas, Washington, and California. BANKAMERICA CORP., 1992 ANNUAL REPORT 71 (1993). Drawing on resources from the holding company, each of

IV. WILD CARD STATUTES

Wild card statutes present a potential solution to many of the pressures and the problems facing state banking regulators and legislators. Such statutes have the potential to enable State Banks to enter into derivatives, insurance, and other banking powers currently enjoyed primarily by National Banks.[100] Surprisingly, although many state legislatures have passed wild card statutes, regulators generally have failed to take advantage of these statutes.

A. Generally

States first began to pass a significant number of wild card statutes in the 1960s,[101] in response to Comptroller of the Currency James Saxon's efforts to expand national banking powers.[102] Alaska, for example, adopted the current formulation of its wild card statute in order "to provide the [Alaska department of banking] with the flexibility necessary to allow the state banking system to keep pace with new developments in the federal system."[103]

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these National Bank subsidiaries is potentially capable of exercising any or all of the national banking powers exercised by the others. For a list of the potential activities permitted a National Bank, see FDIC, *supra* note 59.

100. *See supra* notes 73-79 and accompanying text for the broad powers expressly granted to National Banks by the OCC.

101. 1961 Ill. Laws 2361 (codified as amended at ILL. COMP. STAT. ANN. ch. 205, § 5/5 (West Supp. 1994)); 1967 Kan. Sess. Laws ch. 74, § 1 (codified as amended at KAN. STAT. ANN. § 9-1715 (1988)); 1969 Minn. Laws 1129, art. 4, § 9 (codified as amended at MINN. STAT. § 48.15(2) (Supp. 1993)); 1967 Mo. Laws, S.B. 1, § A (codified as amended at MO. ANN. STAT. § 362.105 (Vernon Supp. 1994)); 1969 Wyo. Sess. Laws ch. 84, § 1 (codified as amended at WYO. STAT. § 13-3-704 (1993)). The Alaska wild card statute, however, was originally enacted in 1951. *See* Op. Alaska Att'y Gen., Nos. J99-096-80, J-66-051-81, at 4 (Aug. 4, 1980) (citing 1951 Alaska Sess. Laws ch. 129, § 2.104A (codified and later repealed at ALASKA STAT. § 06.05.005(3)(B) (1988)).

102. To respond to this threat, "many states enacted 'wild card' statutes . . . [in order] to foreclose the possibility at least in most states that national bank powers can be suddenly expanded to the competitive disadvantage of state banks." AM. BANKER, Oct. 24, 1979, at 4 (quoting Paul Horvitz).

103. Op. Alaska Att'y Gen., Nos. J99-096-80, J-66-051-81, at 5 (Aug. 4, 1980).

Thirty-nine states have passed statutes[104] intended to permit, to one degree or another, their State Banks to engage in the same activities in which National Banks are permitted to engage.[105] In addition to these thirty-nine states, Georgia and Michigan have statutes that resemble wild card statutes.[106] Montana's wild card statute provides a typical formulation of a wild card provision:

> With the consent of the [Montana banking] department, every bank organized under the laws of the state shall have power to and may engage in any activity or business in which such bank could engage if it were operating as a national bank. The department may prescribe, amend, and repeal regulations affecting and controlling the exercise of the powers granted by

104. ALA. CODE § 5-5A-18.1 (Supp. 1994); ALASKA STAT. § 06.01.020 (Supp. 1994); ARIZ. REV. STAT. ANN. § 6-184 (1989); ARK. CODE ANN. § 23-32-701(16) (Michie 1994); COLO. REV. STAT. ANN. § 11-2-103(5) (West 1990); FLA. STAT. ANN. § 655.061 (West 1984 & Supp. 1995); HAW. REV. STAT. § 412:5-201 (1993); IDAHO CODE § 26-1101(3) (1990); ILL. COMP. STAT. ANN. ch. 205, § 5/5(11) (West Supp. 1994); KAN. STAT. ANN. § 9-1715(b) (1991); KY. REV. STAT. ANN. § 287.020(3) (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 6:242(C) (West Supp. 1995); ME. REV. STAT. ANN. tit. 9-B, § 416 (West 1980); MD. CODE ANN., FIN. INST. § 5-504 (1992); MINN. STAT. ANN. § 48.15(2) (West 1988); MISS. CODE ANN. § 81-5-1(10) (Supp. 1994); MO. ANN. STAT. § 362.105(3) (Vernon Supp. 1994); MONT. CODE ANN. § 32-1-362 (1993); NEV. REV. STAT. ANN. § 662.015(1)(f) (Michie Supp. 1993); N.H. REV. STAT. ANN. § 394-A:6 (1983); N.J. STAT. ANN. § 17:9A-25(12) (West Supp. 1994); N.M. STAT. ANN. § 58-1-34(A)(2)(b) (Michie Supp. 1991); N.D. CENT. CODE § 6-03-38 (Supp. 1993); OHIO REV. CODE ANN. § 1125.23 (Anderson 1988); OKLA. STAT. ANN. tit. 6, § 203(5) (West 1984 & Supp. 1995); OR. REV. STAT. § 706.795 (1989); PA. STAT. ANN. tit. 7, § 307 (1995); R.I. GEN. LAWS § 19-9-1 (Supp. 1994); S.C. CODE ANN. § 34-1-110 (Law. Co-op. 1987); S.D. CODIFIED LAWS ANN. § 51A-2-14 (1990); TENN. CODE ANN. § 45-2-601 (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4) (West Supp. 1995); UTAH CODE ANN. § 7-3-10(1) (Supp. 1994); VT. STAT. ANN. tit. 8, § 606 (Supp. 1994); VA. CODE ANN. § 6.1-5.1(A) (Michie 1993); WASH. REV. CODE ANN. § 30.04.215 (West Supp. 1995); W. VA. CODE § 31A-3-2(a)(5)(B) (Supp. 1994); WIS. STAT. ANN. § 220.04(8) (West 1994); WYO. STAT. § 13-3-704 (1993).

105. *See* STEPHEN K. HUBER, BANK OFFICER'S HANDBOOK OF GOVERNMENT REGULATION § 3.02[5] (1989) (noting that wild card statutes permit "locally chartered depository institutions to undertake all activities permitted to nationally chartered institutions"). One of the most progressive states regarding liberalization of state banking powers has been New York, which does not have a wild card statute. In certain areas, New York has been ahead of National Banks in permitting its state banks to engage in commodity-linked or equity-linked transactions. *See infra* note 178 and accompanying.

106. GA. CODE ANN. § 7-1-61 (1989); MICH. COMP. LAWS ANN. § 487.451(31) (West Supp. 1994). The Georgia Department of Banking and Finance and the Michigan Financial Services Bureau do not consider their statutes technically to be wild card provisions. Telephone Interview with Steven Bridges, Georgia Deputy Comm'r of Banking (June 28, 1994); Telephone Interview with Russ Kropschot, Michigan Fin. Servs. Bureau (June 15, 1994). Neither state has issued any rulings under their respective statutes. Telephone Interview with Steven Bridges, Georgia Deputy Comm'r of Banking (June 28, 1994); Telephone Interview with Russell Kropschot, Chief Deputy Commissioner Michigan Fin. Servs. Bureau (June 15, 1994).

> this section, provided that . . . such regulations and powers shall not apply to activities which are expressly prohibited or limited by the statutes of the state.[107]

Although the various wild card statutes share the common goal of granting parity between their State Banks and National Banks, they vary considerably in their reach and their formulation.

B. Characteristics

Wild card statutes typically are not self-executing. Thirty-three of the thirty-nine wild card statutes require express affirmative approval from the state's banking regulator to engage in a wild card activity.[108] Wild card statutes, however, are not nearly as uniform in other respects.

The states are also non-uniform with respect to what the wild card statute specifically authorizes. Eight states grant the same "privileges" to their State Banks as National Banks enjoy.[109] Twenty-one states permit their State Banks to do the same "acts" or "activities" as permitted a National Bank.[110] Five states only refer to a "power."[111] Only

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107. MONT. CODE ANN. § 32-1-362(1) (1993).

108. Only Arizona, Illinois, Pennsylvania, Rhode Island, Utah, and Vermont do not expressly require prior approval from the relevant state banking authority prior to engaging in such activities. *See* ARIZ. REV. STAT. ANN. § 6-184(2); ILL. COMP. STAT. ANN. ch. 205, § 5/5(11); PA. STAT. ANN. tit. 7, § 307; R.I. GEN. LAWS § 19-9-1; UTAH CODE ANN. § 7-3-10(1); VT. STAT. ANN. tit. 8, § 606. Considering the risks associated with exercising banking powers not expressly authorized, even in these states, State Banks would probably want to confirm their understanding of the statute with their respective state regulator prior to exercising such wild card powers. *See infra* notes 280-91 and accompanying text.

109. ALA. CODE § 5-5A-18.1; HAW. REV. STAT. § 412:5-201; LA. REV. STAT. ANN. § 6:242(C); MISS. CODE ANN. § 81-5-1(10); N.H. REV. STAT. ANN. § 394-A:6; OHIO REV. CODE ANN. § 1125.23; UTAH CODE ANN. § 7-3-10; WIS. STAT. ANN. § 220.04(8). Oregon's statute is phrased as "advantage of law" rather than "privilege." OR. REV. STAT. § 706.795.

110. ARIZ. REV. STAT. ANN. § 6-184(2); ARK. CODE ANN. § 23-32-701(16); IDAHO CODE § 26-1101(3); ILL. COMP. STAT. ANN. ch. 205, § 5/5(11); KAN. STAT. ANN. § 9-1715(b); KY. REV. STAT. ANN. § 287.020(3); ME. REV. STAT. ANN. tit. 9-B, § 416; MD. CODE ANN., FIN. INST. § 5-504; MINN. STAT. ANN. § 48.15(2); MONT. CODE ANN. § 32-1-362; NEV. REV. STAT. ANN. § 662.015(1)(f); N.J. STAT. ANN. § 17:9A-25(12); N.D. CENT. CODE § 6-03-38; S.C. CODE ANN. § 34-1-110; S.D. CODIFIED LAWS ANN. § 51A-2-14(2) (1990); TENN. CODE ANN. § 45-2-601; VA. CODE ANN. § 6.1-5.1 (Michie 1993); WASH. REV. CODE ANN. § 30.04.215; W. VA. CODE § 31A-3-2(5)(B); WYO. STAT. § 13-3-704. Texas refers to "transaction of affairs." TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4).

111. ALASKA STAT. § 06.01.020; MO. ANN. STAT. § 362.105(3); N.M. STAT. ANN. § 58-1-34 (referring also to "authority"); OKLA. STAT. ANN. tit. 6, § 203(5); VT. STAT. ANN. tit. 8, § 606.

ten states specifically reference a power of investment or ownership.[112]

Furthermore, the states are not uniform in establishing a standard for what constitutes a permissible national banking activity, in which State Banks may then also engage under a wild card statute. For example, twenty-two statutes specify federal law or legislation as evidence of approval for a National Bank to engage in an activity.[113] Of those twenty-two, only fourteen refer to OCC regulations or rulings.[114] Only two statutes refer to court rulings.[115] The remaining states provide no reference to a particular authority for determining what constitutes a permissible national bank activity in which State Banks can also engage under a wild card statute.

The wild card statutes are also divided as to whether or not the wild card provision expressly overrules a conflicting provision of state law. Eighteen statutes expressly grant State Banks the same powers as those possessed by a National Bank, even if such power would contravene state law.[116] Nine state statutes expressly restrict wild card activities to activities which do not contravene state law.[117] The

112. ALA. CODE § 5-5A-18.1; FLA. STAT. ANN. § 655.061; ILL. COMP. STAT. ANN ch. 205, § 5/5(11); KAN. STAT. ANN. § 9-1715(b); N.D. CENT. CODE § 6-03-38; PA. STAT. ANN. tit. 7, § 307 (referring solely to investments); R.I. GEN. LAWS § 19-9-1 (same); S.C. CODE ANN. § 34-1-110; TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4); WIS. STAT. ANN. § 220.04(8).

113. FLA. STAT. ANN. § 655.061; HAW. REV. STAT. § 412:5-201; ILL. COMP. STAT. ANN. ch. 205, § 5/5(11); KAN. STAT. ANN. § 9-1715(b); ME. REV. STAT. ANN. tit. 9-B, § 416; MD. CODE ANN., FIN. INST. § 5-504; MINN. STAT. ANN. § 48.15(2); N.H. REV. STAT. ANN. § 394-A:6; N.J. STAT. ANN. § 17:9A-25(12); N.M. STAT. ANN. § 58-1-54; N.D. CENT. CODE § 6-03-38; OHIO REV. CODE ANN. § 1125.23; OKLA. STAT. ANN. tit. 6, § 203(5); OR. REV. STAT. § 707.340; R.I. GEN. LAWS § 19-9-1; S.C. CODE ANN. § 34-1-110; TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4); VT. STAT. ANN. tit. 8, § 606; VA. CODE ANN. § 6.1-5.1(A); WASH. REV. CODE ANN. § 30.04.215; W. VA. CODE § 31A-3-2(5)(B); WIS. STAT. ANN. § 220.04(8).

114. FLA. STAT. ANN. § 655.061; HAW. REV. STAT. § 412:5-201; KAN. STAT. ANN. § 9-1715(b); ME. REV. STAT. ANN. tit. 9-B, § 416; MINN. STAT. ANN. § 48.15(2); N.H. REV. STAT. ANN. § 394-A:6; N.M. STAT. ANN. § 58-1-54; OHIO REV. CODE ANN. § 1125.23; S.C. CODE ANN. § 34-1-110; TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4); VA. CODE ANN. § 6.1-5.1(A); WASH. REV. CODE ANN. § 30.04.215 (rulings); W. VA. CODE § 31A-3-2(a)(5)(B); WIS. STAT. ANN. § 220.04(8). Louisiana refers only to regulations. LA. REV. STAT. ANN. § 6:242(C).

115. HAW. REV. STAT. § 412:5-201(a); OHIO REV. CODE ANN. § 1125.23.

116. ALA. CODE § 5-5A-18.1; ALASKA STAT. § 06.01.020; FLA. STAT. ANN. § 655.061; HAW. REV. STAT. ANN. § 412:5-201; IDAHO CODE § 26-1101(3); ILL. COMP. STAT. ANN. ch. 205, § 5/5(11); KAN. STAT. ANN. § 9-1715(b); LA. REV. STAT. ANN. § 6-242(c); MD. CODE ANN., FIN. INST. § 5-504; MISS. CODE ANN. § 81-5-1(10); N.M. STAT. ANN. § 58-1-34(A)(2)(b); N.D. CENT. CODE § 6-03-38; OHIO REV. CODE ANN. § 1125.23; OR. REV. STAT. § 706.795; R.I. GEN. LAWS § 19-9-1; S.C. CODE ANN. § 34-1-110; WASH. REV. CODE ANN. § 30.04.215; W. VA. CODE § 31A-3-2(a)(5)(B).

117. ARIZ. REV. STAT. ANN. § 6-184; COLO. REV. STAT. ANN. § 11-2-103(5); KY. REV. STAT. ANN. § 287.020(3); MINN. STAT. ANN. § 48.15(2); MO. ANN. STAT. § 362.105(3);

remaining twelve state statutes do not specify, or are ambiguous, as to whether or not a wild card activity may be engaged in if it violates another provision of state law.[118]

Several wild card statutes directly address the question of branch banking. For example, the Kansas statute expressly precludes the state banking commissioner from authorizing state banks to conduct branch banking.[119] In contrast, Missouri and Montana empower the commissioner to enact regulations that would grant State Banks the same branching powers of National Banks in their respective states.[120] A few states provide that a rule issued pursuant to a wild card statute will expire if the legislature fails to codify it within a certain period of time.[121]

Finally, although promoting parity is the rationale behind wild card statutes, only eleven states require a showing to the banking regulators that the wild card activities are necessary in order to ensure parity or competitive equality with a National Bank or to serve the public convenience.[122]

C. Regulatory Interpretation of the Wild Card Statute

State banking regulators have varied radically in their willingness to rely upon their state's wild card statute. In fact, nineteen states with wild card statutes have not published any regulations, rulings, or orders interpreting their statutes.[123] Of the remaining states, the num-

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MONT. CODE ANN. § 32-1-362; PA. STAT. ANN. tit. 7, § 307; S.D. CODIFIED LAWS ANN. § 51A-2-14(2); TEX. REV. CIV. STAT. ANN. art. 342-113(a)(4).

118. *See* ARK. CODE ANN. § 23-32-701(16); ME. REV. STAT. ANN. tit. 9-B, § 416; NEV. REV. STAT. ANN. § 662.015(1)(f); N.H. REV. STAT. ANN. § 394-A:6; N.J. STAT. ANN. § 17:9A-25(12); OKLA. STAT. ANN. tit. 6, § 203(5); TENN. CODE ANN. § 45-2-601; UTAH CODE ANN. § 7-3-10(1); VT. STAT. ANN. tit. 8, § 606(a)(1); VA. CODE ANN. § 6.1-5.1(A); WIS. STAT. ANN. § 220.04(8); WYO. STAT. § 13-3-704.

119. KAN. STAT. ANN. § 9-1715(d). The Florida statute at one time also contained a similar restriction. 1980 Fla. Laws ch. 80-273, §1 (current version codified at FLA. STAT. ANN. § 655.061).

120. MO. ANN. STAT. § 362.105(3); MONT. CODE ANN. § 32-1-362(2).

121. IDAHO CODE § 26-1101(3); OHIO REV. CODE ANN. § 1125.23; VA. CODE ANN. § 6.1-5.1. In the one instance in which Idaho has acted under its wild card statute, the next succeeding legislature codified the rule. The Kansas wild card statute requires that the leaders of the legislature be notified of the action. KAN. STAT. ANN. § 9-1715(c).

122. ALA. CODE § 5-2A-7 (Supp. 1994); ALASKA STAT. § 06.01.020; FLA. STAT. ANN. § 655.061; IDAHO CODE § 26-1101(2); KAN. STAT. ANN. § 9-1715; LA. REV. STAT. ANN. § 6:121 (West Supp. 1995); MD. CODE ANN., FIN. INST. § 5-504; MO. ANN. STAT. § 362.105(3); OR. REV. STAT. § 706.795; S.D. CODIFIED LAWS ANN. § 51A-2-14; WASH. REV. CODE ANN. § 30.04.215(3).

123. Telephone Interview with Thomas J. Candon, Vermont Deputy Comm'r of Banking, Dep't of Fin. Insts. (June 30, 1994); Telephone Interview with Steven Cayouette, State Chief Banking Examiner, Rhode Island Dep't of Banking (Sept. 8,

ber of published interpretations varies considerably. For example, the Mississippi Department of Banking and Consumer Finance has identified over 150 rights, powers, privileges, immunities, duties, and obligations of a National Bank that may be enjoyed by a Mississippi state-chartered bank.[124] More commonly, however, state banking regulators have issued significantly fewer interpretations of their respective wild card statutes.[125] The various state banking regulators that have issued wild card rulings have most commonly considered topics dealing generally with investment powers, activities, lending limits, branch banking, and corporate governance matters.

1. Investments

State banking statutes are generally highly restrictive in providing investment powers, limiting the ability of State Banks to make investments in either debt obligations or equity securities.[126] Banking regulators, however, have been willing to expand this list based upon those investments permitted National Banks. These investments typi-

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1994); Telephone Interview with Elizabeth Ann Clark, Staff Attorney, Tennessee Dep't of Fin. Insts. (July 1, 1994); Telephone Interview with Ronald Draughon, Supervisor of Sav. and Loans, Utah Dep't of Fin. Insts. (June 27, 1994); Telephone Interview with Richard A. Duncan, South Dakota Director of Banking (June 28, 1994); Telephone Interview with Kenneth R. Ehrich, Supervising Bank Examiner, Colorado Dep't of Fin. Insts. (June 28, 1994); Telephone Interview with Harold Feeney, Superintendent of Banks, Arizona Banking Dep't (June 27, 1994); Telephone Interview with Julie Kidd, Nevada Dep't of Fin. Insts. (June 27, 1994); Telephone Interview with William G. Logan, Fin. Insts. Examiner 3, Alaska Dep't of Commerce (June 27, 1994); Telephone Interview with Steven Lovejoy, Maryland Assistant Attorney General (July 25, 1994); Telephone Interview with John A. Marzullo, Staff Attorney, Louisiana Dep't of Fin. Insts. (July 1, 1994); Telephone Interview with Verne McKee, Supervising Examiner, Oregon Div. of Fin. and Corp. Sec. (June 27, 1994); Telephone Interview with Sherman Moen, Chief Examiner, Minnesota Dep't of Fin. Insts. (June 30, 1994); Telephone Interview with Colette Mooney, Deputy Superintendent of Banks, Maine Bureau of Banking (June 30, 1994); Telephone Interview with Robert Reading, Assistant Comm'r of Banking, South Carolina Board of Fin. Insts. (July 5, 1994); Telephone Interview with Gary L. Ruby, Regulation Analyst, Hawaii Dep't of Banking (June 27, 1994); Telephone Interview with James A. Russell, Principal Financial Analyst, Virginia Dep't of Fin. Insts. (June 29, 1994); Telephone Interview with Laurie Schnarrs, Staff Attorney, Pennsylvania Dep't of Banking (July 29, 1994); Telephone Interview with G.R. Zachary, Assistant Director, Washington Dep't of Fin. Insts. (June 27, 1994).

124. *See* State Bd. of Banking Review, State of Mississippi, Reg. No. 2 (Nov. 29, 1993) [hereinafter Mississippi Reg. No. 2].

125. *See, e.g.*, Orders of General Application for Florida Chartered Institutions (19 orders); MO. CODE REGS. tit. 4, div. 140, ch. 2 (13 rules); TEX. ADMIN. CODE tit. 7, §§ 11.1-.83 (1994) (23 rulings); WIS. ADMIN. CODE §§ Bkg. 3.001-.07 (Feb. 1994) (eight rulings); WYO. AUDIT DEP'T, Banking Div., chs. I-IV (1993) (four rulings).

126. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 205, § 5/32 (West 1993) (mandating that debt securities must be investment grade), *as amended by* Pub. Act No. 88-546, 1994 Ill. Legis. Serv. 317 (West).

cally relate to government favored or encouraged investments, or activities directly related to a bank's operation. State banking regulators have permitted such investments, including: (1) investments in the debt obligations of quasi-government entities;[127] (2) certain equity investments in quasi-government entities, the most popular being the Federal Home Loan Bank;[128] (3) investments in small business investment corporations;[129] and (4) investments in community development projects or corporations.[130] State regulators have also

127. *See, e.g.*, Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 87-2 (Jan. 27, 1987) ("Sallie Mae" and "Fannie Mae"); OHIO ADMIN. CODE § 1301:1-7-07 (1981) (expired) (allowing investments in the Federal National Mortgage Association ("Fannie Mae")). A National Bank is authorized pursuant to 12 U.S.C. § 24 (Seventh) (1988 & Supp. V 1993), *as amended by* Riegle Community Development & Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2241. Mississippi and North Dakota generally permit investments in all quasi-government agency debt securities permitted National Banks. *See* Mississippi Reg. No. 2, *supra* note 124, at 18, 20-22 (permitting investment in generally all quasi-government agency securities including "Sallie Mae" and "Fannie Mae"); N.D. ADMIN. CODE § 13-02-10-01 (1991) (allowing any investments permitted National Banks).

128. *See, e.g.*, MO. CODE REGS. tit. 4, § 140-2.035 (1991) (allowing investment in Federal Home Loan Bank stock); Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 90-10 (June 29, 1990) (same); Kansas State Bank Comm'r, Special Order No. 1990-3 (Nov. 19, 1990) (same). National Banks are authorized to make those investments pursuant to 12 U.S.C. §§ 1424, 1426 (Supp. V 1993). Other authorized equity investments include the Student Loan Marketing Association ("Sallie Mae") and the Federal Home Loan Mortgage Corporation. *See In re* Investment in Student Loan Mktg Ass'n Stock, Admin. Procedure No. 84-17-DOB (Fla. Dep't Banking & Fin. Aug. 17, 1984) (order of general application); Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 92-5 (May 14, 1992) (Sallie Mae and Federal Home Loan Mortgage Corporation); MO. CODE REGS. tit. 4, § 140-6.063 (1988) (allowing investment in the Federal Agricultural Mortgage Corporation). Mississippi generally permits equity investments in all quasi-government agencies permitted National Banks. *See* Mississippi Reg. No. 2, *supra* note 124, at 18, 20-22.

129. *See, e.g.*, Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 93-030 (Dec. 21, 1993); Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 86-2 (Oct. 24, 1986); Mississippi Reg. No. 2, *supra* note 124, at 22; TEX. ADMIN. CODE tit. 7, § 11.82(b). National Banks are authorized pursuant to 15 U.S.C. § 682(b) (1988) and 12 C.F.R. § 7.7535 (1994). Vermont enacted a limited wild card statute in 1971 expressly to permit investment in small business investment corporations. *See* VT. STAT. ANN. tit. 8, § 1163 (1984).

130. *See* Arkansas State Banking Board, Investment in Community Development Corporations, Amendment to Oct. 16, 1984 Resolution (Feb. 14, 1994); Mississippi Reg. No. 2, *supra* note 124, at 17 (corporations); MO. CODE REGS. tit. 4, § 140-2.067 (1993); N.M. Fin. Inst. Reg. 93-2B (Nov. 8, 1993); TEX. ADMIN. CODE tit. 7, §11.83(g) (1994) (projects and foundations); Wyo. Audit Dep't, Gen. Div., ch. 15, § 1 (filed Mar. 24, 1994) (community development project). Texas and Mississippi have also authorized their State Banks to make charitable contributions. *See* TEX. ADMIN. CODE tit. 7, § 11.83(f); Mississippi Reg. No. 2, *supra* note 124, at 3. National Banks are authorized to invest in community development projects or corporations pursuant to 12 C.F.R. pt. 24 (1994).

permitted investments in mutual funds[131] and investments in the stock of Bankers' Banks.[132]

2. Activities

Regulators have permitted a broad array of activities under wild card statutes. The most common expansion of activities has been to permit a bank to directly lease personal property to its customers.[133] The various state banking regulators also authorize State Banks to engage in other activities such as: (1) exercising various insurance powers;[134]

131. *See, e.g., In re* Florida Chartered Commercial Banks Purchase of Shares of Money Mkt. Mutual Funds (Fla. Dep't of Banking & Fin. Apr. 17, 1984) (order of general application) (money market mutual funds); *In re* Florida Chartered Commercial Banks Inv. in Open-End Inv. Co., Case No. 3236-B (Fla. Dep't Banking & Fin. Dec. 16, 1993) (order of general application) (other mutual funds); Kansas State Bank Comm'r, Special Order No. 1987-1 (Jan. 26, 1987) (money market mutual funds); Mississippi Reg. No. 2, *supra* note 124, at 19 (mutual fund shares); MO. CODE REGS. tit. 4, § 140-6.055 (1987); OHIO ADMIN. CODE § 1301:1-7-18 (1987) (expired); WIS. ADMIN. CODE § Bkg. 3.06 (Feb. 1994) (investment company shares). National Banks are authorized to make these investments pursuant to Banking Bull. No. 83-58 (Dec. 15, 1983); OCC Banking Cir. No. 220 (Nov. 21, 1986).

132. Memorandum from Kenneth R. McCartha, Alabama Acting Superintendent of Banks, to Chief Executive Officers of State-Chartered Banks (May 3, 1994); Mississippi Reg. No. 2, *supra* note 124, at 17; WIS. ADMIN. CODE § Bkg. 3.01 (Feb. 1994) (permits Bankers' Bank); *cf. In re* Florida Chartered Bankers' Banks Investment Powers (Fla. Dep't of Banking & Fin. Nov. 21, 1983) (order of general application) (explaining Bankers' Bank investment powers). A Banker's Bank is a bank that is owned exclusively by other banks and is engaged exclusively in providing depository institution related services for other banks. *See* FDIC, *supra* note 59, at 1. National Banks are authorized pursuant to 12 U.S.C. § 24 (Seventh) and 12 U.S.C. § 27(b) (1988).

133. *See, e.g.*, Kansas State Bank Comm'r, Special Order No. 1988-1 (Jan. 25, 1988); Kansas State Bank Comm'r, Special Order No. 1976-2 (Dec. 20, 1976); Mississippi Reg. No. 2, *supra* note 124, at 8; MO. CODE REGS. tit. 4, § 140-2.150 (1994); OHIO ADMIN. CODE § 1301:1-7-10 (1992) (expired); WIS. ADMIN. CODE § Bkg. 3.05 (Feb. 1994); WYO. AUDIT DEP'T, Gen. Div., ch. 1, § 3 (filed July 7, 1992); *cf.* Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 93-027 (Dec. 15, 1993) (allowing banks to lease real property to municipalities to same extent as National Banks). National Banks are authorized to make such leases pursuant to 12 U.S.C. § 24 (Seventh), 12 U.S.C. § 371d (1988), and 12 C.F.R. § 23.7 (1994).

134. *See, e.g.*, Kansas State Bank Comm'r, Special Order No. 1990-2 (Nov. 19, 1990) (granting 12 U.S.C. § 92 insurance powers); MO. CODE REGS. tit. 4, § 140-2.051 (1994) (same); Mississippi Reg. No. 2, *supra* note 124, at 5-6 (same); Kansas State Bank Comm'r, Special Order No. 1988-4 (Oct. 17, 1988) (may credit life insurance); Kansas State Bank Comm'r, Special Order No. 1988-4 (Oct. 17, 1988) (may sell fixed rate annuities); State Bd. of Banking Review, State of Mississippi, Amended Reg. No. 2, at 6 (1993) (same); Arkansas State Banking Bd., Sale of Title Ins. (Aug. 22, 1989). The Tennessee Attorney General has opined that the Tennessee wild card statute also grants certain insurance powers. Op. Tenn. Att'y. Gen., No. 89-69 (May 1, 1989), *questioned by* Op. Tenn. Att'y. Gen., No. 92-34 (Apr. 16, 1992). The Montana Attorney General has also opined that Montana State Banks may market fixed annuities pursuant to the Montana wild card statute. 43 Op. Mont. Att'y. Gen., No. 76 (Nov. 16, 1990). See *infra*

(2) receiving equity kickers;[135] (3) dealing with real estate held as a result of foreclosure;[136] and (4) acting in a variety of different capacities, such as a tax preparer,[137] mortgage servicer,[138] postal substation,[139] and others.[140]

3. Lending Limits

Several state banking regulators have liberalized lending limits through their wild card statutes, primarily by changing the definition of capital or surplus.[141] For example, Kansas has taken advantage of

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notes 182-91 and accompanying text for a discussion of the insurance powers held by National Banks. National Banks are authorized to engage in such insurance activities. *See infra* notes 182-86.

135. Equity kickers represent "a share in the profit, income or earnings from a business enterprise of a borrower . . ., in addition to or in lieu of interest." 12 C.F.R. § 7.7312 (1994). Florida, Missouri, and Mississippi have authorized their State Banks to receive equity kickers. *In re* Florida Chartered Banks—Loan Agreements Providing a Share in Profits, Income or Earnings (Fla. Dep't Bank. & Fin. June 9, 1981) (order of general application); Mississippi Reg. No. 2, *supra* note 124, at 17-18; MO. CODE REGS. tit. 4, § 140-6.050 (1994). National Banks are authorized pursuant to 12 C.F.R. § 7.7312 (1993).

136. *See* Mississippi Reg. No. 2, *supra* note 124, at 11-12; Kentucky Dept. of Fin. Inst. Parity Letter No. 92-2 (1992); *In re* Florida-Chartered Banks-Expenditures Related to Other Real Estate, Admin. Procedure No. 85-7-DOB (Fla. Dep't of Banking & Fin. Jan. 14, 1985) (order of general application); Kansas State Bank Comm'r, Special Order No. 1988-3 (Apr. 18, 1988); New Mexico Fin. Inst. Div. Reg. 93-3B (Nov. 8, 1993). National Banks are authorized to hold "other real estate owned" ("OREO") property pursuant to 12 U.S.C. § 29 (Fourth) (1988).

137. *See* MO. CODE REGS. tit. 4, § 140-6.056 (1994); Mississippi Reg. No. 2, *supra* note 124, at 10. National Banks are authorized pursuant to 12 C.F.R. pt 24. (1994).

138. *See In re* Florida Chartered Banks Servicing of Mortgage & Other Loans as Agent (Fla. Dep't of Banking & Fin. Oct. 5, 1982) (order of general application); Mississippi Reg. No. 2, *supra* note 124, at 11. National Banks are authorized pursuant to 12 C.F.R. § 7.7379 (1994).

139. *See* TEX. ADMIN. CODE tit. 7, § 11.83(h) (1994); Kansas State Bank Comm'r, Special Order No. 1975-2 (Nov. 17, 1975). National Banks are authorized pursuant to 12 C.F.R. § 7.7482 (1994).

140. *See, e.g.*, Mississippi Reg. No. 2, *supra* note 124, at 10 (debt collection); MO. CODE REGS. tit. 4, § 140-6.058 (1994) (same); *id.* § 140-6.059 (allowing operation of Credit Bureaus); Mississippi Reg. No. 2, *supra* note 124, at 4 (same); *id.* at 4 (allowing marketing of software); TEX. ADMIN. CODE tit. 7, § 11.83(i) (1994) (allowing issuance of payroll); WIS. ADMIN. CODE § Bkg. 3.03 (Feb. 1994) (allowing data processing services). National Banks are authorized pursuant to issue payroll pursuant to 12 C.F.R. § 7.7485 (1994); to be involved in debt collection through a subsidiary pursuant to OCC Interpretive Letter No. 53, [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,128 (June 27, 1978); to market software pursuant to OCC Interpretive Letter, 1987 WL 149776 (July 13, 1987); and to furnish data processing services pursuant to 12 C.F.R. § 7.3500 (1994).

141. *See, e.g.*, Ark. State Banking Board Resolution (Jan. 19, 1988) (defining legal lending limits); OHIO ADMIN. CODE § 1301:1-7-16 (1992) (expired); N.M. Fin. Inst. Div. Reg. 93-1B (Nov. 8, 1993); WYO. AUDIT DEP'T, Gen. Div., ch. 15, § 1 (filed Mar. 24,

federal rules which implement substitute lending limits or capital forbearance plans.[142] Regulators have also carved out lending activities that, under federal rules, do not constitute lending for lending limit purposes.[143]

4. Branch Banking

Regulators often have resorted to their wild card statutes to expand branch banking. As National Banks were permitted to branch out on an interstate basis pursuant to new interpretations of federal law,[144] state banking regulators began to authorize their own institutions to branch out in a similar manner.[145]

5. Corporate Governance

State statutes frequently provide that State Banks are not eligible for the more liberal corporate codes governing non-banking corporations.[146] Some state banking regulators, however, have looked to

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1994) (surplus account). Capital and surplus for National Banks are defined at 12 C.F.R. § 3.100 (1994).

142. *See* Kansas State Bank Comm'r, Special Order No. 1986-1 (May 22, 1986) (adopting OCC substitute lending limits with regard to charged-off agricultural and oil and gas loans); Kansas State Bank Comm'r, Special Order No. 1986-2 (May 22, 1986) (approving lower minimum capital requirement). The substitute lending rules for National Banks are discussed *infra* notes 219-22 and accompanying text.

143. *See In re* Lending Limits, Admin. Procedure No. 3014-B (Fla. Dep't of Banking & Fin. July 21, 1992) (order of general application) (lending to government entities if loan constitutes general obligation of government not subject to lending limit); Illinois Comm'r of Banks & Trust Cos., Interpretive Letter No. 92-17 (Dec. 8, 1992) (earn-out portion of sale of state bank subsidiary financed by selling bank not subject to lending limits); OHIO ADMIN. CODE § 1301:1-7-02 (1992) (expired) (IDB authorities not borrower); TEX. ADMIN. CODE tit. 7, § 11.81(d) (1994) (same); TEX. ADMIN. CODE tit. 7, § 11.82(c) (1994) (stating that repurchase agreements are not borrowing obligations); TEX. ADMIN. CODE tit. 7, § 11.81(c) (1994) (not applicable to accrued interest).

144. *See supra* notes 93-99 and accompanying text.

145. *See* Memorandum from Z. Thompson, Alabama Superintendent of Banks, to Chief Executive Officers of State-Chartered Banks (May 31, 1990); *In re* State Chartered Commercial Banks Statewide Branching (Fla. Dep't Banking & Fin. Nov. 17, 1988) (order of general application); Mississippi Reg. No. 2, *supra* note 124; MO. CODE REGS. tit. 4, § 140-2.126 (1994); WYO. AUDIT DEP'T, Gen. Div., ch. 13, art. 3 (filed Nov. 13, 1993); *cf. In re* Establishment of Trust Representative Officers (Fla. Dep't Banking & Fin. Jan. 12, 1981) (order general application) (permitted to establish trust representative offices to the same extent as National Banks); Kentucky Dep't of Fin. Inst., Parity Letter No. 92-3 (Aug. 23, 1993) (main office relocations).

146. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 805, § 5/3.05 (West 1993) (mandating that banks may not be organized under the Illinois Business Corporation Act); ILL. COMP. STAT. ANN. ch. 805, § 5/13.05 (West 1993 & Supp. 1994) (prohibiting foreign corporations from dealing in banking); N.M. STAT. ANN. § 53-11-3 (Michie 1993) (allowing corporations to be organized under the Business Corporation Act for any lawful purpose except banking).

what is typically a much more liberal national banking corporate code in giving their banks greater flexibility. In addition, as National Banks begin to convert to State Banks, the remaining National Banks will push their regulators to liberalize their corporate codes so that their corporate procedures and policies will not be disrupted.

Several state regulators have authorized important corporate powers for their banks based upon the wild card statutes in their states. For example, several states have granted some form of indemnification to State Bank directors, officers, and employees.[147] Other states have permitted their banks to pledge property, act as sureties or guarantors,[148] expand their capacity to borrow money or issue preferred stock,[149] create subsidiaries,[150] avoid attachment prior to final judgment,[151] or utilize a particular form of merger.[152] State regulators have also authorized other, less important corporate powers, including the power to purchase life insurance policies for their officers,[153] to

147. *See, e.g.*, Mississippi Reg. No. 2, *supra* note 124, at 2; New Mexico Fin. Inst. Div. Reg. 92-1B (Feb. 11, 1992); WYO. AUDIT DEP'T, Gen. Div., ch. VI, § 2 (filed Jan. 31, 1986). National Banks are authorized pursuant to 12 C.F.R. § 7.5217 (1994).

148. *See, e.g.*, Mississippi Reg. No. 2, *supra* note 124, at 5; TEX. ADMIN. CODE tit. 7, § 11.83(b) (1994) (may act as guarantor). National Banks are authorized pursuant to OCC Interpretive Letter, 1987 WL 149807 (Dec. 16, 1987) (may pledge investment securities to secure borrowings); 12 C.F.R. § 7.7410 (1994) (may pledge assets to secure public deposits); 12 C.F.R. § 7.7000 (1994) (guarantee own obligations); 12 C.F.R. §§ 7.7010, 7.7012 (1994) (guarantee obligations of others under certain circumstances).

149. *See, e.g.*, OHIO ADMIN. CODE § 1301:1-7-12 (1992) (expired) (preempting the borrowing limitation); OHIO ADMIN. CODE § 1301:1-7-11 (1992) (expired). National Banks are authorized to issue preferred stock pursuant to 12 U.S.C. § 51a (1988).

150. *See, e.g.*, Kansas State Bank Comm'r, Special Order No. 1988-3 (April 18, 1988) (may create subsidiaries to hold foreclosed property); Mississippi Reg. No. 2, *supra* note 124, at 19 (may create operating subsidiaries); TEX. ADMIN. CODE tit. 7, § 11.82(a) (1994) (may create operating subsidiaries); WIS. ADMIN. CODE § Bkg. 3.04 (Feb. 1994) (operate through subsidiaries). National Banks are authorized to operate subsidiaries pursuant to 12 C.F.R. § 5.34 (1994).

151. *See, e.g.*, *In re* State-Chartered Banks-Attachments, Injunctions and Executions, Admin. Procedure 2854-B (Fla. Dep't of Banking & Fin. Nov. 30, 1990) (order of general application); Rules of Okla. Banking Board IV-19 (1991), *invalidated by* Morrow Dev. Corp. v. American Nat'l Bank and Trust Co., 816 P.2d 537 (Okla. 1991). For a discussion of *Morrow Dev. Corp.*, see *infra* notes 243-44 and accompanying text.

152. *See In re* State-Chartered Banks Reorganization by Reverse Triangular Mergers (Fla. Dep't of Banking & Fin. May 28, 1982) (order of general application). National Banks are authorized pursuant to 12 U.S.C. §§ 215, 215a, 215b, 215c (1988 & Supp. V 1993).

153. *See, e.g.*, Bank Purchases of Life Insurance, Arkansas State Banking Board Resolution (Aug. 15, 1991); Mississippi Reg. No. 2, *supra* note 124, at 7; TEX. ADMIN. CODE tit. 7, § 11.83(c) (1994). National Banks are authorized to provide insurance for bank officers pursuant to 12 C.F.R. § 7.7115 (1994).

establish rules on shareholder or board meetings,[154] to establish rules regarding qualifying shares,[155] and to remain open on Saturdays.[156]

Despite the above uses, the number of published rulings issued pursuant to a particular state's wild card statute is relatively low in proportion to the number of states that have adopted wild card statutes.[157] In the future, state banking regulators will continue to be faced with obstacles in expanding wild card powers.

V. POTENTIAL OF THE WILD CARD STATUTE

As national banking powers expand, there are several other areas in which State Banks can achieve parity with National Banks. State Banks, however, will remain forced to overcome resistance from state banking regulators before regulators will authorize their banks to exercise such powers.

National and State Banks continue to make headlines as they begin to exercise non-traditional banking powers.[158] Although National Banks have been permitted to exercise a variety of new powers, many State Banks have yet to receive authorization to do so. State banking regulators, however, could close the gap quickly in this area through the use of existing wild card statutes.

A. Financial Derivatives

Probably the greatest potential use of a wild card statute currently lies in the area of financial derivatives.[159] Financial derivatives are defined as "financial instruments which derive their value from the

154. *See* TEX. ADMIN. CODE tit. 7, § 11.83(j) (1994) (shareholder action without meeting); *id.* tit. 7, § 11.83(k) (board action without meeting). National Banks are authorized to act in this way pursuant to OCC Interpretive Letter No. 524 (Oct. 1990).

155. *See, e.g.*, Mississippi Reg. No. 2, *supra* note 124, at 2; OHIO ADMIN. CODE § 1301:1-7-06 (Oct. 13, 1980) (expired). National Banks are governed by 12 U.S.C. § 84 (1988) and 12 C.F.R. § 7.4210 (1994).

156. *See* Idaho Bank Rule No. 1 (Dec. 22, 1992). The Idaho ruling appears to be in response to a ruling that federal law preempts Idaho's statute that required National Banks to close on Saturday. Idaho v. Security Pac. Bank Idaho, 800 F. Supp. 922, 923-24 (D. Idaho 1992) (citing OCC letter authorizing National Banks to remain open on Saturday).

157. *See supra* note 123 and accompanying text.

158. *See, e.g.*, Kenneth H. Bacon, *U.S. Regulators Shift Attention to Banks' Risk*, WALL ST. J., May 13, 1994, at B4C (discussing regulation of derivative activity).

159. The use of financial derivatives has expanded greatly over the last decade. *See* U.S. GENERAL ACCOUNTING OFFICE, FINANCIAL DERIVATIVES: ACTIONS NEEDED TO PROTECT THE FINANCIAL SYSTEM 3 (1994) [hereinafter GAO REPORT]; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., DERIVATIVE PRODUCT ACTIVITIES OF COMMERCIAL BANKS (1993) [hereinafter JOINT STUDY]; GROUP OF THIRTY, DERIVATIVES: PRACTICES AND PRINCIPLES (1993).

performance of assets, interest or currency exchange rates, or indexes."[160] "Derivative transactions include a wide assortment of financial contracts, including structured debt obligations, deposits, swaps, futures, options, caps, floors, collars, forwards, and various combinations thereof."[161]

Banks earn revenues from derivative activities through "transaction fees, bid-offer spreads, and their own trading positions."[162] Banks may also earn fees by offering customers risk management tools through the use of financial derivatives.[163] In addition, banks may use financial derivatives to lower their cost of funding and to reduce undesirable exposure to interest rate changes or currency fluctuations.[164]

Banks control approximately seventy percent of the off-exchange derivatives activities.[165] Although National Banks have been authorized for several years to engage in financial derivative activities,[166] with the exception of New York,[167] there appears to be little published guidance for State Banks. Ten banks, or their affiliates, accounted for approximately ninety percent of bank derivative activity with respect to interest rate contracts as of September 1992.[168] Six of these ten banks were National Banks, and the remaining four were New York State Banks.[169]

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160. *Risk Management of Financial Derivatives*, Banking Circular No. 277, 5 Fed. Banking L. Rep. (CCH) ¶ 58,717, at 36,459 (Oct. 27, 1993) [hereinafter Circular No. 277].

161. *Id.*; *see also* JOINT STUDY, *supra* note 159, at 1-5 (providing a general introduction to derivative products). For a glossary of many of the common terms in the derivative area, see *id.* at app. III.

162. *See* JOINT STUDY, *supra* note 159, at 6.

163. *See id.*

164. Circular No. 277, *supra* note 160, at 36,459; *see* JOINT STUDY, *supra* note 159, at 6.

165. Jeffrey Taylor & Steven Lipin, *SEC, Six Firms Work to Set Derivative Rules*, WALL ST. J., July 6, 1994, at C1. At the end of 1992, the 50 largest National Banks had derivative exposure for interest rate contracts of approximately $50 billion. *See* GROUP OF THIRTY, *supra* note 159, at 59. Derivative exposure represents the replacement costs for these contracts. *Id.* For a discussion of bank credit exposure from derivative trading, see Lyn Perlmuth, *The Derivatives Danger Defined?*, INSTITUTIONAL INVESTOR, July 1994, at 211.

166. *National Banks Are Advised on Participation in the Financial Futures and Forward Placement Markets*, Banking Circular No. 79, [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,539 (Apr. 19, 1983).

167. *See infra* note 178 and accompanying text.

168. *See* JOINT STUDY, *supra* note 159, at 11.

169. *Id.* The six National Banks (or their affiliates) were Citicorp, BankAmerica, Chase Manhattan, First Chicago, Bank of Boston, and Continental Bank, N.A. *Id.* The four New York State Banks were Chemical, J.P. Morgan, Bankers Trust, and Bank of New

The OCC has permitted National Banks to engage in financial derivative activities in accordance with "safe and sound banking practices,"[170] and has put into place substantial regulations dealing with the use of derivatives.[171] Financial derivatives not only include transactions involving interest rates, but also include transactions linked to commodity prices, equity prices, or indexes in which all or a portion of the return is linked to either such prices or an index of such prices.[172]

OCC Banking Circular 277 prescribes extensive guidelines covering derivative activities, including rules regarding senior management and board oversight of derivatives' activities, credit risk management, liquidity risk management, and operations and systems risk management.[173] The OCC bases its guidelines on a bank's level of

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York. *Id.* Continental Bank has since converted into an Illinois State Bank. *See* Lipin, *supra* note 85, at B6B.

170. Circular No. 277, *supra* note 160, at 36,460. The OCC permits a National Bank to use derivatives for the following purposes: (1) to manage financial risk for its own account; (2) to lower its cost of funding; (3) to exploit arbitrage opportunities across financial markets; and (4) to engage in the trading of, and dealing in, derivatives on behalf of customers. *Id.* at 36,459.

171. Regulators are also contemplating additional rules. *See* Bacon, *supra* note 158, at B4C (discussing regulators tailoring examinations to match derivative risks); Barbara A. Rehm, *Delay Seen in Swaps Disclosure Regulations*, AM. BANKER, June 9, 1994, at 1 (discussing regulators requiring banks to expand disclosure of derivative activities); Taylor & Lipin, *supra* note 165, at C1 (relating that the SEC is negotiating voluntary standards with derivatives dealers).

172. *See* OCC Interpretative Letter, 1992 WL 125220 (Mar. 2, 1992) (allowing unmatched commodity index swaps managed on a portfolio basis); Bank to Act as Principal in Unmatched Commodity Price Index Swaps, OCC No Objection Letter No. 90-1, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,095, at 71,219 (Feb. 16, 1990) (allowing banks to expand swap activities to include acting as principals in unmatched commodity index swaps); National Bank Acting as Principal in Commodity Price Index Swaps with Customers, OCC No Objection Letter No. 87-5, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,034, at 76,638 (July 20, 1987); OCC Interpretive Letter, 1988 WL 282282 (Aug. 8, 1988) (permitting a certificate of deposit product which pays interest at a rate based in part upon changes in the S&P 500). The OCC has also agreed that "National Banks may engage in physical commodity transactions in order to manage the risks arising out of physical commodity financial derivative transactions." Circular No. 277, *supra* note 160, at 36,466; *see also* OCC Interpretive Letter 632, 1993 WL 639335 (June 30, 1993) (concluding that hedging financial exposure from activities involving commodities is permissible); Letter from William P. Bowden, Jr., *supra* note 60.

173. Circular No. 277, *supra* note 160. The OCC provides additional guidance regarding the interpretation of Circular No. 277 in OCC Bull. No. 94-31, 1994 WL 194290 (May 10, 1994). The OCC also intends to issue detailed examination procedures regarding derivative activities. Daily Report for Executives (BNA), Sept. 8, 1994, at A-1. The Federal Reserve Board has also provided similar but less comprehensive guidelines for examination of derivative activities. *See Risk Management of Financial Derivatives*, 5 Fed. Banking L. Rep. (CCH) No. SR 93-69 ¶ 58,717, at 36,467 (Dec. 20,

activity, taking into account whether the bank is a dealer, an active position taker, or a limited end-user.[174] Congress is also contemplating additional regulation.[175]

No state appears to have enacted express statutory authority permitting a State Bank to engage in financial derivative transactions to the same extent as National Banks. In fact, the Kansas Attorney General has opined that a Kansas State Bank does not have the power to enter into financial derivative transactions.[176] The Kansas Attorney General's opinion, however, recognized that the Kansas wild card statute may arguably have granted authority to the Kansas Bank Commissioner to authorize such activity.[177]

At least two states expressly authorize derivative activities to some extent. The bank regulatory authority for New York has authorized several different types of derivative activities.[178] Illinois also appears

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1993).

174. Circular No. 277, *supra* note 160, at 36,461. The Joint Study refers to them as "end-users" and "intermediaries" (or "dealers"). JOINT STUDY, *supra* note 159, at 5.

175. Kenneth H. Bacon & Greg Hitt, *Derivatives Face New Regulation From Congress*, WALL ST. J., May 11, 1994, at A4 (discussing Rep. Markey's announcement that he will introduce a bill to regulate derivatives); *Bill Introduced to Regulate Derivative-Instruments Use*, WALL ST. J., July 19, 1994 at C6 (relating that Senator Riegle introduced bill to regulate derivatives); Randall Smith & Steven Lipin, *Beleaguered Giant: As Derivative Losses Rise, Industry Fights to Avert Regulation*, WALL ST. J., Aug. 25, 1994, at A1 (generally); Rep. Leach Introduces Derivatives Bill for All Financial Institutions, End-Users, 26 Sec. Reg. & L. Rep. (BNA) No. 5 at 168 (Feb. 4, 1994) (discussing Leach bill).

176. The Kansas Attorney General opined that a State Bank could not enter into interest futures and forward placement contracts, a form of financial derivatives. Op. Kan. Att'y Gen., No. 82-68, 1982 WL 187557, at *1 (Mar. 16, 1982).

177. The Attorney General's office refused to rule on the reach of the wild card statute in this area because it was "unaware of any decisions of the Kansas Supreme Court or prior opinions of this office construing the scope and extent of the general powers granted the Commissioner by this [wild card] statute" and because the issue was "not presented for our consideration." *Id.* at *11.

178. New York has granted such authority based upon a bank's incidental banking powers. *See* Letter from David T. Halvorson, First Deputy Superintendent, Banking Dep't, State of New York, to Edmund P. Rogers III, Esq., Senior Vice President and Resident Counsel, Morgan Guaranty Trust Company of New York (Aug. 11, 1989) (opposing commodity linked activities); Letter from David T. Halvorson, First Deputy Superintendent, Banking Dep't, State of New York, to Anthony J. Horan, Vice President and Counsel, Bankers Trust Company (Nov. 14, 1988) (stating that commodity related financing activities are permissible under New York law); Letter from Carmine M. Tenga, Deputy Superintendent of Banks, Banking Dep't, State of New York, to Guy C. Dempsey, Vice President and Counsel, Bankers Trust Company (July 16, 1992) (approving of commodities investments); Letter from Carmine M. Tenga, Deputy Superintendent of Banks, Banking Dep't, State of New York, to Guy C. Dempsey, Vice President and Counsel, Bankers Trust Company (Nov. 20, 1991) (approving of commodities investments).

to have recognized an incidental power for its State Banks to hedge their interest rate risk through the use of interest rate swaps and similar instruments.[179]

A wild card statute provides an opportunity for a state banking regulator to authorize the use of financial derivatives at varying levels of activity based upon the authorization granted to National Banks by the OCC. Failure to authorize such use could deprive a State Bank of an important tool for managing interest risk or of the opportunity to generate additional revenue. By relying on the guidelines developed by the OCC, a state banking regulator may take advantage of the limitations and the controls that the OCC has already developed.

B. Insurance Activities and Annuities

Insurance activities of all types provide another important area in which to apply a wild card statute.[180] Both large and small banking institutions generally "consider insurance the easiest and likely the most successful area for small as well as large institutions to enter."[181] Although some states have granted insurance powers either expressly or through their wild card statutes, the potential remains for other states to use wild card statutes to authorize insurance powers.

National Banks have been authorized, in certain circumstances, to sell various types of insurance[182] despite Congress' general delegation of regulating the insurance industry to the states pursuant to the McCarran-Ferguson Act.[183] For example, National Banks generally

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179. *See* ILLINOIS COMMISSIONER OF BANKS AND TRUST COMPANIES, STATEMENTS OF POLICY § 4.05, at 4-6 (1991). Section 4.05 requires that all such derivative transactions be for "hedging purposes rather than speculation" and "must be kept within the legal investment limitation permitted by the Illinois Banking Act." *Id.*

180. For a general discussion of the interaction between insurance and banking, see Fischer, *supra* note 29, at 771-821.

181. Barry A. Abbott et al., *Banks and Insurance: An Update*, 43 BUS. LAW. 1005, 1005 (1988).

182. The Eighth Circuit Court of Appeals recently rejected Arkansas' attempt to regulate a National Bank's sale of debt cancellation contracts (basically credit life insurance), holding that state insurance laws were preempted to the extent they conflicted with incidental banking powers granted to National Banks. First Nat'l Bank of E. Ark. v. Taylor, 907 F.2d 775, 778 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). For a discussion regarding the future of debt cancellation contracts under either National Bank or wild card authorization, see Nathaniel E. Butler, *Comment: Official Confusion a Brick Wall to Debt Cancellation Contracts*, AM. BANKER, Aug. 6, 1993, at 17.

183. *See* 15 U.S.C. §§ 1011-1015 (1988). For a discussion of the continuing battle of banks with state regulation, see Philip C. Meyer, *Banks Gird for New Fight in Congress over Insurance Powers*, 12 Banking Pol'y Rep. (P-H) No. 17 at 5 (Sept. 6, 1993).

Insurance subsidiaries of bank holding companies generally may engage in insurance

have the power to sell and underwrite insurance related to the extension of credit, such as credit life insurance,[184] municipal bond insurance,[185] and title insurance.[186]

Section 92 of the National Bank Act also authorizes National Banks to sell fire, life, and other types of insurance in cities with fewer than 5,000 people.[187] The OCC has attempted to expand the reach of Section 92 beyond communities of 5,000.[188] The Second and Fifth Circuits, however, have firmly rejected these attempted expansions.[189]

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activities to the extent permitted by applicable law or the National Bank Act. *See generally* Fischer, *supra* note 29 (summarizing law relating to insurance powers and bank holding companies). For a discussion of the Federal Reserve Board's insurance regulation, see Abbott et al., *supra* note 181.

184. *See* Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); 12 C.F.R. § 2 (1994) (allowing the sale of credit life, credit health, and accidence insurance); National Bank Allowed to Acquire Subsidiary Engaged in Underwriting, as Reinsurer, Credit Life Insurance, OCC Interpretive Letter No. 277, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441, at 77,596 (Dec. 31, 1983).

185. *See* American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1989) (upholding the regulation); Issuance of Standby Letters of Credit by Subsidiary to Support Municipal Bond Issues, OCC Interpretive Letter No. 338, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,790 (May 2, 1985).

186. *See* Bank May Act as Agent in the Sale of Title Insurance Incidental to Its Express Authority to Make Loans Secured by Real Property, OCC Interpretive Letter No. 368, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,836 (July 11, 1986); Title Insurance Policy Activities of Operating Subsidiary of National Bank, OCC Interpretive Letter No. 377, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601, at 77,901 (Feb. 6, 1987).

187. Section 92 provides that:

> [A]ny such association [national bank] located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company.

12 U.S.C. § 92 (1988 & Supp. V 1993). The United States Supreme Court recently upheld this interpretation in United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993). For a general discussion of National Bank insurance powers, see generally Abbott et al., *supra* note 181.

188. *See* Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1012 (5th Cir. 1968) (relating the OCC approval of the application of Citizens & Southern National Bank to sell broad forms of automobile, home, casualty, and liability insurance); National Bank May Sell Insurance to Customers Residing Outside Small Town Where Its Main Office or Branch is Located, OCC Interpretive Letter No. 366, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536, at 77,833 (Aug. 18, 1986); OCC Ruling No. 7110 (1963) (codified at Banks & Banking, 12 C.F.R. § 7.7100 (1994)) ("may act as agent in the issuance of insurance incident to banking transactions").

189. The Second and Fifth Circuits contend that Section 92 creates a statutory prohibition on National Bank insurance activities in cities with more than 5,000

In contrast, a recent decision by the District of Columbia Circuit approved an OCC expansion of Section 92 by holding that Section 92 imposes no geographical limitation on the activities of a National Bank's insurance agency located in a town of fewer than 5,000 people.[190] The OCC ruling presents the possibility that National Banks could open branches in cities with populations of fewer than 5,000 people, then use these branches to market their insurance activities over a wider geographic area.[191]

Both National Banks and State Banks are also interested in selling annuities, a financial product similar to insurance,[192] because of the potential profit that could be made from the activity.[193] The OCC has permitted National Banks to sell annuities in communities with populations greater than 5,000, asserting that annuities are not insurance and should not be subject to Section 92 limitations.[194] The United States Supreme Court has recently upheld this practice, holding that the

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persons. *See* American Land Title Ass'n v. Clarke, 968 F.2d 150, 156 (2d Cir. 1992) (prohibiting National Banks from selling title insurance in cities with more than 5,000 people), *cert. denied*, 113 S. Ct. 2959 (1993); *Saxon*, 399 F.2d at 1012 (5th Cir. 1968) (overruling OCC Rul. 7110). *But see* Independent Ins. Agents of Am., Inc. v. Board of Governors of the Fed. Reserve Sys., 736 F.2d 468, 476-77 (8th Cir. 1984) (finding general insurance powers outside of Section 92); Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) (permitting a subsidiary of a National Bank to sell certain kinds of insurance).

190. *See* OCC Interpretive Letter No. 366, *supra* note 188 (concluding that Section 92 places no geographical limitation on the insurance activities of a national bank in a town of fewer than 5,000 persons); Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993) (upholding OCC Interpretive Letter No. 366).

191. *See* Arthur D. Postal, *OCC Chase Stratagem Exploits Insurance Rule*, FDIC WATCH, Oct. 11, 1993, at 1; David W. Roderer, *Viewpoint: Congress Should Defer Action on Bank Annuity Sales*, AM. BANKER, Nov. 3, 1993, at 12.

192. Annuities generally provide for a variable or fixed payment payable over a fixed term or for life. BLACK'S LAW DICTIONARY 90 (6th ed. 1990). *See also* Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1297, 1300 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 2121 (1994). For a discussion of annuities, see Jonathan B. Cleveland, Comment, Variable Annuity Life Insurance Company v. Clarke*: A Second Look at National Bank Annuity Sales and 12 U.S.C. § 92*, 78 MINN. L. REV. 911, 926 n.79 (1994).

193. *See* Kalen Holliday, *Banks Benefit from Stampede to Insurance Products*, AM. BANKER, Sept. 24, 1993, at 13 (stating that banks anticipate strong future growth); *see also Supreme Court is Next Stop in Legal Dispute over Bank Annuities*, Banking Pol'y Rep. (P-H) No. 18, at 7 (Sept. 20, 1993) (stating that "billions of dollars are at stake" over whether National Banks are permitted to sell annuities); Karen Talley, *Courts Leave Banks in Limbo on Right to Market Annuities*, AM. BANKER, Sept. 28, 1993, at 12 (relating that annuities generated $450 million in fee income for banks in 1992).

194. *See* National Banks May Participate in Brokering of Variable Annuity Contracts, OCC Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,773 (Apr. 4, 1985); National Bank Permitted to Sell Annuity Contracts, OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,210 (Feb. 12, 1990).

"brokerage of annuities is an 'incidental power . . . necessary to carry on the business of banking'" for a National Bank.[195] The Court further noted that annuities are not insurance under Section 92.[196]

Sixteen states, seven of which are not wild card states, currently authorize State Banks or their subsidiaries to engage in insurance brokerage activities.[197] Although fourteen other states suggest that their wild card statutes would authorize such activities,[198] only four of these states appear to have actually published regulations or rulings providing such powers.[199] In addition, only three states expressly authorize the sale of annuities.[200]

C. Investments in Quasi-Government Agencies

Congress has periodically authorized National Banks to make equity investments in a variety of quasi-government agencies.[201] Due to typically stringent restrictions on the ability of State Banks to purchase debt and equity investments, investments in such agencies often require either express statutory authorization or regulatory approval.[202] Wild card statutes may be used, however, to permit State Banks to invest in quasi-government agencies.

The power to purchase stock in the Federal Agricultural Mortgage Corporation ("Farmer Mac") provides an example of an investment that may be authorized through a wild card statute.[203] Farmer Mac is a federal agency created in 1988 to develop a secondary market for farm real estate loans.[204] Congress intended that both National and State

195. NationsBank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 814 (1995) (quoting 12 U.S.C. § 24 (Seventh)).

196. *Id.* at 814-15.

197. CONFERENCE OF STATE BANK SUPERVISORS, *supra* note 13, at 14-15.

198. *Id.*

199. *See supra* note 134.

200. *See supra* note 134.

201. *See, e.g.*, 12 U.S.C. § 24 (Seventh) (1988 & Supp. V 1993), *as amended by* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2241 (Agricultural Credit Corporation); 12 U.S.C. § 1424 (1988) (Federal Home Loan Bank); 12 U.S.C. § 1718(d) (Supp. V 1993) (Federal National Mortgage Association); Purchase of Preferred Freddie Mac Stock by National Banks, OCC Interpretive Letter No. 577, [1991-1992 Transfer Binder] Fed. Banking L. Rep. ¶ 83,347, at 71,489 (Apr. 6, 1992) (Federal Home Loan Mortgage Corporation).

202. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 205, §§ 5/33, 5/35 (West 1993) (listing permitted investments in debt securities).

203. Farmer Mac was created pursuant to the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, 1687 (codified as amended at 12 U.S.C. § 2279aa-1(a)(1) (1988)).

204. H.R. REP. NO. 295(I), 100th Cong., 1st Sess. 69-70 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2723, 2740-41.

Banks purchase stock in Farmer Mac.[205] The Farmer Mac legislation, however, did not specifically permit either National Banks or State Banks to purchase stock in the agency. Consequently, the OCC issued a letter specifically granting National Banks the power to purchase stock in Farmer Mac.[206] States have been slower to respond, however; only nine state legislatures have expressly empowered their State Banks to invest in Farmer Mac.[207]

Reacting to this slow response, commentators have suggested that state banking regulators could utilize wild card statutes to give State Banks the power to invest in Farmer Mac without the need for express legislative approval.[208] Missouri, in fact, has already authorized an investment in Farmer Mac through its wild card statute.[209] By looking to their wild card statutes, other state banking regulators also could easily and quickly expand the types of investments their State Banks could make, avoiding the often arduous process of obtaining legislative approvals.

Similar arguments could be made for State Banks to invest in other government favored investments in which National Banks are permitted to invest, such as small business investment companies,[210] national housing partnerships,[211] housing development corporations,[212] and

205. Authority of National Banks to Purchase Security in the Federal Agricultural Mortgage Corporation, OCC Interpretive Letter No. 427, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651, at 78,031 (May 9, 1988) ("A number of other provisions in the Agricultural Act indicate that Congress intended that all types of financial institutions purchase the stock of Farmer Mac . . . .").

206. *See id.*

207. *See* HAW. REV. STAT. § 412:5-305; IOWA CODE ANN. § 524.901 (West 1993); KAN. STAT. ANN. § 9-1101; MINN. STAT. ANN. § 48.61 (West 1988 & Supp. 1995); NEB. REV. STAT. § 8-148 (Supp. 1993); N.D. CENT. CODE § 6-03-47.4 (Supp. 1993); OKLA. STAT. ANN. tit. 6, § 806 (West Supp. 1995); S.D. CODIFIED LAWS ANN. § 51A-4-26 (1990); VA. CODE ANN. § 6.1-60.1 (Michie Supp. 1994). Neither Nebraska nor Iowa has a wild card statute.

208. Weldon Barton of the Independent Bankers Association of America suggests that wild card statutes might empower state banks to purchase equity in Farmer Mac. *See* Robert M. Garsson, *Comptroller Says National Banks Can Buy Stock in Farmer Mac*, AM. BANKER, May 11, 1988, at 14.

209. MO. CODE REGS. tit. 4, § 140-6.063 (1988).

210. Small business investment companies ("SBIC") are generally companies that provide equity capital for small business concerns. *See* Small Business Investment Act of 1985, 15 U.S.C. §§ 661-697c (1988 & Supp. V 1993). National Banks are authorized to invest in SBICs pursuant to 15 U.S.C. § 682(b) (1988); 12 C.F.R. § 7.7535 (1994).

211. *See* OCC Banking Circular No. 21, [1966-1973 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 95,264 (Jan. 14, 1970).

212. 12 U.S.C. § 24 (Seventh) (1988 & Supp. V 1993), *as amended by* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2241.

state housing corporations.[213]

D. Lending Limits

The power of a State Bank to lend an amount equal to what it would be permitted to lend as a National Bank provides a powerful tool for regulators to assist State Banks unable to lend to customers during depressed business cycles due to decreases in such banks' capital. Although lending limits may constitute one of the more prominent aspects of a state's banking code,[214] the power to alter that limit may enable state banking regulators to assist their banks to compete with National Banks.

A lending limit is the maximum amount that a bank may lend to its customers and is generally expressed as a percentage of the bank's capital.[215] A lending limit also tends to reflect a regulator's determination of how much a bank can safely lend to a single customer.[216] Lending limits typically range between ten percent and twenty-five percent of a bank's capital.[217] Even if the percentages are uniform, however, lending limits may differ depending upon the definition of "capital."[218]

Congress has generally provided that a National Bank can lend up to fifteen percent of its capital to a customer on an unsecured basis.[219] Congress, however, has delegated to the OCC the power to prescribe rules and regulations "to establish limits or requirements other than

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213. *Id.*

214. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 205, § 5/32 (West 1993); WIS. STAT. ANN. § 221.29 (West 1991 & Supp. 1994).

215. *See* Joanne R. Hicken, *Substitute Lending Limits in Excess of the Statutory Lending Limit: The Regulators Have the Power*, 107 BANKING L.J. 38, 38 (1990).

216. *See id.* at 44; *see generally* Note, *The Policies Behind Lending Limits: An Argument for a Uniform Country Exposure Ceiling*, 99 HARV. L. REV. 430 (1985) (discussing policies behind lending limits); Kenneth J. Rojc, *National Bank Lending Limits—A New Framework*, 40 BUS. LAW. 903 (1985) ("The protection and regulation of national bank finances, rather than the imposition of restrictions on borrowers, has been recognized as the principal aim of the lending limit laws.").

217. *See, e.g.*, FLA. STAT. ANN. § 658.48(2), (5) (stating that an unsecured obligation may not exceed 10% of capital); ILL. COMP. STAT. ANN. ch. 205, § 5/32 (stating that unsecured loans may not exceed 20% of capital); N.J. STAT. ANN. §§ 17:9A-61, 17:9A-62 (West 1984) (stating that unsecured loans may not exceed 10% of capital); TEX. REV. CIV. STAT. ANN. art. 342-507(b) (West Supp. 1995) (unsecured loans may not exceed 25% of capital). *See generally* PROFILE, *supra* note 31, at 221-225 (summarizing state lending limits).

218. *See* 12 C.F.R. § 3.100 (1994). Both Illinois and New Mexico liberalized their lending limits by conforming their definition of capital to that used by National Banks. *See* ILL. COMP. STAT. ANN. ch. 205, § 5/2 (West Supp. 1995); N.M. Reg. 93-1B (Nov. 8, 1993).

219. *See* 12 U.S.C. § 84 (1988).

those specified."[220] By granting the OCC the power to alter a lending limit, Congress intended to enable the OCC to quickly adjust its lending limit regulations to fit business conditions.[221] The OCC has adjusted limits under this power in response to the agricultural and energy crisis of the 1980s.[222]

State Banks will be unable to provide the same level of service to their customers if they are unable to lend the same amount as a National Bank can lend, either because of substitute lending limits or differing interpretations of capital. As the OCC adjusts its lending limit, state banking regulators must provide the same flexibility to their State Banks. A wild card statute provides a unique response to enable state banking regulators to adjust their lending limits to enable State Banks to compete with National Banks.

Several states have concluded that their wild card statutes should be interpreted to encompass the power to lend the same amount that a National Bank can lend.[223] There are several arguments, however, why wild card statutes might be interpreted as not permitting expansion of the lending limits applicable to State Banks. First, it could be argued that wild card statutes operate only to authorize the lending activity itself. If a State Bank is already authorized to engage in an activity, subject to limitations established by state statutes or regulations, then the wild card statute should not enable that bank to exceed its state law-based limitations. Second, critics could argue that wild card statutes were not intended to reach a matter so important to the safety and soundness of a banking institution as lending limits. Typically, a lending limit is not a prohibition on what a bank can do, but rather a demarcation of the extent to which it can do the activity without endangering the safety and soundness of the institution.[224] This argument, however, suggests that the OCC has authorized unsafe banking practices by adjusting lending limits.[225]

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220. *Id.* § 84(d)(1).

221. *See* S. REP. No. 536, 97th Cong., 2d Sess. 25-27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3079-81 (delegating authority to OCC to enable OCC to respond to "economic conditions and financial practices"); *see also* National Banks' Lending Limits, Request for Comment, 51 Fed. Reg. 15,303 (final rule codified at 12 C.F.R. § 32.8 (1994)) (discussing delegation of lending limit authority to the OCC).

222. *See* Lending Limits, 51 Fed. Reg. 39,641 (1986) (codified at 12 C.F.R. § 32.8 (1994) (providing a substitute lending limit for banks with agricultural or oil and gas loans).

223. *See supra* notes 141-43 and accompanying text.

224. *See supra* note 216 and accompanying text.

225. For a discussion of sound banking practices, see *infra* part VI.B.

VI. CONSTRAINTS ON EXPANDED WILD CARD USAGE

Although wild card provisions provide a solution to many problems facing state bank regulators and legislatures, serious policy issues and political constraints remain. It will be necessary, therefore, for state legislatures and policymakers to resolve these issues, in addition to encouraging use of their wild card statutes, before any measurable progress in the use of wild card statutes will result.

A. Limitations on Wild Card Use

Regulators and legislators alike must determine the extent to which their wild card statutes are intended to authorize State Banks to engage in activities that may be permitted for National Banks, either now or in the future. State Bank regulators will continue to encounter tough questions about the potential reach of their wild card statutes as National Banks are empowered to act in ways that could be considered to contravene state law or policy.[226]

1. Limitations Potentially Imposed by State Laws

Twenty-seven wild card statutes expressly address whether a state banking regulator may issue a wild card ruling in contravention of state law.[227] Unfortunately, however, even regulators expressly authorized to contravene state law may resist issuing such a ruling, in fear that a court would find that a legislature lacked the authority to delegate such power. Several of the states which permit contravention provide that such rulings will expire after a certain period of time unless the legislature takes action.[228] As a result, State Banks that may be authorized by the state banking authority to engage in certain activities may decide to await legislative action before commencing these activities, or even making investments to develop them.

Twelve wild card statutes provide no guidance as to whether a banking commissioner is entitled to issue a ruling in contravention of state law.[229] In these states, regulators may be reluctant to contravene state law for fear that either a court or the legislature may determine that the regulators have overstepped their authority.

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226. Under Illinois law, for example, investment securities that a State Bank may purchase must be rated by a rating agency. ILL. COMP. STAT. ANN. ch. 205, § 5/33 (West 1993). No such express rating requirement is imposed on National Banks.

227. *See supra* notes 116-17 and accompanying text.

228. *See supra* note 116.

229. *See supra* note 118 and accompanying text.

The extent to which a state's legislature, by enacting a wild card statute, can expressly or by implication authorize its bank regulatory agency to contravene other conflicting provisions of state law, varies. Alaska, Illinois, and Oklahoma are representative of the various state interpretations of their respective wild card statutes.

2. Limitations Imposed by State Attorneys General

Three Attorneys General opinions issued from 1980 and 1981 narrowly interpreted their respective state wild card statutes. In 1980, the Alaska Attorney General opined that without an express grant from the legislature, the Alaskan wild card statute at that time did not empower Alaska's banking commissioner to issue rulings in contravention of state law.[230] This case was easy, however, because earlier drafts of the statute had contained language, which was subsequently removed, authorizing the commissioner to do so.[231]

In 1980, the Illinois Attorney General read the Illinois statute[232] very restrictively, taking the position that the only effect of Illinois' wild card statute is to permit State Banks to own small business investment company stock that National Banks are permitted to own.[233] The opinion, however, appears to be colored by the Attorney General's efforts to narrow the wild card statute in order to protect Illinois' branch banking restrictions.[234]

The Illinois Attorney General has also considered whether the Illinois wild card statute permits an Illinois State Bank to charge interest in excess of amounts permitted under Section 4 of the Illinois Interest Act,[235] as National Banks were permitted to do.[236] The

230. Op. Alaska Att'y Gen., Nos. J99-096-80, J-66-051-81 (Aug. 4, 1980). Alaska's legislature since that time has added "notwithstanding" language to that state's wild card statute that provides that its wild card statute may contravene state law. Op. Alaska Att'y Gen., No. J-66-321-81 (Feb. 19, 1981).

231. *Id.*

232. ILL. COMP. STAT. ANN. ch. 205, § 5/5(11) (West Supp. 1994).

233. 1980 Op. Ill. Att'y Gen., Nos. 70, 72 (Apr. 15, 1980).

234. The Illinois Attorney General noted that there was a "strong public policy against branching by banks," and that if such restrictions were to be repealed, the Illinois General Assembly should do it expressly (which it did in 1993). *Id.* The Illinois Attorney General's opinion probably should be considered to have been implicitly overruled by the Illinois Appellate Court in Town & Country Bank of Quincy v. E. & D. Bancshares, 527 N.E.2d 637 (Ill. App. Ct. 1988), which interpreted the Illinois wild card statute as authorizing actions as well as ownership. See *infra* notes 283-84 and accompanying text for a discussion of this case. The opinion also appears to have ignored the 1969 amendments to the Illinois statute that substantially broadened its reach. *See infra* note 252.

235. ILL. COMP. STAT. ANN. ch. 815, § 205/4 (West 1993).

236. 1974 Op. Ill. Att'y Gen., No. 82 (Feb. 14, 1974).

Attorney General opined that the phrase "notwithstanding any other provisions of [the Illinois Banking] Act, contained in that state's wild card statute,"[237] was not intended to override the provisions of a separate act, such as the Illinois Interest Act.[238]

3. Judicial Rulings

More troubling is an opinion by the Oklahoma Supreme Court that struck down a wild card ruling promulgated by the Oklahoma Banking Commission. The Oklahoma Banking Commissioner formulated a rule[239] pursuant to the Oklahoma wild card statute[240] which paralleled Section 91 of the National Bank Act.[241] Section 91 provided that a National Bank was not subject to attachment or execution until after the National Bank had exhausted all of its appellate remedies.[242]

Relying on the Commissioner's wild card ruling, the Tulsa County District Court stayed execution of a judgment against an Oklahoma State Bank.[243] On appeal, however, the Oklahoma Supreme Court held that the "[l]egislature may not delegate to an administrative agency the power to amend or subvert a statute through administrative rules and regulations."[244]

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237. ILL. COMP. STAT. ANN. ch. 205, § 5/5(11) (West 1993 & Supp. 1994).

238. 1974 Op. Ill. Att'y. Gen., Nos. 82, 84-86 (Feb. 14, 1974).

239. Rules of the Okla. Banking Board IV-19 (1991).

240. OKLA. STAT. ANN. tit. 6, § 203 (West 1984 & Supp. 1995).

241. 12 U.S.C § 91 (1988).

242. *Id.* Section 91 specifically provides that "no attachment, injunction, or execution, shall be issued against [a National Bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." *Id.*; *see also* United States v. FDIC, 881 F.2d 207 (5th Cir. 1989) (precluding creditors from filing abstracts of judgment until receiving a final judgment), *cert. denied*, 493 U.S. 1072 (1990); United States v. Lemaire, 826 F.2d 387, 388 (5th Cir. 1987) (holding that National Banks are not subject to execution until after appellate remedies are exhausted), *cert. denied*, 485 U.S. 960 (1988); Glad v. Thomas County Nat'l Bank, No. 87-1299-C, 1991 WL 261712 *1 (D. Kan. Nov. 14, 1991) (holding that National Banks are not required to post supersedeas bond until final judgment); William E. Deitrick & Christian A. Johnson, *National Banks and Section 91: Protection from Judgment Creditors Pending Appeal*, 112 BANKING L.J. 325 (1995); Letter from Peter Liebesman, Assistant Director, Bank Operations and Assets Division, Office of the Comptroller of the Currency, to L. Roger Boord, Esq., Kirkland & Ellis (July 30, 1993) (supersedeas bond requirement directly conflicts with 12 U.S.C. and is preempted). *But see* United States v. Theos, 709 F. Supp. 1007 (D. Colo. 1989) (holding that judgment creditor not precluded by Section 91 from filing judgment lien); Whitney Nat'l Bank v. McCrossen, 635 So. 2d 401 (La. Ct. App.) (holding a judgment creditor is not precluded from filing lis pendens), *cert. denied*, 639 So. 2d 1164 (La. 1994).

243. Morrow Dev. Corp. v. American Nat'l Bank & Trust Co., 816 P.2d 537 (Okla. 1991); *see* OKLA. R. APP. P. 1.13.

244. *Morrow Dev. Corp.*, 816 P.2d at 537 (citing Oklahoma Alcoholic Beverage Control Bd. v. Welch, 446 P.2d 268 (Okla. 1968)); *cf.* Utah League of Insured Sav.

Perhaps limiting the impact of this decision on other jurisdictions is the fact that the Oklahoma wild card statute does not expressly permit banking regulators to adopt rules in contravention of Oklahoma banking law. It is unclear whether the Oklahoma Supreme Court would have reached the opposite conclusion had "notwithstanding" language been present.[245] The Oklahoma Supreme Court might also have arrived at a different result had the statute that was overridden been a banking statute as opposed to a rule of civil procedure.[246]

Although the Oklahoma Supreme Court resisted what the court perceived to be the use of power to amend or subvert a statute, it is arguable whether any Oklahoma law was either amended or subverted. The Oklahoma state legislature made the policy decision that Oklahoma State Banks should enjoy the "powers . . . conferred upon [N]ational [B]anks" by enacting its wild card statute,[247] thereby implicitly repealing any state law that conflicted with such policy.

4. Addressing State Law Limitations

One probable fear of states that have failed to enact wild card statutes, and even of those states that have already enacted wild card statutes, is the apparent authority granted to the state banking regulator. The enactment of a wild card statute might be interpreted to constitute a grant to the state banking regulator of the authority to issue rulings under the wild card statute in contravention of state law. At least in those states where the legislature has expressly delegated to the state banking authority the power to ensure that the activities permitted

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Ass'ns v. Utah, 555 F. Supp. 664, 671-74 (D. Utah 1983) (finding an impermissible delegation under Utah Savings & Loan Association wild card statute). The Utah decision has been sharply criticized by commentators. *See* HUBER, *supra* note 105, at 3-12 ("The Utah Savings decision can easily be distinguished in subsequent cases because the court stated in its opinion that the decision should be read narrowly and because of the adoption of specific legislation declaring that enforcement of due-on-sale clauses is contrary to public policy in Utah."); Gregory J. Pulles, *Constitutionality of State Parity Statutes*, 39 BUS. LAW. 1275, 1277 (1984) (generally critiquing Utah decision's reasoning).

245. See *supra* note 118 for a listing of state wild card statutes that do not expressly provide for, or are ambiguous about, whether a ruling may be adopted notwithstanding conflicting state law.

246. For a discussion of an Illinois Attorney General opinion making a similar distinction regarding the Illinois wild card statute and the Illinois Interest Act, see *supra* notes 235-38 and accompanying text.

247. *See* OKLA. STAT. ANN. tit. 6, § 203 (West 1984 & Supp. 1995); HUBER, *supra* note 105, at 3-12 (discussing validity and importance of state legislative decisions to adopt future federal rules); Pulles, *supra* note 244, at 1277 ("It seems unreasonable to require the state legislature to act each year to effectuate this legitimate policy of competitive equality.").

of State Banks should match those of National Banks,[248] any wild card rulings by that state banking authority should be entitled to deference. On the federal level, Congress has frequently delegated similar substantive rule making authority to federal agencies.[249] Courts have generally upheld such rule making authority, provided that the agency follows congressional intent in issuing such regulations.[250] State courts apply similar guidelines.[251]

Although the concern relating to the broad authority of state banking regulators under wild card statutes is significant, it would be difficult to place State Banks on a competitive footing with National Banks in the absence of such implicit authority. For example, the only way to grant lending limit parity would be to adopt a limit different from that expressly authorized by the legislature. Legislatures must assess whether they need to amend their wild card statutes to clarify their statutes' reach and the extent of authority each statute gives to state

248. *See supra* note 116.

249. *See, e.g.*, 12 U.S.C. § 93a (1988) (delegating rule making authority to OCC with respect to National Banks); I.R.C. § 469(l) (1994) ("The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section."). These agencies often act in a "legislative capacity when implementing and administering the statutory schemes Congress entrusts to them." Robert J. Gregory, *When a Delegation Is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps*, 39 CATH. U. L. REV. 725, 732 (1990); *see also* JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 3.70 (1991) (discussing validity of legislative regulations issued by IRS).

250. *See* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority entrenching on the principle of separation of powers has occurred." (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989))); United States v. Sharpnack, 355 U.S. 286, 294 (1958) ("Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress . . . of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government."); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

251. *See, e.g.*, Governor of Md. v. Exxon Corp., 370 A.2d 1102, 1119 (Md. 1977) (holding that delegations of legislative power ordinarily do not violate the principle of separation of powers when sufficient safeguards are provided), *aff'd*, 437 U.S. 117 (1978); General Assembly of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982) (stating that it is commonplace for legislative standards governing an administrative agency to be expressed in broad, general terms, on the assumption that the agency will implement its enabling legislation through the adoption of more detailed standards). At least one court has refused to apply a wild card statute relating to the Savings and Loan industry because the legislative history of the statute "strongly illustrates that the legislation did not intend to affect the Washington law governing enforcement" of the statute in question. Perry v. Island Sav. & Loan Ass'n, 684 P.2d 1281, 1288 (Wash. 1984).

banking regulators.[252]

B. Safety and Soundness Considerations

State banking regulators may resist resorting to their wild card statute on grounds that such an expansion of state banking powers may endanger the safety and the soundness of their financial institutions. Regulators may point to earlier financial disasters that they view as the results of banking power expansions.[253] Regulators may suggest that weaker banks are more likely to take advantage of expanded banking powers in their efforts to improve profits.[254] Regulators may also cite the recent substantial losses from financial derivatives suffered by commercial banks and their customers as an example of the dangers of expanding banking powers.[255]

Evidence on the benefits of diversifying a state's banking activities by expanding banking powers is mixed. Commentators and empirical studies have suggested that expanding the activities may result in more profitable and efficient banks.[256] Critics of these studies, however, suggest that the results, in practice, may be much different based upon difficulties banks may have in funding or in managing these new

252. Illinois, in fact, broadened its statute in 1969 in an effort to expand use of its wild card statute. Pub. Act No. 76-1826, 76th Gen. Ass., 1969 Ill. Laws 4025 (codified as amended at ILL. COMP. STAT. ANN. ch. 205, § 5/5 (West Supp. 1994)). Alaska added "notwithstanding" language to broaden the reach of its statute. *See supra* note 230 and accompanying text.

253. One commentator has noted that "[s]pecifically, one of the lessons of the thrift crises of the 1980s is that it is foolish to give new powers to nearly or already insolvent institutions with little or no experience in the new activities and with ample incentives to take risks at the deposit insurer's expense." Robert E. Litan, *Interstate Banking and Product-Line Freedom: Would Broader Powers Have Helped the Banks?*, 9 YALE J. ON REG. 521, 539 (1992).

254. *See id.* at 539-40.

255. *See* GAO REPORT, *supra* note 159, at 39-40 ("concerns exist that size, concentration, and linkages increase the risk to firms and markets"); J. Arnold, *Better Safe Than Sorry*, ENERGY RISK, April 1994, at 1 (discussing how regulators are trying to avoid market disaster stemming from derivatives); *cf.* R. Myers, *Is This How Banks Sell Derivatives*, GLOBAL FINANCE, May 1994, at 37 (discussing financial risk of derivatives to bank customers).

256. *See* Peter Eisemann, *Diversification and the Congeneric Banking Holding Company*, 7 J. BANK RES. 68 (1976) (comparing stock price and dividend data for selected banks and nonbanks); Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 319-30 (1987); Arnold Heggestad, *Riskiness of Investments in Nonbank Activities by Bank Holding Companies*, 27 J. ECON. & BUS. 219 (1975) (comparing profitability of banking and nonbanking industries); Note, *Restrictions on Bank Underwriting of Corporate Securities: A Proposal for More Permissive Regulation*, 97 HARV. L. REV. 720, 729 (1984) (combining activities based upon portfolio theory may reduce risks).

activities.[257]

Safety and soundness concerns with respect to wild card statutes, however, should be kept in context. First, by definition, National Banks already engage in these "new" expanded activities, providing a state regulator with a history of the effect of such activities on an institution's health.

Second, National Banks may already be exercising such expanded powers in the very jurisdiction of state regulators. There is some evidence suggesting that failing to grant a financial institution the powers that its competition already exercises may actually make the institution weaker as it struggles to compete.[258]

Third, a State Bank exercising wild card powers remains subject to the same restrictions and regulations currently in place for National Banks.[259] In authorizing extended powers, the OCC has already determined that these activities are safe and sound practices for National Banks, and has issued appropriate safeguards to prevent endangering the safety and soundness of the National Banks.[260] State regulators will thus have a ready reference point to use in determining how far they should go in expanding a particular banking power.

Finally, if a regulator is concerned that only certain of its institutions are capable of exercising a particular power in a safe or sound manner, the regulator may limit its approval to State Banks meeting certain conditions. For example, a regulator could require that a State Bank meet certain capital requirements prior to trading financial derivative products.[261] A regulator may also require evidence that the State Bank has sufficient expertise in the activity before granting its approval.

C. Bureaucratic Inertia

State Banks awaiting authorization of wild card powers may encounter many of the same obstacles that organizations or individuals often face from bureaucracies when requesting permission to perform

257. Helen A. Garten, *Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform*, 49 MD. L. REV. 314, 353-71 (1990) (describing the hazards of inefficient funding and management upon diversification).

258. Beatty, *supra* note 67, at 31.

259. *See supra* notes 54-60 and accompanying text.

260. The OCC has the power to terminate unsafe or unsound banking practices. 12 U.S.C. § 1464(d)(2)(A) (Supp. V 1993) (HOLA provision); *id.* §§ 1818(a), (b), (e) (1988 & Supp. V 1993) (FDIA provisions); *see* Malloy, *supra* note 25, at 723 (discussing federal regulatory agencies' powers).

261. OCC Circular No. 277 already imposes different requirements upon National Banks engaging in derivative activities, depending upon the extent of their activity. *See* Circular No. 277, *supra* note 160.

a restricted activity. Almost all of the wild card statutes require approval from their respective banking regulators before State Banks may engage in a new wild card activity,[262] yet State Banks may face resistance to obtaining such powers from their banking regulator.[263] The current minimal use of wild card statutes by state banking regulators is probably evidence of this inertia.[264]

Initially, a state banking regulator may perceive few rewards from granting wild card powers. For example, if a state banking regulator authorized a power to a State Bank under a wild card statute which later proved unwise, the banking regulator would receive much of the blame.[265] Also, unilaterally expanding a banking power such as a lending limit to equal that governing a National Bank, without the express concurrence of the legislature, could result in serious political repercussions for the regulator if a State Bank dangerously overextended itself.[266] Thus, after analyzing the costs and benefits of taking action, a regulator may conclude that there would be little advantage for the agency to gain from authorizing such wild card activity, leading the regulator to avoid or to delay authorizing such activities in the interest of institutional self-preservation.[267]

In addition, the "Bureaucratic Personality" often insists upon overly strict conformity to the duties, rules, and regulations under which it operates.[268] Regulators often resort to such formalism to avoid ever having to make a decision.[269] As a result, a state banking regulator

262. *See supra* note 108 and accompanying text.

263. For example, anecdotal evidence suggests that one reason for the few rulings made under the Illinois wild card statute was the conservative interpretation the Illinois Banking Commissioner has given to the provision. Christine Winter, *Insurance Door is Left Ajar to Illinois Banks*, CHI. TRIB., July 15, 1990, § 7, at 1.

264. *See supra* notes 123-25 and accompanying text.

265. Some bureaucrats are referred to as "conservers" that "tend to be biased against any change in the status quo. It might harm them greatly and cannot do them much good." ANTHONY DOWNS, INSIDE BUREAUCRACY 97 (1967).

266. *See* Hicken, *supra* note 215, at 44 ("Banking regulators accept this principal [of risk reduction] and will be reluctant to relax the lending limit except in special circumstances.").

267. Similar risk aversion behavior has been observed by commentators at the Securities and Exchange Commission. *See* Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527, 529-31 (1990).

268. *See* JOHN P. BURKE, BUREAUCRATIC RESPONSIBILITY 86 (1986) ("A literalist interpretation and strict conformity to duties, rules and regulations, however, can take such allegiance to dangerous extremes."); *see also* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 123-24 (1957); NICOS P. MOUZELIS, ORGANIZATION AND BUREAUCRACY 55 (1967) ("The instrumental and formalistic aspects of the bureaucracy become more important than the substantive ones.").

269. DOWNS, *supra* note 265, at 100 ("[R]igid rule-following acts as a shield

may require such strict compliance with a wild card statute that it becomes virtually impossible to satisfy its requirements. For example, a statute that requires a showing that such power "serves the public convenience or advantage"[270] could be interpreted so strictly as to prevent any authorization except for the most obvious examples.

Regulators often strive to preserve their powers and their autonomy,[271] and may be reluctant to do anything that would result in surrendering regulatory authority over state banking institutions. Defaulting to federal regulation or OCC administrative opinions may undermine, to some extent, the authority granted to a regulator to issue rules and regulations governing such institutions. Deference to OCC rulings could suggest that the OCC understands what is best for a State Bank better than the primary state regulator. Such reasoning may explain why regulators in nearly one-half of the states with a wild card statute have been reluctant to employ it in any situation.[272]

Commentators appear to have ignored the current and the future effects of bureaucratic inertia when they describe the impact of wild card statutes on the banking system. Professors Henry Butler and Jonathan Macey have argued that wild card statutes may have already lessened the political pressure for regulators to grant increasingly greater banking powers.[273] They argue that because states will immediately respond to innovations at the federal level through their wild card statutes, National Banks will have little incentive to lobby for expanded bank powers because they will have to share such benefits with State Banks.[274]

Butler and Macey's argument assumes, however, that state banking regulators actually, or automatically, respond to federal innovations through wild card statutes.[275] The contrary has been true; nearly one-half of the wild card states have issued no rulings with regard to their wild card statutes[276] and the remaining states, excluding Mississippi,[277] have issued few interpretations.[278]

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protecting them from being blamed for mistake by their superiors . . . .").

270. *See supra* note 122 and accompanying text.

271. BURKE, *supra* note 268, at 91.

272. *See supra* note 123 and accompanying text.

273. *See* Butler & Macey, *supra* note 84, at 706.

274. *Id.*

275. Kenneth Scott makes the same assumption in arguing the opposite point. Scott, *supra* note 16, at 36.

276. *See supra* note 123 and accompanying text.

277. *See supra* note 124 and accompanying text.

278. *See supra* note 125 and accompanying text.

Butler and Macey also argue that National Banks may not seek new powers because of the possibility that a State Bank may be granted similar powers.[279] This argument also assumes that a State Bank would be automatically granted National Bank powers. It further assumes that the only reason a National Bank seeks such powers is to distinguish itself from a State Bank, an unlikely conclusion based upon banks' drive to expand the services that they offer to customers.

D. What Constitutes a National Banking Power?

An important issue that state legislatures or banking authorities must resolve is what constitutes a national banking power or activity. As explained above, wild card statutes, in general, may inadequately describe who defines what constitutes a national banking power.[280] Due to the multiplicity of statutory, administrative, and judicial authorities that directly or indirectly define the scope of national banking powers, it may be unclear what a state legislature intended its banking regulators to rely upon in authorizing wild card activities.

The definition of national banking power under a wild card statute may be particularly important to a National Bank that is converting into a State Bank.[281] A converting National Bank would argue that if the OCC permits an activity, either in writing, orally, or implicitly, the Bank should be permitted to engage in a similar activity as a State Bank. This continuity of activity would minimize the disruption of the services or activities in which a National Bank could continue to engage after its conversion to a State Bank.

Wild card statutes may base state banking powers on national authorities including federal statutes and court decisions, as well as OCC regulations, rulings, and interpretations. None of the wild card statutes, however, expressly refers to all of these authorities. Many of the wild card statutes, in fact, do not expressly refer to any authority, but instead grant only a general power to do what a National Bank is empowered to do.[282]

There is little judicial authority interpreting the question of what constitutes national banking power. An Illinois appellate court appears to have decided that an "act of Congress" specified in the Illinois wild card statute[283] includes OCC regulations and rulings, as well as court

279. *See* Butler & Macey, *supra* note 84, at 706.
280. *See supra* notes 113-15 and accompanying text.
281. *See supra* notes 89-90 and accompanying text.
282. *See supra* notes 113-15 and accompanying text.
283. ILL. COMP. STAT. ANN. ch. 205, § 5/5(11) (West 1993 & Supp. 1994).

decisions.[284] Another Illinois appellate court noted that the Illinois wild card statute "merely adds all powers possessed by national Banks, as restricted by Federal law."[285]

The OCC issues many different types of interpretations of the National Banking Act. First, Congress has specifically authorized the OCC to promulgate regulations.[286] In addition, the OCC regularly issues rulings, circulars, bulletins, and various types of interpretive and no-objection letters.[287] All of these documents are generally available to the public.[288]

The FDIC also issues interpretations defining what constitutes a national banking power for the purposes of Section 303 of the FDIC Improvement Act.[289] In deciding what constitutes a permissible activity, the FDIC has ruled that a State Insured Bank may look to OCC interpretations in addition to federal statutes: "Activities expressly authorized by statute or recognized as permissible in regulations, official circulars or bulletins issued by the [OCC] or in any order or interpretation issued in writing by the [OCC] will be accepted as permissible for state banks."[290] The FDIC has also issued a pamphlet for State Banks that lists the equity investments and activities which are permissible for National Banks.[291]

E. Limitations Imposed by the Federal Reserve Board

As discussed above, the Federal Reserve Board has certain powers that may enable it to restrict State Banks from engaging in a wild card activity.[292] The Federal Reserve Board may be hesitant, however, to preclude a State Bank from engaging in an activity that it might otherwise consider too risky or inappropriate, if National Banks are already engaged in such an activity. Nevertheless, there are several

284. Town & Country Bank of Quincy v. E. & D. Bancshares, Inc., 527 N.E.2d 637, 641 (Ill. App. Ct. 1988).

285. Estate of Lindberg v. Beverly Bank, 388 N.E.2d 148, 155 (Ill. App. Ct. 1979).

286. *See supra* note 24 and accompanying text.

287. *See* OCC Adopts a Staff No-Objection Procedure, OCC Banking Circular 205, [1984-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,314, at 90,973 (July 26, 1985) (discussing OCC no-objection letters).

288. *See* 12 C.F.R. § 4.15 (1994).

289. *See supra* notes 58-60 and accompanying text.

290. 12 C.F.R. § 362.2(b) (1994).

291. FDIC, *supra* note 59. The lists are very comprehensive and should serve as an excellent tool for both state banks and state regulators. The OCC has also proven a useful source of information on this topic, independently issuing a ruling for a State Bank that had written for clarification for purposes of Section 24 of the National Bank Act. *See* Letter from William P. Bowden, *supra* note 60.

292. *See supra* note 46 and accompanying text.

circumstances in which the Federal Reserve Board has acted to limit the ability of State Member Banks to engage in an activity, despite the fact that National Banks are permitted to engage in the activity. For example, a State Member Bank must apply to the Federal Reserve Board for permission to enter into commodity or equity-linked transactions[293] even though National Banks are allowed to engage in such activities.[294]

The Federal Reserve Board also restricts State Member Banks from engaging in certain commercial paper placement activities in which National Banks are permitted to engage.[295] The Federal Reserve Board will not permit a State Member Bank to "provide any letter of credit or other guarantee arrangement in an effort to make the paper more acceptable in the market" for commercial paper that it places.[296] In contrast, the OCC takes a more pragmatic approach in approving limited credit enhancement of commercial paper placed by National Banks.[297]

F. Limitations Created by Risk of Director Liability

The risk of personal liability faced by directors of State Banks may provide a further limitation on the effectiveness of wild card statutes in achieving parity between State Banks and National Banks. When deciding whether to authorize wild card activities, a State Bank's directors may consider whether the activities would create risk of director liability. For example, states commonly have a statute that holds a director personally liable for the bank's breach of a lending

293. 12 C.F.R. § 208.128 (1994). Commodity-linked or equity-linked transactions are transactions "in which a portion of the return is linked to the price of a particular commodity or equity security or to an index of such prices." *Id.* § 208.128(b) (1994).

294. *See supra* note 170 and accompanying text.

295. Both the Federal Reserve Board and the OCC permit commercial banks to place commercial paper. *See* Commercial Paper Activities of Bankers Trust Company of New York Do Not Constitute Underwriting Securities, [1984-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,270, at 90,823 (June 4, 1985) [hereinafter Commercial Paper]; Bankers Trust Third Party Commercial Paper Placement Activities Would Be Authorized by National Banking Laws, OCC Interpretative Letter No. 329, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,499, at 77,763 (Mar. 4, 1985) [hereinafter OCC Commercial Paper Letter].

296. *See* Commercial Paper, *supra* note 295, at 90,835.

297. *See* OCC Commercial Paper Letter, *supra* note 295, at 77,764, 77,766-67 n.6; Standby Letters of Credit May Be Provided by National Banks in Connection with Their Private Placement Advisory Services, OCC Interpretative Letter No. 212, [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,293, at 77,448 (July 2, 1981); *see also* MICHAEL G. CAPATIDES, A GUIDE TO THE CAPITAL MARKETS ACTIVITIES OF BANKS AND BANK HOLDING COMPANIES 148-50 (1993).

limit or investment limitation.[298] If the wild card statute permitted such a breach, banking activity consistent with the wild card statute could potentially create director liability.

None of the wild card statutes appears to provide guidance on this issue. It would be inconsistent, however, for a state statute to impose director liability for an activity expressly permitted by a wild card statute in the same state. Arguably, the offending statute would have been impliedly repealed upon the issuing of a ruling by the respective state banking regulator regarding such banking power under the wild card statute. Banks, however, may seek written assurance from their respective banking authority prior to engaging in an activity that may, on the face of the statute, impose director liability.

VII. MODEL STATUTE

A survey of the thirty-nine wild card statutes reveals that they are neither similar nor uniform.[299] Each of the statutes appears to leave certain questions unanswered as to how they should be interpreted. State legislatures should thus review their wild card statutes and determine what is restraining regulators from approving wild card powers.

The following is a model statute that would eliminate many of these concerns:

Additional Banking Powers

1. *Construction.* The purpose of this section is to ensure parity between those banking powers permitted National Banks and those permitted State Banks.

2. *Parity.* The Banking Commissioner may adopt such regulations or rules granting a bank organized under this chapter any power as may now or hereafter be conferred upon a national banking association with its principal place of business in this state, subject to the same restrictions and limitations imposed on such national banking association with respect to such power. If any power of a national banking association is terminated or modified, the Banking Commission may terminate or make a similar modification to any corresponding power granted pursuant to this section.

298. *See, e.g.*, Act of Sept. 9, 1994, Pub. Act. No. 88-636, Ill. Legis. Serv. 1762 (codified at ILL. COMP. STAT. ANN. ch. 205, § 5/39(a) (West 1994)) (holding directors personally liable for breaches of investment and lending limits). The Illinois statute has been read by courts to impose virtually strict liability for any such breach. *See* Colchester State Bank v. McIntyre, 577 N.E.2d 897, 899 (Ill. App. Ct. 1991).

299. *See supra* notes 104-22 and accompanying text.

> 3. *Other Statutes.* Any such grant of power shall be in addition to, and not in limitation of, any other provision of this chapter notwithstanding any provision to the contrary. The proper exercise of any power authorized by this Section shall not result in the imposition of personal liability upon any director, officer, employee or agent.
>
> [Optional Paragraph 3]
>
> 3. *Other Statutes.* The Banking Commission may not authorize any power prohibited by the laws of this state.
>
> 4. *Definition of Power.* For purposes of this section, "power" means any banking or corporate power, right, benefit, privilege, or immunity of a national banking association as set forth in any Federal statute or any regulation, ruling, circular, bulletin, order, or interpretation issued by the Office of the Comptroller of the Currency or by the Federal Deposit Insurance Corporation.

Paragraph one provides a rule of construction for the banking regulator, expressly encouraging the regulator to authorize wild card powers.[300] A similar result could be achieved by an equivalent statement in the legislative history.

Paragraph two ensures that regulators may authorize powers not only currently exercisable by National Banks, but also those powers that may be authorized in the future. It also permits regulators to adjust those powers based upon changes to national banking powers.

Paragraph three provides legislatures with a choice as to whether or not they will authorize a regulator to issue a ruling that may contravene state law.[301] An express statement to such effect is important to avoid future confusion or litigation on the issue. Legislatures should also consider clarifying the effect of the statute regarding such issues as branch banking,[302] insurance,[303] and lending limits.[304]

In the event that a power may be granted in contravention of state law, paragraph three clarifies that the exercise of such power will not impose personal liability upon any director, officer, employee, or agent of the State Bank.[305]

Paragraph four defines "power" broadly to permit a State Bank to engage in the same activities and to make the same investments as

300. See *supra* part VI.C for a discussion regarding current problems with reluctant regulators.

301. See *supra* part VI.A for a discussion of current varied responses to this question.

302. *See supra* part IV.C.4.

303. *See supra* part V.B.

304. *See supra* parts IV.C.3 and V.D.

305. *See supra* part VI.F.

permitted a National Bank.[306] The definition also ensures that a State Bank can benefit from any protections extended to a National Bank and any rules relating to the corporate governance.[307] In addition, paragraph four clarifies the statutory, regulatory, or administrative authorities that define a national banking power, avoiding uncertainty as to whether a particular issuance is authoritative for purposes of a wild card statute.[308] By also specifying the authorities issued by the FDIC, in addition to those of the OCC, the regulator is able to benefit from the work previously done by the FDIC in interpreting Section 303.[309]

VIII. CONCLUSION

Wild card statutes provide a unique solution to enable State Banks to compete and to maintain parity with National Banks. Although the majority of the states have enacted wild card statutes, few state banking regulators have exercised the full extent of the authority given to them under these provisions. As National Bank powers continue to expand, State Banks should petition their respective regulators to authorize the banking powers that wild card statutes provide. State Banks risk losing important opportunities to expand their business and to better serve their customers if they are unable to compete in all aspects with National Banks.

Legislatures should consider clarifying their wild card statute to ensure that State Banks receive all of the powers that the legislature intended them to exercise. The model statute presented[310] suggests some important provisions generally missing from most wild card statutes that would ensure that State Banks receive the full benefit of their respective state's wild card statute.

306. *See supra* part V.A-C.
307. *See supra* part IV.C.5.
308. *See supra* part VI.D.
309. *See supra* notes 58-60 and accompanying text.
310. *See supra* part VII.