

**Friendly Watchdog: Federal *Regulator* Often Helps Banks Fighting Consumers ---  
Dependent on Lenders' Fees, OCC Takes Their Side Against Local, State Laws ---  
Defending Uniform Rules**

*By Jess Bravin and Paul Beckett. [Wall Street Journal](#). (Eastern edition). New York, N.Y.: [Jan 28, 2002](#). pg. A.1*

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When a federal appeals court in San Francisco took up the issue of automated-teller-machine fees earlier this month, it sparked the latest round in the battle between big banks and customers.

Sticking up for consumers were the cities of San Francisco and Santa Monica. They had banned certain ATM fees, after customers complained about being gouged when they use ATMs belonging to banks other than their own. Defending the fees were California's two largest banks -

- [Bank of America Corp.](#) and [Wells Fargo & Co.](#) -- which had won at trial.

Also in the courtroom: the Office of the Comptroller of the Currency, the federal banking regulator. But in this case -- as in more than a dozen others in recent years -- the OCC wasn't there to check the economic power of banking titans. Instead, the regulator was helping the nationally chartered banks defend their fees. The appeals court is expected to rule in coming months.

Many federal regulators have a clear mandate to put consumers first. The Securities and Exchange Commission, for example, refers to itself as "the investor's advocate."

It's less clearcut for the federal banking watchdog. Time and again, the U.S. agency that bank customers might assume is on their side has lined up with banks to fight state and local measures that purport to aid consumers.

In addition to the ATM-fees case in California, the OCC recently has supported banks in their effort to kill a ban in Texas on certain check-cashing fees. In Pennsylvania and Rhode Island, the OCC has weighed in on the side of giant FleetBoston Financial Corp. against consumer allegations of improper increases in credit-card rates. And in Michigan, the federal agency has even supported a push by banks making auto loans to curb a state law aimed at unscrupulous car dealers.

The OCC's solicitousness toward the businesses it oversees stems in part from its need to compete for their loyalty. In an uncommon arrangement, banks can choose either a state or federal regulator, and the selection has financial consequences: The OCC and state banking departments subsist entirely on fees paid by the institutions they regulate.

The competition, though discreet, can get intense. As consolidation has swept the industry, the OCC's once-mighty position has slipped. Since 1990, as the number of U.S. banks dropped 31%, to 8,300, the number regulated by the OCC dropped 45%, to about 2,230. It still regulates the

bulk of the banking industry as measured by assets, but consolidation has made the agency increasingly dependent on a few big players. Third-ranking [Bank of America](#), based in Charlotte, N.C., now pays \$40 million a year to the OCC in fees, or the equivalent of 10% of the agency's annual \$400 million budget.

The OCC promises federally chartered banks the predictability of a uniform set of rules, rather than the burden of complying with varying state standards. A further attraction is the likelihood that the agency will support its banks in court against aggressive state regulators. State banking authorities typically offer the competing enticement of lower examination fees.

The OCC, an arm of the Treasury Department with 2,900 employees, maintains that it safeguards customers by enforcing federal consumer-protection laws and by securing the overall health of the national banking system. But the agency's chief, John D. Hawke Jr., says that state efforts to stick up for bank customers often threaten to undermine the right of national banks under federal law to operate and charge fees as they see fit.

The OCC's siding with banks in court fights "may operate in some cases to the disadvantage of consumers," says Mr. Hawke, a 68-year-old lawyer who in private practice represented both state- and federally chartered banks. But his agency "can't pick and choose whether a [state] law or action is good or bad" for consumers. If it cramps banks' freedom to operate in the eyes of the OCC, it must go, he says.

History helps explain the OCC's stance. It was founded during the Civil War to oversee newly created national banks that were formed to circulate a national currency and finance the Union's military campaign. With strong backing from the federal courts, the OCC still interprets the National Bank Act of 1863 as authorizing it to oppose any state or municipal attempt to interfere with the ability of nationally chartered banks to engage in "the business of banking." When the agency goes to court, it also invokes a provision in the U.S. Constitution stating that federal law prevails in conflicts with state law.

Frustrated consumers say the upshot is that the OCC favors the industry that pays its bills. "The individual bank customer is just no equal of the large banking institutions," says David Buda, an attorney in Fort Lee, N.J., who has complained unsuccessfully to the OCC about increases in the interest rate on his FleetBoston credit card. If "your only avenue is to complain to the comptroller of the currency, then all you're going to get is a form letter saying, 'We can't help you,'" Mr. Buda adds.

Other federal regulators operate differently. The SEC budget comes from fees from securities exchanges and publicly traded companies. But unlike banks, those companies don't have a choice of regulator, so the SEC isn't competing for their loyalty. About 12% of the Food and Drug Administration's budget comes from industry fees. The Federal Trade Commission is funded by taxpayers.

During tough economic times, the bank-regulatory setup comes under a brighter spotlight. Consumers find it harder to keep up financially. Banks, faced with rising loan losses, seek

additional revenue with moves such as fee hikes on credit cards -- making it that much more likely that consumers will seek help from the federal bank regulator.

Mr. Hawke, who was appointed by President Clinton in 1998 to a five-year term, says he spends time both looking out for consumers and seeking to defend his regulatory turf. In 1999, he introduced a 12-minute video the OCC distributes to banks called "The Value of the National Bank Charter." In it, he describes "how the OCC and a national charter can help banking organizations achieve their goals."

Sometimes, he makes personal appeals. In August 1999, when state-chartered AmSouth Bancorp of Birmingham, Ala., was in the process of buying OCC-chartered First American Corp. of Nashville, Tenn., Mr. Hawke flew to visit C. Dowd Ritter, AmSouth's chief executive. After exchanging pleasantries, Mr. Hawke reached into his briefcase to show Mr. Ritter a copy of a federal bank charter issued in 1884 to one of AmSouth's predecessor banks.

"This is something I thought you would like to see," Mr. Hawke said, according to Stephen Yoder, AmSouth's general counsel, who attended the meeting. "We have something in Washington that is part of your history."

Despite the imaginative appeal, AmSouth rebuffed Mr. Hawke, retaining its Alabama state charter after the merger. The bank says it already had a good relationship with its state regulator.

Mr. Hawke, who confirms the account, says that losing market share "is a matter of concern to us." But he stresses the OCC takes seriously its responsibility to protect consumers. He occasionally makes speeches chastising bankers for such practices as selling confidential customer information to telemarketing firms. And the agency enforces about a dozen federal consumer laws, including the Truth in Lending and Fair Credit Reporting Acts. Typically, the OCC enforces compliance with those laws during its routine bank examinations, agency spokesman Robert Garsson says.

Earlier this month, as the result of an examination, the OCC ordered Eagle National Bank, a small institution in Upper Darby, Pa., to get out of the business of funding so-called payday loans. These are high-interest loans repayable on the borrower's next payday and viewed by many regulators as exploitative. The OCC said it acted because Eagle's lack of oversight of the loans had placed its financial viability at risk.

In a separate case 18 months ago, the agency joined a civil probe initiated by the San Francisco district attorney into allegations that Provident Financial Corp., a San Francisco credit-card issuer, had misled customers about interest rates on credit cards. Provident allegedly promised card holders they wouldn't have to pay an annual fee when the company in fact imposed a mandatory \$156 annual charge for "credit protection." Without admitting wrongdoing, Provident agreed to pay \$300 million to purported victims, plus a \$5.5 million penalty to San Francisco. Mr. Hawke calls the case a landmark exercise of the OCC's authority to ban deceptive practices.

Still, he doesn't apologize for using the OCC's power to override state and local laws designed to protect consumers. Enjoying this aid provides an incentive for banks to sign up with the OCC, he

says. "It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it." His counterparts at the SEC, FTC or FDA don't have a comparable turf-related incentive to advertise their ability to knock down state and local consumer-protection laws.

State banking regulators often engage in their own efforts to lure banks. The Kansas banking commissioner, for instance, promises on his official Web site that state-chartered banks will have greater ability "to lobby [the] state legislature for changes in laws and regulations." Commissioner Franklin Nelson explains in an interview that his department is next door to the statehouse and can help bank officials and their lobbyists reach lawmakers. The OCC can't offer such access, he says.

State regulators also aren't shy about pointing out that national banks pay as much as 2.5 times the annual examination fees charged to state banks. The fees are determined by bank size. A small bank, with \$500 million in assets, would typically have to pay \$43,000 under a state charter, compared with \$113,000 under a federal charter, according to OCC estimates.

It is the OCC's ability to help override state laws that has the biggest impact on consumers. The OCC's involvement in the California ATM case began in 1999, when [Bank of America](#) and

[Wells Fargo](#), which together control more than 60% of the ATMs in the state, asked a federal judge in San Francisco to void that city's and Santa Monica's bans on some fees, which generate about \$6 million annually for the two banks. The OCC, in separate legal papers, said "the public interest" favored allowing banks to charge noncustomers more for using their ATMs. Otherwise, the OCC argued, the banks would lack the incentive to operate large numbers of ATMs in areas where they don't have many customers.

"That's flat-out wrong," Santa Monica Mayor Michael Feinstein responds in an interview. "We are closer to that consumer than the OCC is," he adds. And, on balance, he says, consumers want lower fees, even in the face of bank threats to deny noncustomers any access to their ATMs.

Mr. Hawke suggests that angry customers do as he says he does: walk a few extra blocks to find a no-fee ATM.

A federal judge in 2000 agreed with the OCC's argument and blocked the municipal ATM-fee restrictions, prompting this month's hearing before a three-judge panel of the Ninth U.S. Circuit Court of Appeals. Opposing the OCC in that case, officials from California, New York and seven other states filed papers siding with the cities.

The OCC came to the defense of the same pair of big banks, among others, last year in Texas. The legislature there had recently passed a law that effectively prevented a bank from charging noncustomers a fee for cashing certain kinds of checks. Four big banks that operate in the state,

including [Wells Fargo](#), levy the fees, which typically range from \$3 to \$5 per check. [Bank of America](#) is planning to do the same. The four that currently charge the fees account for 40% of bank deposits in the state and generate a total of \$5.2 million a year from the fees, according to court papers.

Before the new law was scheduled to take effect Sept. 1, Wells Fargo, Bank of America and Bank One Corp. of Chicago, which also holds a federal charter, asked the OCC if they had to obey the law. The OCC said they didn't. The agency weighed in with a "friend of the court" brief in U.S. district court in Austin, arguing that the National Bank Act permits national banks to charge whatever fees they deem appropriate for their services. In December, Judge James R. Nowlin agreed.

The Texas Banking Department is appealing the decision. "Texas passed a consumer-protection law that was duly enacted and should apply," says state Banking Commissioner Randall James.

The OCC even has backed its banks trying to knock down regulations that cover other companies they do business with outside of the banking industry.

In Michigan, the state Motor Vehicle Sales Finance Act, passed in 1950, requires that auto dealers fully disclose installment-payment terms. It also limits document-preparation fees to \$40 and restricts the conditions under which a car can be repossessed. The statute applies only to dealers who sell cars through installment plans. It doesn't apply to banks.

But National City Bank, a unit of Cleveland's National City Corp., and Huntington National

Bank, owned by [Huntington Bancshares Inc.](#) of Columbus, Ohio, sought in administrative proceedings to make the dealers who market their car loans exempt from the law. Michigan's commissioner of financial and insurance services, Frank Fitzgerald, ruled in January 2000 that car dealers who teamed with national banks were still covered.

"We had to do something to get by that," says Daniel W. Morton, Huntington National's vice president and senior counsel. So the two banks asked the OCC for an opinion saying the state law was trumped by the National Bank Act. Commissioner Fitzgerald filed an objection, arguing that it would be "absurd" if the OCC could kill a state law aimed at nonbanking businesses.

In May, the OCC found otherwise, concluding that Michigan's law "frustrates the [banks'] ability to exercise their lending authority" and therefore shouldn't be enforced against car dealers marketing loans made by OCC-chartered banks. Michigan isn't contesting the ruling. The state doesn't think it can beat the OCC in federal court, says Mr. Fitzgerald.

Mr. Garsson, the OCC spokesman, says that consumers obtaining car loans funded by national banks -- such as those in the Michigan case -- would be covered by federal consumer protections that the OCC enforces.

In the FleetBoston case, the OCC received hundreds of letters from customers in 2000, complaining that the federally chartered bank had increased interest rates on its credit cards after allegedly promising a "fixed" rate. In response, the OCC sent customers letters saying it couldn't help. Federal law "recognizes banks' ability to change the terms of credit card account agreements," as long as the change is disclosed, the OCC said in a typical letter sent to a complaining customer on March 23, 2000. "If you wish to pursue further remedy to your

complaint, we can only suggest that you contact private legal counsel regarding any additional remedies," the OCC added.

In October 2000, several customers filed suit, seeking class-action status and accusing FleetBoston of deceptive practices under Rhode Island state law. A Rhode Island state judge in Providence ruled in April that the case could proceed. But the OCC stepped in to help FleetBoston. The OCC argued in a friend-of-the-court brief that the state law on which the suit was based doesn't apply to FleetBoston because the OCC can take action against unfair and deceptive practices, as it did in the Providian case -- although the agency hadn't done so regarding FleetBoston.

Justice Judith Colenback Savage of Rhode Island Superior Court rejected the OCC's argument last April, a decision the state's Supreme Court declined to review. The case was then consolidated with a similar suit filed by a separate group of disgruntled FleetBoston customers before another Rhode Island judge.

In December, the new judge, Michael Silverstein, handed the OCC a victory. He ruled that FleetBoston couldn't be sued under the state's deceptive-practices law. Such a suit would call into question the OCC's "very foundational authority to regulate national banks," the judge ruled. At a hearing last week, FleetBoston sought to have the suit dismissed on those grounds. A decision is expected by the end of March.