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April 17, 2006

Opinion No. 06-072

Senate Bill 3813 Regarding Credit Cards

QUESTIONS

1. To what extent does Senate Bill 3813 limit the charges or fees that a national bank may impose on retail merchants for processing credit card transactions?

2. To the extent it applies to national banks, is Senate Bill 3813 preempted by the National Bank Act and, therefore, invalid under the Supremacy Clause of the United States Constitution?

3. In the event that application of the bill to national banks is preempted by federal law, are such limits also inapplicable to state banks under the "wild card" statute, Tenn. Code Ann. § 45-2-601?

OPINIONS

1. The act limits the amount any credit card issuer in Tennessee, including a national bank, may impose on retail merchants for processing credit card transactions.

2. We think there is a substantial risk that a court would conclude that, to the extent it applies to national banks, Senate Bill 3813 is preempted by the National Bank Act and regulations promulgated by the Comptroller of the Currency under that act.

3. Yes, under the "wild card" statute, state banks may exercise any of the powers that a national bank may exercise. Thus, if the limits are preempted with respect to national banks, they would also be inapplicable to state banks.

ANALYSIS

This opinion concerns Senate Bill 3813 ("SB 3813"), which is an act "to amend Tennessee Code Annotated, Title 47, Chapter 22, relative to credit cards." Section 3 of the bill provides:

> (a) No card issuer shall charge to any retail merchant more than seventy-five hundreths of one percent (0.75%) per transaction for all processing fees involving the use of a credit or debit card.

Subsection (b) of § 3 would make a violation of subsection (a) an "unfair and deceptive act," subject to the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101, *et seq.* The bill would define the term "card issuer" as "a person doing business in Tennessee that issues a credit card or that person's agent or assignee with respect to the card." § 2(4). The term "retail merchant" means "a business with at least eighty percent (80%) of its credit card transactions conducted through a credit card terminal." §2(8). The bill also defines the terms "credit card" and "debit card."

> "Credit card" or "card" means any card, plate, coupon book or other single credit device that is issued primarily for consumer credit purposes and that may be used from time to time to obtain credit, including, but not limited to, a card that may be used to effect transactions governed by chapter 11 of this title [retail installment sales];
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> "Debit card" means any real or forged instrument, writing or other evidence known by any name issued with or without a fee by an issuer for the use of a depositor in obtaining money, goods, services or anything else of value, payment of which is made against funds previously deposited in an account with the issuer.

§ 2(6) & (7). The bill, therefore, seeks to regulate the fee that a credit card issuer may charge a retail merchant as a processing fee when the merchant's customers make their purchases by credit card or debit card.

1. Effect of Bill on National Banks

The first question is to what extent SB 3813 limits the fees that a national bank may impose on retail merchants for processing credit card transactions. By its terms, the bill applies to any "card issuer." That term includes a person doing business in Tennessee that issues a credit card or that person's agent or assignee with respect to the card. Since national banks are not excluded from this definition, the bill would limit the fees that a national bank, as a credit card issuer, may impose on retail merchants for processing credit card transactions.

2. Preemption

The second question is whether, as applied to national banks, Senate Bill 3813 is preempted under federal law and, therefore, invalid under the Supremacy Clause of the United States Constitution. We think there is a substantial risk that a court would reach this conclusion. Under 12 C.F.R. § 7.4002(a), the Office of the Comptroller of the Currency ("OCC") has granted a national bank the authority to charge its customers non-interest fees and charges. This regulation does not exclude retailers who contract with credit card issuers. 12 C.F.R. § 7.4002(d) states that traditional preemption principles apply to state laws, "*that purport to limit or prohibit charges or fees described in this section.*" (Emphasis added). Traditionally, courts defer to OCC regulations. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Further, several courts have recently found that federal law, as contained in OCC regulations, preempts state and

local limitations on ATM surcharges for non-account holders. *See, e.g., Wells Fargo Bank, Texas, N.A. v. James,* 321 F.3d 488, 495 (5th Cir. 2003) (state regulation of surcharges on check cashing fees preempted); *Bank of America v. City and County of San Francisco,* 309 F.3d 551, 562-63 (9th Cir. 2002), *cert. denied,* 538 U.S. 1069, 123 S.Ct. 2220, 155 L.Ed.2d 1127 (2003); *Bank One Utah v. Guttau,* 190 F.3d 844, 849 (8th Cir. 1999), *cert. denied*, 529 U.S. 1087, 120 S.Ct. 1718, 146 L.Ed.2d 641 (2000); *Metrobank v. Foster,* 193 F.Supp.2d 1156, 1161 (S.D. Iowa 2002). These fees are comparable to the merchant discount that Senate Bill 3813 seeks to limit. For these reasons, a court would probably find that, at least as applied to national banks, Senate Bill 3813 is preempted by federal law.

3. State "Wild Card" Statute

The last question is whether, in the event that Senate Bill 3813, as applied to national banks, is preempted by federal law, the limits would be applicable to state banks under the Tennessee "wild card" statute. The State's "wild card" statute appears at Tenn. Code Ann. § 45-2-601. It provides in relevant part that "any state bank may exercise any power or engage in any activity which it could exercise or engage in if it were a national bank located in Tennessee, subject to regulation by the commissioner for the purpose of maintaining the state bank's safety and soundness." Under the last sentence of this statute, any power accorded by federal law to a national bank located in Tennessee is automatically extended to state banks, subject to regulation by the Commissioner of Financial Institutions for the purpose of maintaining the state bank's safety and soundness. Op. Tenn. Att'y Gen. 86-156 (September 2, 1986). Historically, this Office has interpreted this provision to permit state banks to exercise any power that national banks may exercise, subject to the same terms and conditions, and subject to state regulation to maintain the state bank's safety and soundness. Op. Tenn. Att'y Gen. 04-059 (April 7, 2004); Op. Tenn. Att'y Gen. 02-103 (February 1, 2002) (state banks may invest in a subsidiary licensed as a title insurance agent on the same terms and conditions as national banks); Op. Tenn. Att'y Gen. 89-69 (May 1, 1989) (state banks operating in towns of 5,000 or less, like national banks, may engage in insurance activities); Op. Tenn. Att'y Gen. 87-192 (December 16, 1987) (since national banks are not prohibited from charging document preparation fees in connection with their loans, state banks may also do so); Op. Tenn. Att'y Gen. 86-156 (September 2, 1986) (as a result of OCC regulations and federal case law, a state bank may operate an ATM without being subject to state law regulations and geographic restrictions). Thus, if the limits under Senate Bill 3813 are preempted with respect to national banks, they would also be inapplicable to state banks.

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