THE FDIC'S GENERAL LEGISLATIVE RULE-MAKING AUTHORITY: ARE THERE LIMITS IN A DUAL BANKING SYSTEM?

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I. Introduction

Recently, the Federal Deposit Insurance Corporation ("FDIC") stated that it has broad general authority to issue legislative-type rules under 12 U.S.C. 1819 Tenth, its general rule-making authority.[1] The FDIC claims that such rules may be issued as long as the rules are reasonably related to the purposes of the enabling legislation containing the general rule-making authority.[2] The FDIC contends that this general rule-making power permits it to limit or prohibit a state chartered bank from engaging in particular state authorized activities which the FDIC believes are unsafe or unsound.[3] Such restrictions are permissible, the FDIC claims, because one of the primary purposes behind the Federal Deposit Insurance Act ("FDI Act") is to promote the safety and soundness of insured banks.[4]

There are approximately 9,000 FDIC insured state chartered non-member banks in the United States.[5] The powers of these state chartered banks are controlled by the banking laws of the

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1 50 Fed. Reg. 23,964 (1985) (to be codified at 12 C.F.R. § 332) (proposed June 7, 1985).

2 *Id.* at 23,967.

3 *Id.*

4 *Id.* Insured banks are those banks whose deposits are insured with the FDIC. *See also* Fisher, *Bank Enforcement Actions: Usurping Legislative Prerogatives*, 104 BANKING L.J. 215 (1987).

5 E. B. COX, BANKERS DESK REFERENCE 1985, 261 (1986). Non-member banks refer to those banks that are not members of the Federal Reserve System ("FRS"). While FRS members must be insured by the FDIC, non-member banks may elect such coverage.

state in which they are incorporated.[6] During the 1970s and 1980s, while the federal government was actively deregulating financial institutions, states were also loosening the restrictions on their state chartered counterparts.[7] During this deregulation, states granted their banks many new powers, including the authority to develop and invest in real estate, as well as permitting them to engage in various insurance activities.[8] The FDIC is concerned with the impact these activities may have on the safety and soundness of state chartered insured banks.[9] In response, the FDIC has proposed regulations which will severely limit the so-called non-traditional banking practices of state banking institutions.[10]

This article will explore the FDIC's general rule-making authority and whether it permits the FDIC to limit state sanctioned activities through legislative rule-making. This will be done by analyzing the statute, its legislative history, related statutes, and pertinent case law. The article will not examine, however, the validity of the proposed regulation on other grounds,[11] or other statutory sources cited by the FDIC as its authority to issue general rules limiting state granted powers.[12]

II. The Dual Banking System

The FDIC's proposal involves a federal agency usurping the state granted powers of state chartered banks. Therefore, before examining 12 U.S.C. 1818 Tenth in detail, an examination of the role of the dual banking system is appropriate. The dual banking system is a system comprised of both state and national banks

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6 *See generally* Englert, *Bank Supervision in Historical Perspective*, 34 BUS. LAW. 1659 (1979).

7 *See State and Federal Regulators Tangle in a Showdown for Control*, SAVINGS INSTITUTIONS 54, 56 (October 1985).

8 *Id.*

9 50 Fed. Reg. 23,964 at 23,969 (1985).

10 *Id.*

11 There is no focus directed here as to whether the FDIC has fully complied with the requirements of the Administrative Procedure Act, 5 U.S.C. § 500 (1982).

12 50 Fed. Reg. 23,964 at 23,967-8 (1985). Likewise, no analysis will be directed toward issues which may be raised by insured state member banks as well as insured national banks regarding the FDIC's authority in this area. Such an analysis would involve examining the authority of the Comptroller of the Currency under the FDI Act and the parenthetical in 12 U.S.C. 1819 Tenth.

primarily regulated by respective state and federal agencies.[13] Almost all financial institutions, however, are regulated at two levels.[14]

The primary level is that of the chartering authority.[15] With respect to state chartered banks and savings and loans, that authority is the chartering state, and with respect to national banks and federal savings and loans, it is the Comptroller of the Currency and the Federal Home Loan Bank Board, respectively.[16] This primary regulating entity defines the powers and regulates the activities and investments of the institutions chartered by it.[17]

This primary level is overlaid with a secondary system of regulation and supervision, which consists exclusively of federal regulations of specific areas.[18] This secondary regulation stems principally from the federal agencies' insurance of deposits and control of monetary policy.[19] Banks which are members of the Federal Reserve System are subject to regulations of the Federal Reserve Board.[20] National banks, state member banks, and state chartered FDIC insured non-member banks are all subject to the FDIC's authority as the insurer of their deposits.[21] Federal savings and loans and state chartered savings and loans which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") are subject to the regulations issued by the FSLIC.

For FDIC insured state chartered non-member banks, the layer of federal control is considerably thinner than for some other institutions.[22] The FDIC's statutory control over insured state chartered non-member banks is principally limited to examination, cease and desist powers, approval over domestic branches, and approval of mergers and acquisitions.[23]

Hence, the term "dual banking system" refers to the exist-

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13 Scott, *The Dual Banking System: A Model of Competition in Regulations*, 30 STAN. L. REV. 1, 5 (1977). Professor Scott stated that the structure of banking regulation is very complex, an observation which is most certainly accurate. *Id.* at 3.

14 *Id.* at 5.

15 *Id.*

16 *Id.* at 5-6.

17 *Id.*

18 *Id.* at 6.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

ence of both federal and state regulators, along with federal deposit insuring agencies. The dual banking system, therefore, consists of two parallel competing primary regulatory systems with a secondary level of federal control in the form of deposit insuring agencies, namely the FDIC and the FSLIC. As the deregulation of banks and savings and loans continues at the state level, the ultimate issue confronting the dual banking system is to what extent may the "secondary" regulator control the activities of state chartered institutions.

III. FDIC's Rule-Making Authority

In proposing rules relating to a bank's real estate development investments and insurance activities, the FDIC claims that it has the authority to restrict the powers granted to state chartered FDIC insured non-member banks by their primary regulator.[24] The FDIC claims that by restricting state chartered banks from engaging in such activities, it is protecting the safety and soundness of the banking system, one of its primary purposes.[25] The FDIC has previously promulgated regulations concerning brokered deposits, pointing out its concern with brokered deposits contributing to the failure of insured institutions.[26] These regulations, however, were stricken by the courts as unauthorized under a plain reading of the deposit insurance provisions of the FDI Act.[27]

In the FDIC's proposal, it states that it has broad general authority under 12 U.S.C. 1819 Tenth to issue regulations " 'as it may deem necessary to carry out the provisions of the [Federal Deposit Insurance Act] or any other law which it has the responsibility of administering or enforcing [except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency].' "[28] The FDIC claims that this statute allows it to promulgate legislative-type rules that are reasonably related to the purposes of the enabling legislation containing the general rule-making authority.[29]

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24 50 Fed. Reg. 23,967 (1985).
25 *Id.*
26 49 Fed. Reg. 13,003 (1984).
27 FAIC Securities, Inc. v. United States, 768 F.2d 352 (D.C. Cir. 1985).
28 50 Fed. Reg. 23,967 (1985) (quoting 12 U.S.C. § 1819 Tenth).
29 *Id.*

A plain reading of the rule-making statute[30] could reasonably result in an interpretation which would require the FDIC to point to a specific provision of the FDI Act or another specific law as authority for any regulation it promulgates. Further inquiry would have to be made as to whether authority has been granted to another regulatory agency as well. This literal analysis, however, has been rejected by the courts on a number of occasions.[31] Provisions such as 12 U.S.C. 1819 Tenth will support general rule-making, as long as the rules are reasonably related to the purposes of the FDI Act.[32]

The FDIC states that it is charged with providing a sound, efficient banking system and that the courts have recognized that one of its purposes is to protect the safety and soundness of its banks.[33] The FDIC claims that the purposes of the FDI Act include the protection of the safety and soundness of its insured banks, the stability of the financial system, and the protection of the medium of payment from destruction caused by bank failure.[34] Therefore, the FDIC believes that it has the authority to promulgate legislative-type rules restricting or limiting state granted powers, as long as the FDIC concludes its actions further the safety and soundness of banks.[35]

The FDIC is surely correct that a regulation promulgated under a general rule-making provision, such as 12 U.S.C. 1819 Tenth, is valid as long as it is reasonably related to the purposes of the enabling legislation. However, its conclusion that it may contradict state power in the name of safety and soundness deserves closer scrutiny.

A. *Legislative History of the FDIC's Power*

The legislative history of 12 U.S.C. 1819 Tenth and the general intent of Congress must be determined in order to reconcile an apparent conflict between the FDIC's regulatory powers and

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30 12 U.S.C. § 1819 Tenth (1982).

31 *See* Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); American Trucking Ass'ns, Inc. v. U.S., 344 U.S. 298 (1953). *See also* National Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

32 Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973).

33 50 Fed. Reg. 23,967 (1985).

34 *Id.*

35 *Id.* The FDIC cited *Mourning*, 41 U.S. 356 as support for such authority. *Id.*

the states' legislative powers. While courts are clear in stating that they should not depart from the plain meaning of a statute, courts are equally strident in pointing out that the true intent of Congress may be gleaned from a close examination of the legislative history.[36]

In *In Re Permian Basin Area Rate Cases*, the Supreme Court stated that an analysis of legislative history and congressional intent is proper when determining the validity of an administrative agency's rule, since the scope of administrative authority must be measured in part by the purposes for which it was conferred.[37] In *Touche Ross & Co. v. SEC*, the court similarly declared that it must independently examine the entire statutory scheme to determine if a rule is in accordance with congressional policy and purpose.[38] Above all, courts have noted that administrative agencies must be required to follow congressional mandates, whether explicit or ascertainable as inherent underlying policies.[39] Thus, the Congress' intent with respect to the dual banking system and the vesting of broad regulatory power in the FDIC over the states must be explored.

With respect to this issue, it must first be ascertained whether the safety and soundness of banks is a legitimate recognized purpose of the FDI Act. It must then be determined whether there are other purposes or policies encompassed in Congress' enacting 12 U.S.C. 1819 Tenth which can be reasonably reconciled with the FDIC's promulgation of general rules limiting state granted powers. If not, the next consideration is whether there is a statutory interpretation of 12 U.S.C. 1819 Tenth which reasonably gives effect to all the provisions and purposes of the FDI Act, as well as the intent of Congress.

Safety and soundness and the stability of financial institutions are clearly legitimate purposes embodied in the FDI Act.[40] However, the manner in which these purposes are to be recon-

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36 Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976). *See also* 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 65.02 (C.D. Sands 4th ed. 1974).

37 In re Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968).

38 Touche Ross & Co. v. Securities and Exchange Comm'n, 609 F.2d 570, 579 (2d Cir. 1979).

39 United Steelworkers of Am., AFL-CIO v. NLRB, 390 F.2d 846 (D.C. Cir. 1967).

40 *See* Continental Bank and Trust Co. v. Woodall, 239 F.2d 707, 710 (10th Cir.),

ciled with the dual banking system is not clear. Some indication can be gained by reviewing the legislative history of the FDI Act, and particularly 12 U.S.C. 1819 Tenth.

The FDIC was created by the Banking Act of 1933 ("Banking Act").[41] At first, Congress was uncertain of its authority to insure state banks, thus, did not intend to provide insurance to non-member banks.[42] Then, when Congress decided to broaden insurance coverage to state non-member banks, questions arose as to the effect the system of insurance would have on state banks.[43] Senator Robinson was particularly concerned with the possibility that the FDIC would do away with the state banking system.[44] Senator Vandenberg, in response, stated "that inspection and supervision [by the FDIC] do not mean dependence and abrogation of the state's system."[45] Congressman Steagall, one of the Sponsors of the bill which broadened deposit insurance coverage, stated that "[t]his bill will preserve independent, dual banking in the United States to supply community credit, community service, and for the uplifting of community life. That is what this bill is intended to do. That is the purpose of the bill; that is what the measure will accomplish."[46]

In 1950, the FDI Act was readopted as a separate act, and the language of 12 U.S.C. 1819 Tenth was carried forward intact as it was set forth in the Banking Act.[47] Congress was again concerned about possible control by the federal government over the dual banking system. Congressman Multer, in response to Congressman Fulton's concerns, stated "there is not one of us who wants to see banking nationalized or socialized in this country and that we will do nothing in this bill, or otherwise, that would lead to a nationalization of our banking system."[48] There-

cert. denied, 353 U.S. 909 (1957); Fed. Deposit Insurance Corp. v. Citizens State Bank, 130 F.2d 102 (8th Cir. 1942).

41 Pub. L. No. 73-66, 48 Stat. 162, 172 (codified as amended in scattered sections of 12 U.S.C. (1982)).

42 *See* 77 CONG. REC. 79 (1933).

43 *Id.*

44 *Id.* at 181-82.

45 *Id.* at 185.

46 *Id.* at 4033.

47 Pub. L. No. 81-797, 64 Stat. 881-882 (codified as amended at scattered sections of 12 U.S.C. (1982)).

48 96 CONG. REC. 10,658 (1950).

fore, from the inception of the FDI Act, there was clearly never any congressional intent to permit the FDIC to take action which would undermine the state banking system.

In 1966, the FDIC Act was again amended, this time to provide for cease and desist power.[49] Under this amendment, the FDIC was authorized to issue temporary cease and desist orders to institutions under its jurisdiction that are or have violated any law, rule, regulation or charter, or are or have engaged in unsafe and unsound practices.[50] Temporary cease and desist orders may be stayed by a district court order,[51] and final cease and desist orders are appealable to the circuit court of appeals.[52]

During the passage of this amendatory legislation, the Senate Banking Committee Report noted that, while strengthening the federal regulator's powers, the Committee did not wish to take any action which would disrupt the balance between state and federal functions and responsibilities which underlies the dual banking system.[53] Therefore, an amendment was inserted in the original bill which required prior notice to state supervisors if the FDIC intended to issue a cease and desist order against a state chartered bank.[54] Furthermore, the state was also given an opportunity to act in such instances.[55] Thus the Congress was clearly concerned that the FDIC's cease and desist powers might disrupt the dual banking system and took measures to prevent this.

The Committee Report noted that the duties and powers of the Federal Reserve Board ("FRB") and the FDIC must be broad and sweeping to carry out their functions.[56] However, it stressed that the FDIC, FRB, state member insured banks and the state bank supervisors should never forget that "the state banks are

[49] Pub. L. No. 89-695, 80 Stat. 1046, 1054 (codified as amended at 12 U.S.C. § 1818 (1982)).

[50] 12 U.S.C. § 1818(b).

[51] *Id.* at § 1818(c)(1).

[52] *Id.* at § 1818(h)(2).

[53] S. REP. No. 1482, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3538.

[54] 12 U.S.C. § 1818(m).

[55] *Id.*

[56] S. REP. No. 1482, *supra* note 53, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3538.

chartered by the states and are operated under state laws."[57] These state chartered institutions are "responsible first and foremost to the officials of the states which created them."[58] The Committee, therefore, endorsed the proposal which required notification of the appropriate state supervisor and gave the primary state regulator an opportunity to act prior to federal government action under a cease and desist order.[59] The amendment constituted a significant recognition in federal law of the importance and power, as well as the responsibilities, of state supervisory authorities in the dual banking system.

K.A. Randall, FDIC chairman at the time, stated that there was a need for the cease and desist power, since the only corrective action the FDIC could take under existing law was to institute a proceeding to terminate deposit insurance.[60] It would appear that if the FDIC thought 12 U.S.C. 1819 Tenth vested it with general rule-making authority, it could have promulgated the rules necessary to proscribe certain activities, rather than be limited to termination of insurance.

In 1967, the FDI Act was again amended to provide that banks may not be involved in state sponsored lottery ticket sales.[61] Then Chairman Randall stated in response to the question of the need for this amendment that "it generally has been the position of this Corporation that the structure and scope of state banking activities should be a matter of state determination."[62] The minority members on the Senate Banking Committee questioned whether it was appropriate to use the insurance provided by the FDIC as a means to restrict the activities of state chartered banks specifically authorized by the state.[63] Thus, it would clearly appear improper for the FDIC to restrict state powers by using its general rule-making authority when the congressional committee itself had reservations about Congress restricting the states through the FDI Act.

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57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 3537.

61 Pub. L. No. 90-203, 81 Stat. 608 (codified as amended at 12 U.S.C. § 1829a (1982)).

62 S. REP. No. 727, 90th Cong. 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS, 2228, 2237.

63 *Id.* at 2238.

In 1978, the Congress again amended the FDI Act to subject the foreign branches of state non-member banks to the jurisdiction of the FDIC.[64] The FDIC requested that authority from Congress, claiming that, without this power, the safety and soundness of insured banks would be adversely affected.[65] Once again, if the FDIC possessed broad legislative type rule-making authority, it could have addressed this issue in a regulation rather than requesting action from Congress.

In the Competitive Equality Banking Act of 1987 ("Bill"),[66] recently passed by the Senate, Congress once again indicated its desire not to infringe upon the rights of states to regulate their banks. The Bill expands the authority of the FDIC to arrange the sale of troubled banks to interstate buyers.[67] However, similar to the cease and desist powers,[68] the FDIC would be required to give prior notice to and obtain approval from the state regulator if the state agency is the primary regulatory of any of the banks involved.[69] Furthermore, the FDIC "may not assist a merger or sale . . . or take final action . . . without the concurrence of the State bank supervisor of the State in which the bank in danger of closing is chartered."[70]

Thus, while expanding the powers of the FDIC, the Senate Banking Committee permits the state regulator to maintain its position as primary regulator. The committee report expressly indicates that the Bill requires state approval in order "to preserve the right of each state to control which banks operate within its borders."[71]

The Bill also recognizes the power of the states to determine the activities of its banks. The Bill does require a state chartered bank to limit its insurance activities to those allowed by the Bank

64 Pub. L. No. 95-630, 92 Stat. 3677 (codified as amended at 12 U.S.C. § 1813 (1982)).

65 H. REP. No. 95-1383, 95th Cong. 2nd Sess., *reprinted in*, 1978 U.S. CODE CONG. & ADMIN. NEWS 9273, 9277, 9299.

66 S.790, 100th Cong., 1st Sess., 133 CONG. REC. S3451 (daily ed. March 19, 1987).

67 S.790 *supra* note 66 § 403, 133 CONG. REC. S3799 (daily ed. March 25, 1987).

68 *See supra* text accompanying notes 49-55.

69 S.790 *supra* note 66 § 403, 133 CONG. REC. S3806 (daily ed. March 25, 1987).

70 *Id.*

71 S. REP. No. 100-19, 100 Cong. 1st Sess., FED. BANKING L. REP. (CCH) Special Rep. 1173 (March 27, 1987).

Holding Company Act ("BHCA") if acquired by a bank holding company ("BHC").[72] However, this is only to prevent a BHC from doing indirectly through a subsidiary those activities which a BHC cannot do directly under the BHCA.[73]

The Bill, as originally released by the Senate Banking Committee, was silent about limiting the powers of a state chartered bank not owned by a BHC. To prevent interfering with the states' rights, the Senate adopted an amendment by Senator Breaux, which stated that "[n]othing in this Act shall be construed to deny any State the authority to permit its State-chartered banks to engage in any insurance activity."[74]

The Breaux Amendment clearly indicated that Congress does not want to "trample on the rights of states to charter State banks, to allow those State-chartered banks to engage in activities in that particular State that are allowed under the State rules and the State laws."[75] The Breaux amendments were praised for its recognition of the dual banking system and for making it clear that the Bill is not intended "to prevent [state chartered] banks from obtaining broader powers in securities, insurance or real estate."[76]

For the last fifty years, Congress has made it clear that it wishes to preserve the dual banking system and not infringe upon the primary supervisory jurisdiction of the states. In both the FDIC merger statute[77] and the cease and desist authority,[78] the state supervisors have a role prior to federal agency action. With respect to mergers, the state must first approve the merger application before the FDIC may act,[79] and with respect to cease and desist orders, the state must receive prior notice and be given an opportunity to act.[80] Committee reports, congressional debate, FDIC testimony before Congress and recent proposed legislation in the Senate, as well as the regulatory scheme devel-

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72 S.790 *supra* note 66 § 201, 133 CONG. REC. S3935 (daily ed. March 26, 1987).

73 S. REP. No. 100-19, *supra* note 71.

74 S.790 *supra* note 66 § 201, 133 CONG. REC. S3935 (daily ed. March 26, 1987).

75 133 CONG. REC. S3936 (daily ed. March 26, 1987) (statement of Sen. Breaux).

76 133 CONG. REC. S4058 (daily ed. March 27, 1987) (statement of Sens. Glenn and Kerry).

77 12 U.S.C. § 1828(c).

78 *Id.* at § 1818(m).

79 *Id.* at § 1828(c).

80 *Id.* at § 1818(m).

oped by Congress, recognize the primary regulatory role of the state supervisors with respect to state insured non-member banks.

B. *Judicial Interpretation*

The Courts have also recognized the dual banking system and the primary role the states play in it. In *First Bank of Hudson County v. U.S.*, the court stated that the primary function of regulation and supervision is to be carried out by the New Jersey Commissioner of Banking, not by the FDIC.[81] The function of the FDIC is to support the stability and integrity of the banking system by providing insurance on the accounts of depositors.[82]

In *Investment Company Institute v. FDIC*, the court stated that the FDIC must not usurp state banking agencies' regulatory authority over state banks, noting that the FDIC must notify appropriate state authorities of its intention to issue cease and desist orders.[83] The court overruled a lower court order requiring the FDIC to take action in a particular area, observing that upholding the order would have entirely disregarded the primary role Congress intended state agencies to play in the regulation of state banks.[84] Thus, courts have also recognized the primary role of the state agency in a dual banking system.

The FDIC has pointed to *Independent Bankers Association v. Heimann* as authority for the proposition that unsafe and unsound practices may be banned by general rule-making under the cease and desist proceedings rule.[85] In that case, however, the court was construing the Comptroller of the Currency's rules regarding national banks and pointed specifically to the clear authority the Comptroller had to regulate national banks.[86] This is an important distinction because national banks are chartered by the Comptroller, which is the primary regulator, unlike the FDIC, which is only a secondary regulator over state chartered banks.

81 471 F. Supp. 33, 35 (D.N.J. 1978).

82 *Id.*

83 728 F.2d 518, 525 (D.C. Cir. 1984). This case involved the FDIC's cease and desist powers granted by 12 U.S.C. § 1818(m), discussed *supra* text accompanying notes 49-60.

84 *Id.*

85 618 F.2d 1164 (D.C. Cir. 1980).

86 *Id.*

Thus, the *Independent Bankers Association* case is very tenuous authority for the FDIC's position.

It would seem illogical that, where Congress set up a comprehensive scheme recognizing the role of the state regulators as primary regulators, it would permit a federal regulator to circumvent that scheme by promulgating a general regulation which would bypass the congressionally established role of the state. Given the fact that the Comptroller is both the primary and secondary regulator of national banks, the *Independent Bankers* decision appears cogent, but not determinative as to the balance to be struck between the state and federal regulators.

In addition, it was noted in *FAIC Securities Inc. v. U.S.* that there may be limits to the FDIC's power under 12 U.S.C. 1819 Tenth to promulgate general rules.[87] In that case, rules limiting the deposit insurance coverage on brokered deposits were invalidated.[88] The court held that 12 U.S.C. 1819 Tenth granted no authority to contravene the statute itself, stating that if Congress has determined an issue, the agency is not free to change it.[89] The court also stated that a plain reading of the Act did not permit the FDIC to redefine the extent of deposit insurance coverage where Congress had expressly done so.[90]

If one concludes from the legislative history of the FDI Act that Congress did not intend to obliterate or harm the dual banking system, it would appear that there may be no authority for the FDIC to promulgate regulations limiting state powers, absent a specific statutory provision. A statute is to be interpreted so as to fulfill the intent of the Congress[91] and there appears to be no intent on Congress' part to have the FDIC usurp the states' power to regulate the investments and activities of their banks.

C. *The FDIC's Interpretation*

The FDIC has also pointed to its own interpretation of the FDI Act and has concluded that this should be given great weight.[92] While it is clear that deference is to be given to a regu-

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87 768 F.2d 352 (D.C. Cir. 1985).

88 *Id.*

89 *Id.* at 362.

90 *Id.* at 361.

91 *See* 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.05.

92 50 Fed. Reg. 23,967 (1985).

latory agency's interpretation of its own statute, even settled administrative practice must yield to clear expressions of legislative intent.[93] Furthermore, there are varying degrees of respect to be accorded to an agency's statutory interpretation of limits.[94] This depends upon such factors as the interpretation's inherent reasonableness, its consistency with prior precedent, its basis in statutory text and legislative history, and whether it is based upon experience or expertise, particularly within the agency's ken.[95]

The initial question is whether the interpretation by the FDIC is inherently reasonable. There may be a serious question as to the reasonableness of such an interpretation. As Judge Tamm stated in analyzing an analogous situation, where an act goes into great detail to set forth the role of a state, a construction which would allow a federal official to take away the very discretion Congress sought to vest in the state seems illogical.[96] "Like the camel sticking its nose in the tent, the Secretary could easily take over entirely. I will not construe a statute in a manner which runs counter to the broad goals which Congress intended to effectuate."[97] In the instant situation, permitting the FDIC to label any practice or power given to a state bank as unsafe or unsound would allow it to become not merely a supervisor, but the primary regulator of a state insured non-member bank. Such an interpretation would appear inherently unreasonable.

The FDIC's interpretation of its own act also appears inconsistent with prior precedent. The FDIC has in prior years sought congressional approval to enlarge its role in merger applications and to obtain stronger cease and desist powers.[98] It did not promulgate a regulation, but rather waited for legislation before banning a bank's involvement in state sponsored lotteries.[99] The FDIC now proposes, without legislation, to take action which would limit state powers. This interpretation thus appears inconsistent not only with legislative history, but with prior practice as

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93 Wawszkiewicz v. Dep't of the Treasury, 480 F. Supp. 739, 744 (D.D.C. 1979).
94 Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n, 655 F.2d 1132, 1141 (D.C. Cir. 1980).
95 *Id.*
96 In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 533 (D.C. Cir. 1981).
97 *Id.*
98 *See supra* notes 49-60 and accompanying text.
99 *See supra* notes 61-63 and accompanying text.

well.[100]

The FDIC could argue that as a federal instrumentality, it has the authority to preempt state law. However, in *Fidelity Federal S&L Ass'n v. DeLaCuesta*, the Court dealt with the preemption by the Federal Home Loan Bank Board of a state mortgage statute.[101] The Court stated that legislative intent must be examined and reviewed to determine whether federal regulations preempt state law.[102] A federal regulator's choice of regulations will be upheld as representing "a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[103] Clearly, there was no intention on Congress' part to preempt state banking powers through the FDIC's general rulemaking authority. Rather, if a state authorized activity of a state non-member bank is deemed unsafe by the FDIC, the cease and desist system is available. If a conflict then exists between the state and the FDIC, the FDIC would prevail, provided its actions under its cease and desist powers are sustained as reasonable by the appropriate court.

In addition, 12 U.S.C. 1819 Tenth should be read together with the FDI Act.[104] It would certainly not be a cohesive, consistent interpretation of the FDI Act to permit the FDIC to veto or restrict the actions of the state legislatures under its general rulemaking authority, where the same Act requires prior notice and

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100 The only exception appears to be the promulgation of 12 C.F.R. § 332 (1986). In August 1946, the FDIC issued what is now 12 C.F.R. § 332. This regulation prohibits state non-member banks which have not, as of the 1946 date of adoption, exercised fidelity, indemnity or title guarantee powers from exercising them in the future. There are no reported cases on this regulation and, as it predates the Administrative Procedures Act, there is no substantial regulatory history. However, in a memorandum dated August 29, 1946 from an FDIC Subcommittee to the full FDIC Board in support of the regulation, the Board looked to the fact that it required banks requesting admission to the FDIC system after 1935 and possessing such powers to divest before becoming FDIC insured. The rule therefore was adopted to prohibit other insured banks which were earlier admitted but not exercising their powers from so doing. It is noteworthy that the Board did not prohibit those banks which were exercising such powers to halt, thereby avoiding a direct challenge to the power of the FDIC over state granted powers.

101 458 U.S. 141 (1982).

102 *Id.* at 154.

103 *Id.* (quoting U.S. v. Shiner, 367 U.S. 374, 383 (1961)).

104 *See* 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 53.

consultation with state regulators regarding termination of insurance, cease and desist orders, and mergers.

It should also be noted that the dual banking system is, by its very existence, a recognition of the diversity of our country and its financial needs. The cease and desist regulation of the FDI Act permits state supervisors' input and a hearing, as well as court review, so that unique situations in various states might be examined and given proper treatment.[105] Blanket legislative rule-making regulation would run contrary to this comprehensive scheme established by Congress.

In *In Re Permanent Surface Mining Regulation Litigation*, the court examined a statute giving the federal government supervisory authority over state agencies with respect to surface mining.[106] In a 6 to 5 decision, the court of appeals permitted the federal administrator to promulgate a regulation broader than that specifically set forth in the statute.[107] It did so after an extensive review of the legislative history which revealed Congress' concern regarding the states' prior actions and the inability of the states to handle certain issues.[108]

A strong dissent, however, pointed out that Congress intended the states to assume the primary governmental responsibility for enforcing the act in question and that the federal government merely had supervisory power.[109] The minority in the Court looked to the congressional scheme, which it believed would be turned on its head if federal supervisory authority were allowed to consume the state discretion and reduce state power to a purely ministerial implementation of a federally devised program.[110]

In the *Surface Mining Regulation* case, the court was dealing with a recently enacted federally devised program allocating responsibility between the state and the federal government, as well as a conflicting legislative history.[111] With respect to banks, on the other hand, there exists an unbroken history and practice

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105 *See* 12 U.S.C. § 1818 (l), (m).
106 653 F.2d 514 (D.C. Cir. 1981).
107 *Id.*
108 *Id.* at 520-21.
109 *Id.* at 532-34 (Tamm, J., dissenting).
110 *Id.*
111 *Id.* at 516-21.

of regulatory separatism which Congress and the FDIC have recognized on numerous occasions. The intent of Congress would surely be strained by allowing the general rule-making power of the FDIC to consume state legislators' discretion as to the powers state financial institutions should possess.

While there may be concern on the part of the FDIC as to the powers granted to state banks, its remedy appears to be twofold. First, cease and desist powers can be used in specific cases, creating administrative precedent which would guide other institutions in the various states. This would permit state authorities to have input, as well as permit appropriate judicial review of a well-defined factual record. Its second recourse is to the Congress. As stated by Judge Gesell in *FAIC Securities, Inc.*:

> [w]hen a court is confronted with a clear need for regulatory action under a statute which does not anticipate the condition which created the regulatory problem or provide the means for dealing with it, there is a temptation to approve a good faith agency effort, despite the agency's apparent lack of authority. But this temptation must be avoided, for it is the Congress, not the judiciary, which must act to provide the regulatory agencies with the tools they require.[112]

Thus, if the FDIC is convinced that it has a clear need for regulatory action and that the cease and desist powers will not adequately address its concerns, it appears that its proper recourse should be to the Congress.

IV. Conclusion

The FDIC's primary purpose is to provide deposit insurance, thereby providing a stable financial system. Inherent in that purpose is the need for safe and sound banking systems. However, competing with this purpose is the structure of the system itself, a dual banking system which Congress has recognized as important and not to be infringed upon. While there is a real need for the FDIC to protect its fund and the stability of the banking system, this must not jeopardize the continued viability and existence of the dual banking system.

Congress has reconciled these concerns by providing a de-

112 FAIC Securities, Inc. v. United States, 595 F. Supp. 73, 79 (D.D.C. 1984), *aff'd*, 768 F.2d 352 (D.C. Cir. 1985).

tailed system of cease and desist authority, a system which gives the states a role. This congressional scheme appears to be the balance currently set by Congress. To permit the FDIC to issue general legislative rules under 12 U.S.C. 1819 Tenth which may contradict state granted authority would appear to upset this balance without the appropriate Congressional authorization.