



# California Corporate & Securities Law

## **The NAFTA, Preemption And Where In the World Are The Reservations?**

By Keith Paul Bishop on October 5, 2011

Earlier, I wrote this [post](#) about the exemption from registration found in Section 3(a)(2) of the Securities Act for “any security issued or guaranteed by any bank”. For purposes of this statute, a “bank” generally means “any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official.” Similarly, California Corporations Code Section 25100(c) exempts from qualification under the Corporate Securities Law of 1968 any security issued or guaranteed by and representing an interest in or a direct obligation of a national bank or a bank or trust company incorporated under the laws of California. Thus, both the federal and California exemptions are not available to banks of other countries. Further, California does not exempt banks chartered under the laws of other states.

### **North American Free Trade Agreement**

I question, however, whether this is legal. In 1994, the North American Free Trade Agreement (aka the NAFTA) went into effect. Chapter 14 of the NAFTA applies to measures adopted or maintained by a Party relating to:

- financial institutions of another Party;
- investors of another Party, and investments of such investors, in financial institutions in the Party’s territory; and
- cross-border trade in financial services.

### **National Treatment**

In particular, Article 1405 of the NAFTA mandates what is known as “national treatment”:  
Each Party shall accord to financial institutions of another Party and to investments of investors of another Party in financial institutions treatment no less favorable than that it accords to its own financial institutions and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.

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As defined by the NAFTA for purposes of Chapter 14, an “investment” appears to include equity securities of an enterprise but not all debt securities. See Article 1416 and Article 1139.

### **Where Are The Reservations?**

The NAFTA provides that Articles 1403-1405 do not apply to then existing non-conforming measures maintained by the parties or their respective states or provinces if those measures were listed on Section A to Annex VII of the treaty. Article 1409(1). [Here](#) is the U.S. Section A to Annex VII as found on the website of the NAFTA Secretariat. Conspicuously absent from the schedule is any reservation for Section 3(a)(2) of the Securities Act or any state measures. I recently contacted the [Office of the U.S. Trade Representative](#) but so far they haven't been able to provide me with an answer concerning the missing state reservations.

This is all very complicated and international trade regulation is not my field. However, it suggests that the Securities and Exchange Commission and state regulators may want to take a look at whether they are in compliance with the NAFTA.

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