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OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Questions Concerning
Applicability and Enforcement of
State Laws: Contacts From State
Officials

TO: Chief Executive Officers of all National Banks, Department and Division Heads, and All Examining Personnel

PURPOSE

This advisory letter describes the general principles that apply in determining whether a state law is applicable to a national bank. It also describes the statutory authority of the OCC to regulate national banks, to examine national banks for compliance with federal and applicable state laws, and to enforce these laws. Finally, it advises national banks to consult with the OCC if state officials contact them concerning the potential application of a state law, or if these officials seek information concerning a national bank's operations.

BACKGROUND

Recently, we have been asked for guidance on the role of state officials in the enforcement of state laws that may affect national bank operations. The applicability of state laws to national banks and their operating subsidiaries -- and the authority to enforce those laws -- raise complex issues of both federal preemption and the statutory authority of the OCC as the supervisor and regulator of national banks.¹ Due to the often complex nature of the determinations regarding the application and enforcement of state law in a particular instance, this advisory letter notifies national banks to consult with the OCC on such matters. In addition, it encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws, or if they seek information from national banks. We appreciate the interest of state officials in these issues, and this advisory is designed to summarize the standards that are applicable in this area.

¹ In most instances, the OCC is responsible for enforcing federal laws that apply to national banks or to their operating subsidiaries. However, some federal statutes also specifically give enforcement authority to state attorneys general. See, e.g., 15 USC 1681s(c) (Fair Credit Reporting Act). Even in these instances, issues may arise as to the appropriate role of a state official with respect to a national bank's activities. Thus, the procedures discussed in this advisory letter should also be followed by national banks in instances involving any state attorney general enforcement action under federal law.

Applicability of State Laws to National Banks

The National Bank Act was enacted in 1864 to create a new system of nationally chartered banks that would operate independently of state regulation.² Since that time, courts have recognized the essentially federal character of national banks,³ and the Supreme Court has repeatedly held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.⁴ In one such decision, the Court noted that national banks are "instrumentalities" of the federal government and stated that "any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created."⁵

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.⁶ To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been "expressly and exclusively" given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with the national bank's exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."⁷

Supervision of National Banks and Enforcement of Applicable Laws

² *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002) (citing Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)).

³ See, e.g., *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

⁴ See *Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903), in which the Supreme Court explained:

[Federal legislation concerning national banks] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states. ... [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

See also *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (the powers of national banks are "grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law").

⁵ *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368, 369 (1923). See also *Bank of Am.*, 309 F.3d at 561 (state attempts "to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties").

⁶ Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. See 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.*; 15 USC 1693 *et seq.*; 12 USC 2601 *et seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC's supervisory standards.

⁷ *Bank of Am.*, 309 F.3d at 559.

In addition to uniform federal standards for regulation of national banks, Congress provided for a complementary system of uniform federal oversight of the activities of national banks as an integral component of the national banking system. Exclusive federal oversight, uniform federal regulation, and state law preemption constitute three essential and distinctive elements of the national bank charter.⁸

Congress provided that the uniform federal standards that would govern national banks – and state laws, where federal law makes them applicable – would be enforced by a single, federal supervisor, the OCC. By statute, national banks generally are not subject to any visitorial powers except as authorized by federal law:

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.⁹

12 USC 484(a). The OCC is specifically authorized under the National Bank Act to “examine every national bank as often as the Comptroller of the Currency shall deem necessary,” and OCC examiners have the power to “make a thorough examination of all the affairs of the bank.” 12 USC 481. Thus, except in specialized instances where federal law makes provision for another regulator to have a role, the OCC’s visitorial powers are exclusive with respect to activities that are authorized or permitted for national banks under federal law or regulation, or by OCC issuance or interpretation.

Congress reaffirmed the OCC’s exclusive visitorial powers in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Pub. L. 103-328, 108 Stat. 2338 (1994). Congress provided in that legislation that specified types of laws of the “host” state in which a national bank has an interstate branch are applicable, *unless* federal law preempts their application to national banks. However, Congress stated that “[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.” 12 USC 36(f)(1)(B).¹⁰

The OCC’s regulations also set forth the agency’s exclusive visitorial authority, providing that, subject to limited exceptions, only the OCC may exercise visitorial powers with respect to national banks. 12 CFR 7.4000(a)(1). These exclusive visitorial powers include:

⁸ Moreover, OCC regulations provide for comparable treatment of national bank operating subsidiaries. The OCC’s regulations state: “Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.” 12 CFR 7.4006. In addition, 12 CFR 5.34(e)(3) provides that “[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.”

⁹ “Visitorial” powers generally refer to the power to “visit” a national bank to examine the conduct of its business and to enforce its observance of applicable laws. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (the word “visitation” means “inspection; superintendence; direction; regulation”) (internal quotations omitted). Section 484 provides an exception to the OCC’s exclusive visitorial authority for state examiners inspecting for compliance with state unclaimed property or escheat laws upon reasonable cause to believe the bank has failed to comply with those laws. 12 USC 484(b).

¹⁰ *See also National State Bank v. Long*, 630 F.2d 981, 989 (3rd Cir. 1980) (“[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner.”)

1. examination of a bank,
2. inspection of a bank's books and records,
3. regulation and supervision of activities authorized or permitted pursuant to federal banking law, and
4. enforcing compliance with any applicable federal or state laws concerning those activities.

12 CFR 7.4000(a)(2)(i - iv).

PROCEDURE

The OCC recognizes that state officials may from time to time possess information that would be valuable to the OCC in connection with its oversight of national banks, or may seek to obtain information from national banks concerning their operations. Given the complexity of issues that can arise with respect to whether a state law is applicable to national bank operations, the enforcement of any such laws, or the propriety of disclosure of information concerning a national bank's operations, the OCC has established the following procedure to address circumstances when state officials raise issues concerning potential violations of laws by national banks, including when state officials may seek information from a national bank about its compliance with any law or for other purposes:

- **State officials are urged to contact the OCC** if they have any information to indicate that a national bank may be violating federal or an applicable state law or if they seek information concerning a national bank's operations. The OCC will review any such information and, if appropriate, take supervisory action, which may include an enforcement action, if it concludes that a national bank has violated an applicable law.
- **National banks should contact the OCC** if they are contacted by a state official seeking information from the bank that may constitute an attempt to exercise visitation or enforcement power over the bank. National banks are encouraged to consult with the OCC as soon as possible following the initial contact by a state official on whether such request may conflict with the federal standards applicable to the regulation and supervision of national banks. Following such consultation, the OCC may want to contact the state official directly to discuss the state's inquiry and to obtain any information that the state might possess that may be relevant to the OCC's supervision of the bank.

OCC Contacts:

- Director, Enforcement and Compliance Division, at (202) 874-4800 (for inquiries by state officials and questions about this Advisory Letter)

- Director, Community and Consumer Law Division, at (202) 874-5750 (for inquiries by state officials and questions about this Advisory Letter)
- The OCC District Counsel for the district in which the bank is headquartered (for inquiries by state officials)
- Director, Legislative and Regulatory Activities Division, at (202) 874-5090 (for questions about preemption and visitorial powers generally)

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