

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 7**

[Docket No. 04-03]

RIN 1557-AC78

**Bank Activities and Operations****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Final rule.**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is publishing its final rule amending its visitorial powers regulation in order to clarify issues that have arisen in connection with the scope of the OCC's visitorial powers.**EFFECTIVE DATE:** February 12, 2004.**FOR FURTHER INFORMATION CONTACT:** For questions concerning the final rule, contact Andra Shuster, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874-5090.**SUPPLEMENTARY INFORMATION:** On February 7, 2003, the OCC published a notice of proposed rulemaking in the *Federal Register* (68 FR 6363) to implement the American Homeownership and Economic Opportunity Act of 2000 (AHEOA) and clarify our visitorial powers regulation (NPRM). In addition, we proposed to amend parts 5, 7, 9, and 34 of our regulations for other purposes and to make various technical changes to correct citations or footnote numbering.

On December 17, 2003, the OCC published a final rule that addressed all of the foregoing parts of the proposal except visitorial powers (68 FR 70122). This final rule relates solely to the visitorial powers proposal (proposal).

The OCC received 55 comments on the NPRM. Of these, 53 comments addressed the visitorial powers proposal. These comments included three from national banks, one from an operating subsidiary of a national bank, six from bank holding companies, five from banking trade associations, two from bank membership organizations, one from a community group association, two from non-profit consumer groups, one from a state bank supervisors' association, 30 from state

bank supervisors' offices, one from a securities administrators' membership organization, and one from a law enforcement association.

While many of the commenters supported the proposal, some were opposed, and many offered suggestions for changes. For the reasons discussed later in this preamble, we have adopted the visitorial powers provisions of the NPRM with certain modifications also described later.

**A. Background**Current 12 CFR 7.4000(a) provides that only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, subject to exceptions provided in Federal law. Section 7.4000(a) goes on to define the regulatory, supervisory, and enforcement actions included within our visitorial powers, while § 7.4000(b) sets out several exceptions to our exclusive authority that are created by Federal law.<sup>1</sup>

These provisions interpret and implement 12 U.S.C. 484. Paragraph (a) of that section states—

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.

Paragraph (b) of the statute then permits lawfully authorized state auditors or examiners to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

In recent years, various questions have arisen with respect to the scope of the OCC's visitorial powers over national banks. In general, the questions fall into two broad categories: First, what activities conducted by a national bank are subject to the OCC's *exclusive* visitorial powers? Second, what is the meaning of certain exceptions to the OCC's exclusive visitorial powers that are provided in the statute, specifically the exception for visitorial powers "vested in the courts of justice?"

The NPRM invited comments on proposed amendments to § 7.4000 to clarify the application of section 484 to both areas.

<sup>1</sup> Paragraph (c) of 12 CFR 7.4000 clarifies that the OCC owns reports of examination and addresses a bank's obligations with respect to these reports. This paragraph is unaffected by this rulemaking.**B. Description of the Proposal**The proposal contained two types of changes to § 7.4000. First, we proposed to add a new paragraph (3) to § 7.4000(a) that identifies the scope of the activities of national banks for which the OCC's visitorial powers are exclusive, pursuant to section 484. The proposal provided that the OCC has exclusive visitorial authority over national bank activities that are permissible under Federal law or regulation or OCC issuance or interpretation, including how those activities are conducted. Second, we proposed to revise § 7.4000(b) to clarify the OCC's interpretation of the "vested in the courts of justice" exception. The proposal provided that national banks are subject to the visitorial power inherently vested in courts and that the "vested in the courts of justice" exception did not create or expand any authority of states or other governmental entities to regulate or supervise national banks. As we will discuss in greater detail later in this preamble, both of these changes serve to clarify that Federal law commits the supervision of national banks' Federally-authorized banking business exclusively to the OCC, (except where Federal law provides otherwise), and does not apportion that responsibility among the OCC and the states; and that state authorities may not achieve indirectly by resort to judicial actions what section 484 prohibits them from achieving directly through state regulatory or supervisory mechanisms. The proposal also added an exception in proposed new § 7.4000(b)(vi) recognizing that functional regulators may exercise the authority over national banks conferred by the Gramm-Leach-Bliley Act (GLBA).<sup>2</sup>**C. Overview of Comments Received**

Many commenters supported the proposal, noting that the clarification of the visitorial powers regulations would be helpful. One commenter said that subjecting national banks' Federally-authorized activities to state regulation would be inconsistent with the purposes of the National Bank Act. Others noted that additional layers of state supervision would have the effect of making the operations of national banks less efficient and more costly. Commenters also stated that they supported the proposal's clarification of

<sup>2</sup> Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999). For example, section 301 of the GLBA (codified at 15 U.S.C. 6711) provides that national banks' insurance activities are functionally regulated by the states, subject to the applicability of state law provisions in section 104 of that law (codified at 15 U.S.C. 6701). *Id.* at section 301, 113 Stat. at 1407, codified at 15 U.S.C. 6711.

the “courts of justice” exception. A number of commenters supporting the proposal suggested that, while the reference in the preamble is helpful, the OCC should add language to the regulation text to explicitly state that the OCC’s exclusive visitorial authority applies to operating subsidiaries.

We also received a number of comments that opposed the proposal. These commenters advanced four principal points: first, that the visitorial powers amendments are inconsistent with the fundamental tenets of the dual banking system, pursuant to which national banks are subject to state regulation; second, that the amendments are inconsistent with the presumptive applicability of state law to national banks, as endorsed by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act);<sup>3</sup> third, that the OCC’s visitorial power over national banks is not exclusive; and, finally, that the OCC lacks authority to prevent states from exercising visitorial powers over national bank operating subsidiaries. The following discussion addresses each of these points.

#### D. Discussion

##### 1. *The Exclusivity of the OCC’s Visitorial Authority is Integral to—Not Inconsistent With—the Dual Banking System*

Many commenters opposed to the proposal argued that the amendments would amount to a “field preemption” that would be inconsistent with what they aver to be a fundamental tenet of the dual banking system, namely, that states have the authority to regulate the business operations of all banks, including national banks, unless Congress preempts state law in specific areas.

This argument mischaracterizes the essence of the dual banking system. Differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. As one noted commenter has observed, “[t]he very core of the dual banking system is the simultaneous existence of different regulatory options that are *not* alike in terms of statutory provisions, regulatory implementation and administrative policy.”<sup>4</sup> The Federal grant of national bank powers and the uniformity of the standards that govern their exercise,

coupled with the OCC’s exclusive visitorial authority, are fundamental distinctions between the national banking system and the system of state-chartered and regulated banks that comprises the other half of the dual banking system.

Neither the case law nor scholarly literature recognizes a definition of dual banking incorporating the notion that national banks are subject to state supervision and regulation of activities they are authorized to conduct under Federal banking law.<sup>5</sup> What the case law *does* recognize is 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.”<sup>6</sup> Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks—and others—to do business.<sup>7</sup> In other words, these state laws provide a framework for a national bank’s ability to exercise powers granted under Federal law; they do not obstruct or condition a national bank’s exercise of those powers.<sup>8</sup>

The argument that the proposed amendments generally amount to an impermissible “field preemption” is also misplaced. First, the regulatory proposal and the final regulation would not have the effect of preempting substantive state laws, but rather would clarify the appropriate agency for

<sup>5</sup> The following is typical of the way the dual banking system is described in recent scholarly articles:

“Depository financial institutions in the United States, including banks, credit unions, and thrifts, are unique in that their incorporators and/or management have a choice between state and federal charters, regulatory authorities, and governing statutes. No other industry has separate and distinct laws governing its powers, regulation, and organizational structure. This phenomenon is known as the ‘dual banking system.’”

John J. Schroeder, “Duel” Banking System? *State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 *Ind. L. Rev.* 197, at 197 (2003), citing Arthur E. Wilmarth, Jr., *The Dual Banking System—A Legal History* (Sept. 30, 1991) (unpublished paper presented at the Education Foundation of State Bank Supervisors (EFSBS) Seminar for State Banking Department Attorneys).

<sup>6</sup> *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002).

<sup>7</sup> The OCC is publishing in the **Federal Register** today a final rule amending parts 7 and 34 of the OCC’s regulations to clarify that these state “infrastructure” statutes would generally not be preempted by Federal law.

<sup>8</sup> See *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33–34 (1996).

enforcing those state laws that are applicable to national banks. Concerns about “field preemption” are misplaced since the rule pertains only to state laws that would provide for state “visitation” of national banks. The proposal and this final rule interpret the text of a Federal statute, 12 U.S.C. 484, that expressly confines the scope of permissible supervision over national banks to what is provided in Federal law, including the limited exception for state inspection of certain records that is contained in section 484. Thus, Congress has spoken to the issue. Our amendments to our visitorial powers rule seek to define the terms used in the statute in order to provide greater certainty to affected parties with regard to the specific issue of visitation.

##### 2. *No Presumption Against Preemption Applies in the Case of the National Banking Laws, a Conclusion That Is Confirmed by the Riegle-Neal Act*

Commenters also argued that the amendments in the proposal are inconsistent with the presumptive application of state law to national banks, which they assert was specifically endorsed by Congress in the Riegle-Neal Act.<sup>9</sup>

However, case law, whether decided before or after Riegle-Neal was enacted, is consistent in holding that there is no presumption against preemption in the national bank context. The Supreme Court has said that a presumption against preemption “is not triggered when the State regulates in an area where there has been a history of significant federal presence.”<sup>10</sup> Courts have consistently held that the regulation of national banks is an area where there has been an extensive history of significant Federal presence. As recently observed by the U.S. Court

<sup>9</sup> Commenters rely on the legislative history of the Riegle-Neal Act as support for their assertions. This history demonstrates that Congress intended that the Riegle-Neal Act would *not* disrupt the application of traditional principles of Federal preemption to questions involving national banks. We note, however, that under well-established principles of statutory construction, it is not necessary to resort to legislative history to determine the meaning of a statute unless the text of the statute is ambiguous, which is not the case here. See, e.g., *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (unless there are exceptional circumstances, judicial inquiry into the meaning of a statute is complete once the court finds that the terms of the statute are unambiguous.) (citation omitted); see also 2A Norman J. Singer, *Sutherland, Statutes and Statutory Construction* § 48.01, at 410 (6th ed. 2000) (“Generally, a court would look to the legislative history for guidance when the enacted text was capable of two reasonable readings or when no one path of meaning was clearly indicated.”).

<sup>10</sup> *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (explaining *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

<sup>3</sup> Pub. L. 103–328, 108 Stat. 2338 (Sept. 29, 1994).

<sup>4</sup> Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 *Stan. L. Rev.* 1, 41 (1977).

of Appeals for the Ninth Circuit, “since the passage of the National Bank Act in 1864, the federal presence in banking has been significant.” The court thus specifically concluded that “the presumption against preemption of state law is inapplicable.”<sup>11</sup> Indeed, when analyzing national bank powers, the Supreme Court has interpreted “grants of both enumerated and incidental ‘powers’ to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.”<sup>12</sup>

The relevant text of the Riegle-Neal Act is fully consistent with these conclusions. In fact, it is entirely consistent with the proposal and final rule in providing that even when state law may be applicable to interstate branches of national banks, the OCC is to enforce such laws, *i.e.*, the OCC retains exclusive visitorial authority:

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, *except*—

(i) When Federal law preempts the application of such State laws to a national bank; \* \* \*

(B) Enforcement of applicable State laws

The 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*.<sup>13</sup>

Thus, although Riegle-Neal section 36(f) clarifies that the laws of the host state regarding community reinvestment, consumer protection, and fair lending would be applicable to branches of an out-of-state national bank located in the host state, *unless preempted*, the Riegle-Neal Act further and unambiguously provides that it is

the OCC that has the authority to enforce such state laws to the extent they are *not* preempted.

3. Section 484 Grants Visitorial Authority to the OCC, to the Exclusion of the States

Some commenters argued that the OCC’s visitorial power is not exclusive because (1) the text of the statute does not contain an explicit grant of exclusive authority to the OCC; and (2) courts have permitted states to exercise concurrent authority to seek enforcement of state laws. These two contentions are addressed in turn.

a. The Text of Section 484

Commenters who opposed the proposal argued that the OCC may not rely on 12 U.S.C. 484 as the basis for our exclusive jurisdiction because that section is silent on precisely who has visitorial powers over national banks. A review of the history of section 484 shows that this reading of the statute is fundamentally mistaken.

In the Act of June 3, 1864, later named the National Bank Act, the visitorial powers provision appeared in the *same section* as the Comptroller’s examination authority. In that context, it was clear that visitorial authority was exclusive to the Comptroller, subject to a single exception for powers “vested in the several courts of law and chancery.” Section 54 of the National Bank Act provided in relevant part:

*And be it further enacted*, That the comptroller of the currency, with the approbation of the Secretary of the Treasury, as often as shall be deemed necessary or proper, shall appoint a suitable person or persons to make an examination of the affairs of every banking association. \* \* \* And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.<sup>14</sup>

These examination and visitorial provisions of section 54 were codified together in 1875 at section 5240 of the Revised Statutes of the United States. Section 5240 explicitly gave the OCC visitorial authority over national banks *and* precluded the exercise of visitorial authority by any other source, except insofar as expressly allowed by one of the exceptions, including the exception covering visitations “as authorized by Federal law.” In context, the meaning of the text is unmistakable. The Comptroller is given the power to examine and supervise national banks—

that is, to serve as the “visitor” of the bank—and that power, as well as any other “visitorial” power is denied to any other entity unless Federal law provides otherwise.

The examination and visitorial provisions were split, slightly revised, then later reunited, in subsequent codifications,<sup>15</sup> but Congress has never altered the original meaning of these grants of authority to the OCC. The visitorial provision has been substantively amended only twice, once in 1913 and once in 1982.<sup>16</sup> Both times, the amendments were consistent with the exclusive grant of visitorial authority in the original enactment. In both cases, the legislative history, though sparse, contains no indication that Congress intended to change the exclusivity of its original grant of authority to the Comptroller. In fact, the 1982 amendment that added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws would have been unnecessary if the language of section 484 permitted state examination and enforcement of applicable state law. As codified today, the examination and visitorial provisions appear in separate sections of the United States Code. Substantive consequences do not attach to the placement of the provisions in the Code, however, and neither provision may be read in isolation to suggest a meaning that is inconsistent with the law as enacted by the Congress.

Moreover, exclusivity is inherent in the structure of the statute, both as originally enacted and today. The visitorial powers provision first sets forth a complete prohibition, then subjects that prohibition to certain exceptions.<sup>17</sup> The inference to be drawn from this structure is that the prohibition applies unless a visitorial power is covered by one of the

<sup>15</sup> The examination provision is currently codified at 12 U.S.C. 481.

<sup>16</sup> In 1913, the exception for Congress and its committees was added, the reference to the Act of June 3, 1864 changed to “other than such as are authorized by law;” and the word “bank” substituted for the word “association.” Amendments in 1982 added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws, added the word “Federal” before the word “law;” and changed “bank” to “national bank.”

<sup>17</sup> Commenters cited to *First Union Nat’l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), in support of their contention that the OCC’s visitorial power is not exclusive. We disagree that the court’s opinion is dispositive of the issues considered here. The opinion did not analyze the purpose, plain language, and structure of section 484. Moreover, we note that the *Burke* court agreed that a state may not directly enforce state law against national banks.

<sup>11</sup> *Bank of America*, 309 F.3d at 558–59 (citations omitted).

<sup>12</sup> *Barnett*, 517 U.S. at 32. The *Barnett* Court went on to elaborate:

[W]here Congress has not expressly conditioned the grant of “power” upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks’ power to local restrictions, because the federal power-granting statute there in question contained “no indication that Congress [so] intended \* \* \* as it has done by express language in several other instances.”

*Id.* at 34 (emphasis in original) (citations omitted).

<sup>13</sup> 12 U.S.C. 36(f)(1) (emphasis added).

<sup>14</sup> Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481–484.

enumerated exceptions. As noted above, the statute's description of the exceptions has changed—though the changes have been modest—over time. But none of these exceptions allows for the allocation of any general bank supervisory responsibility to the states.

As we discussed when we issued the visitorial powers proposal, any allocation of general supervisory authority over national banks to the states would be inconsistent with the history and purpose of the National Bank Act, as well as with the express language of the statute. Congress enacted the National Currency Act (Currency Act) in 1863 and the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the post-Civil War national economy.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.<sup>18</sup> Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general,<sup>19</sup>

<sup>18</sup> Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [i.e., the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong., 1st Sess. 1256 (Mar. 23, 1864). While he did not believe that the legislation was necessarily harmful to the state bank system, Rep. Hooper did "look upon the system of State banks as having outlived its usefulness." *Id.* Opponents of the legislation believed that it was intended to "take from the States \* \* \* all authority whatsoever over their own State banks, and to vest that authority \* \* \* in Washington." Cong. Globe, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over banking from the states to the Federal government. Given that the legislation's objective was to replace state banks with national banks, its passage would, in Rep. Brooks's opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the Federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States." Cong. Globe, 38th Cong., 1st Sess. 1271 (Mar. 24, 1864). See also John Wilson Million, *The Debate on the National Bank Act of 1863*, 2 J. Pol. Econ. 251, 267 (1893-94) regarding the Currency Act. ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.")

<sup>19</sup> See, e.g., *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. 409, 412-413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the

proponents of the national banking system were concerned that states<sup>20</sup> would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions."<sup>21</sup>

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference.<sup>22</sup> Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination into all the affairs of [a national bank],"<sup>23</sup> and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assured, among

organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. \* \* \* National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks." *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2064 (2003) ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" (citation omitted). See also Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 725-34 (1957); Paul Studenski & Herman E. Krooss, *Financial History of the United States* 154-55 (1952).

<sup>20</sup> For ease of reference, we use the term "state" in this preamble in a way that includes other non-Federal governmental entities.

<sup>21</sup> Cong. Globe, 38th Cong., 1st Sess., at 1893 (Apr. 27, 1864); see also *Beneficial Nat'l Bank*, 123 S.Ct. at 2064.

<sup>22</sup> In a report of the Comptroller of the Currency made pursuant to the Currency Act, Hugh McCulloch, then Comptroller, discussed the need to protect national banks from variation in interest rates among the states by making a change in the law to provide for uniform interest rates. He referred to the Supreme Court decision in *M'Culloch v. Maryland*, 17 U.S. 316 (1819), which prohibited the state of Maryland from imposing taxes on the Bank of the United States under the Federal statute establishing the bank, as support for Congress having the authority to make this change by likening the Maryland taxation statute to a state statute on interest. Office of the Comptroller of the Currency, Report on the Finances, Nov. 28, 1863, at 52-53.

<sup>23</sup> Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank, and protected national banks from potential state hostility by establishing that the authority to examine and supervise national banks is vested *only* in the OCC, unless otherwise provided by Federal law.<sup>24</sup>

Courts have consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act. The Supreme Court stated in one of the first cases to address the role of the national banking system that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."<sup>25</sup> Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status.<sup>26</sup>

In *Guthrie v. Harkness*,<sup>27</sup> the Supreme Court recognized how the National Bank Act furthered the objectives of Congress:

Congress had in mind in passing this section [section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts

<sup>24</sup> Writing shortly after the Currency Act and National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." Letter of Secretary of the Treasury, serial set collection, CIS No. 1239 S.misdoc.100, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (Apr. 23, 1866).

<sup>25</sup> *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875).

<sup>26</sup> See *Marquette Nat'l Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299, 314-315 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system.'" (citation omitted)); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.")

<sup>27</sup> 199 U.S. 148, 159 (1905).

of justice, this act was to be the full measure of visitatorial power.

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in *Easton v. Iowa*,<sup>28</sup> the Court stated that Federal legislation affecting 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 as numerous as the states. \* \* \* It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute. \* \* \* [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.

And in *Farmers' & Mechanics' National Bank*, after observing that national banks are means to aid the government, the Court stated—

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."<sup>29</sup>

Our proposed amendment clarifying the scope of the visitatorial powers authorized to the OCC pursuant to section 484 is consistent with the historical meaning of the term "visitation" and with cases discussing section 484. The Supreme Court in *Guthrie* noted that the term "visitatorial" as used in section 484 derives from English common law, which used the term "visitation" to refer to the act of a superintending officer who visits a corporation to examine its manner of conducting business and enforce observance of the laws and regulations.<sup>30</sup> "Visitors of corporations

have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings."<sup>31</sup> The *Guthrie* Court also noted that visitatorial powers include bringing "judicial proceedings" against a corporation to enforce compliance with applicable law.<sup>32</sup>

#### b. Concurrent Enforcement Jurisdiction

Several commenters asserted that states retain jurisdiction concurrent with the OCC to enforce compliance with state laws against national banks in both state and Federal court.<sup>33</sup> The cases cited by commenters in support of this contention are examples of the use of courts for private civil cases in pursuit of personal claims against national banks, which, unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations.<sup>34</sup> Other cases cited by commenters appear inapposite or outdated.<sup>35</sup>

A few commenters cited *First National Bank in St. Louis v. Missouri*<sup>36</sup> to support their position that states may

arguments asserting concurrent jurisdiction between state and Federal courts over national banks, *infra*.

<sup>31</sup> *Id.* (citation omitted).

<sup>32</sup> *Id.* See also *Peoples Bank of Danville v. Williams*, 449 F. Supp. 254, 259 (W. D. Va. 1978) (visitatorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs). For a detailed discussion of the historical scope and content of visitatorial powers generally, see Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369 (1935–36).

<sup>33</sup> We note that the National Bank Act did confer jurisdiction on both state and Federal courts over actions against national banks. See Act of June 3, 1864, § 57. Nothing in the grant of jurisdiction says or implies that state authorities may use the judiciary as the medium to supervise, examine, or regulate the business of national banks, as commenters have asserted.

<sup>34</sup> *First Nat'l Bank of Charlotte v. Morgan*, 132 U.S. 141 (1889) (private action for usury against national banks may be brought in state court); *Bank of Bethel v. Pahquioque Bank*, 81 U.S. 383 (1872) (private creditors may sue national bank in state court).

<sup>35</sup> See, e.g., *Guthrie*, 199 U.S. 148 (private civil action by a stockholder to compel, by writ of mandamus, the directors of a national bank to permit a stockholder to inspect the bank's books; private civil action, no state executive visitation involved); *Colorado Nat'l Bank of Denver v. Bedford*, 310 U.S. 41 (1940) (action for declaratory judgment; consistent with the OCC's final regulation, which does not regard actions for declaratory judgment as visitatorial); *Waite v. Dowley*, 94 U.S. 527 (1877) (substantive preemption case that did not involve visitatorial powers); and *First Nat'l Bank of Youngstown*, 6 F. at 741 (no visitation involved where state taxation authorities used court to compel production of bank's records in aid of taxation of individual depositors; state actions did "not contemplate inspection, supervision, or regulation of [the bank's] business, or an enforcement of its laws or regulations.").

<sup>36</sup> 263 U.S. 640 (1924).

bring enforcement actions directly against national banks.<sup>37</sup> In *St. Louis*, the court upheld a state's ability to preclude, through an action *quo warranto*, a national bank's exercise of a power that was not then authorized to it, namely, intrastate branching.

*St. Louis* presents a unique set of circumstances, now outdated, and did not discuss the scope of section 484; thus the case provides little help in construing section 484. The principal issue in the case was whether a national bank had the power to branch intrastate despite a state law prohibition on branching. The Court looked for express authority to branch intrastate in the text of the National Bank Act and, finding none, concluded that the activity was not authorized. The Court then went on to permit Missouri to enforce its intrastate branching prohibition against the national bank. To the extent that *St. Louis* is still relevant, the case holds that a state may enforce a prohibition against a national bank where: (a) the national bank is found to lack the fundamental authority to engage in an activity;<sup>38</sup> (b) the state has a law prohibiting the activity entirely; and (c) no Federal enforcement mechanism is available to preclude the bank from violating the applicable state law.

The principal means in use today for testing the application of state law to national banks—declaratory judgment—was unavailable to the states prior to the enactment of the Declaratory Judgment Act in 1934, 28 U.S.C. 2201 through 2202. If this type of action had been available at the time of the *St. Louis* case, there would have been no need for the state to bring a *quo warranto* action. Subsequent cases concerning the power of national banks to branch have typically been brought as declaratory judgments.<sup>39</sup>

<sup>37</sup> In *St. Louis*, the state of Missouri brought a *quo warranto* action to stop a national bank from operating a branch in the state. The state had a law prohibiting branch banking. The Supreme Court held that the state statute was applicable to national banks and could be enforced by the state. *Quo warranto* is "[a] common law writ designed to test whether a person exercising power is legally entitled to do so. An extraordinary proceeding, prerogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted. \* \* \* It is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers." Black's Law Dictionary (6th ed. 1990) (citation omitted). Today, such an issue would be raised via an action for a declaratory judgment.

<sup>38</sup> The power to branch intrastate was subsequently authorized for national banks by the McFadden Act in 1927. Act of February 25, 1927, c. 191, § 7, 44 Stat. 1228, codified at 12 U.S.C. 36.

<sup>39</sup> See, e.g., *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965); *State of Utah, ex rel., Dep't of Financial Institutions v. Zions First*

<sup>28</sup> 188 U.S. 220, 229, 231–32 (1903) (emphasis added).

<sup>29</sup> 91 U.S. at 34 (citations omitted).

<sup>30</sup> *Guthrie*, 199 U.S. at 158, citing *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C.D. Ohio 1881), appeal dismissed, 106 U.S. 523 (1883)). Because "visitation" assumes the act of a sovereign body, private actions brought by individuals against banks in pursuit of personal claims ordinarily are outside the scope of visitatorial powers rules. This point is discussed further in the analysis of the

Moreover, the OCC has enforcement authority today that did not exist when *St. Louis* was decided. Congress authorized the OCC to bring enforcement actions predicated on, *inter alia*, violations of state law in 1966.<sup>40</sup> Thus, if state law that would regulate an aspect of a national bank's Federally-authorized banking business is not preempted, it would be enforced by the OCC, not the states.<sup>41</sup>

The essential elements of *St. Louis* thus are entirely consistent with our construction of the "courts of justice" exception as proposed. Moreover, our construction is consistent with the text and history of section 484, the purpose of that section in the context of the national banking laws, and with other U.S. Supreme Court and lower Federal court precedents. The exception preserves the powers that are inherent in the courts. As we noted in the preamble to the proposal, Congress clearly did not intend to create new visitorial authority that could be exercised by state authorities when it recognized the authority of courts of justice. It would be completely contrary to the express purposes of section 484 to read the "vested in the courts of justice" exception as a new Federal authorization for state authorities to accomplish exactly what Congress deliberately and expressly intended states *not* to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

This purpose is effectuated by the plain language of the statute. The exception permits the exercise of "visitorial powers" that are "vested in the courts of justice," powers, in other words, that *courts possess*. Section 484 does not create new powers for state executive, legislative, or administrative

*Nat'l Bank of Ogden, Utah*, 615 F.2d 903 (10th Cir. 1980).

<sup>40</sup> Pub. L. 89-695, section 202, 80 Stat. 1028 (Oct. 16, 1966). For a violation of an applicable state law, the OCC may issue cease and desist orders, exercise its removal and prohibition authority, or impose civil money penalties. See 12 U.S.C. 1818(b), (e), and (i)(2).

<sup>41</sup> See *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980). See also *State of Arizona v. Hispanic Air Conditioning and Heating, Inc.*, CV 2000-003625, Superior Court of Arizona, Ruling at 27-28, Conclusions of Law, paragraphs 46-55 (Aug. 25, 2003). In this action involving a national bank defendant, the court found that restitution and remedial action ordered by OCC pursuant to its visitorial powers was comprehensive and significantly broader than that available through state court proceedings and that it provided more relief to consumers than the court found a legal basis for imposing under state law. The court also noted that ordering the remedies requested by the state would impermissibly affect the exercise of the OCC's administrative enforcement powers.

authorities to supervise and regulate national banks. It grants no *new* authority and thus does not authorize states to bring suits or enforcement actions that they do not otherwise have the power to bring.

To read the *exception* as an authorization to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to *create* a visitorial power that states do not otherwise possess under Federal law. Section 484 by its express terms simply does not create such boundless visitorial powers for state authorities. Where section 484 *does* recognize visitorial authority for states in section 484(b), by contrast, it is specific and narrow, and expressly stated as an *exception* to the general exclusivity of the OCC's visitorial powers recognized in section 484(a).

Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the Federally-authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank's compliance with a law that would govern the content or the conditions for conduct of a national bank's Federally-authorized banking business is within the OCC's exclusive purview.<sup>42</sup> In addition, it does not preclude actions brought by other governmental entities pursuant to a Federal grant of authority.<sup>43</sup>

#### 4. The OCC Has Exclusive Visitorial Authority Over National Bank Operating Subsidiaries to the Same Extent as It Has That Authority Over the Parent National Bank

Commenters also asserted that the OCC lacks the authority to prevent states from exercising visitorial authority over national bank operating subsidiaries because they are state-chartered corporations and because section 484 does not specifically refer to operating subsidiaries. Some suggested that a curtailing of state authority over state corporations violates the 10th

<sup>42</sup> See *Nat'l State Bank, Elizabeth, N.J.*, 630 F.2d at 988 ("[W]e find ourselves unable to agree with the district court's determination that state officials have the power to issue cease and desist orders against national banks for violations of the [state's] antiredeeming statute. Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency."); see also *First Union Nat'l Bank*, 48 F. Supp. 2d at 145-46.

<sup>43</sup> See, e.g., *Bank of America Nat'l Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939) (service of subpoenas on a national bank by the SEC in connection with an investigation under the Securities Exchange Act of 1934).

Amendment to the Constitution.<sup>44</sup> These points are discussed in order, however, it is important to note that the issue of the application of state law to national bank operating subsidiaries is dealt with in a different, preexisting regulation, 12 CFR 7.4006, which we did not propose to change. For the reasons discussed below, we continue to hold the view that under 12 U.S.C. 24(Seventh) and 12 CFR 7.4006, the standards of section 484 apply to national bank operating subsidiaries to the same extent as their parent national bank, and such a result is entirely consistent with Constitutional principles.

#### a. The OCC's Exclusive Visitorial Authority Over Operating Subsidiaries

Pursuant to their authority under 12 U.S.C. 24(Seventh), national banks have long used separately incorporated entities as a means to engage in activities that the bank itself is authorized to conduct. When established in accordance with OCC regulations and approved by the OCC, an operating subsidiary is a Federally-authorized and Federally-licensed means by which a national bank may conduct Federally-authorized activities. Courts have consistently treated operating subsidiaries as equivalent to national banks in determining their powers and status under Federal law, unless Federal law requires otherwise.<sup>45</sup> Operating subsidiaries are consolidated with—that is, their assets and liabilities are indistinguishable from—the parent bank for accounting purposes, regulatory reporting purposes, and for purposes of applying many Federal statutory or regulatory limits.<sup>46</sup> They are, in essence, no more than incorporated departments of the bank itself.<sup>47</sup>

<sup>44</sup> The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

<sup>45</sup> *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (sale of annuities by operating subsidiary); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) (securities brokerage operating subsidiary); *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (bond insurance subsidiary); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977) (auto leasing subsidiary); and *Valley Nat'l Bank v. Lavecchia*, 59 F. Supp. 2d 432 (D. N.J. 1999) (title insurance subsidiary); *Budnik v. Bank of America Mortgage*, 2003 U.S. Dist. LEXIS 22542 (N.D. IL 2003) (mortgage subsidiary).

<sup>46</sup> See 12 CFR 5.34(e)(4) (requiring application of, e.g., statutory lending limit and limit on investment in bank premises to a national bank and its operating subsidiaries on a consolidated basis).

<sup>47</sup> The authority of national banks to conduct business through operating subsidiaries has been recognized for many years. For example, rulings

As a matter of Federal law, operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent bank, including being subject to the exclusive visitorial authority of the OCC.<sup>48</sup> Where Congress wanted a different result, it specifically provided for it. For example, section 111 of GLBA makes provision for state regulation of functionally regulated bank subsidiaries conducting securities and insurance activities, treating such subsidiaries as if they were instead subsidiaries of the institution's holding company.<sup>49</sup> Similarly, section 133 of GLBA seeks to clarify the status of bank and thrift subsidiaries and affiliates for purposes of any provisions of the Federal Trade Commission Act applied by the Federal Trade Commission.<sup>50</sup>

Our regulations make clear that activities conducted in operating subsidiaries must be permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking.<sup>51</sup> Moreover, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."<sup>52</sup> This includes state laws that purport to govern the activities conducted in the operating subsidiary. OCC regulations specifically provide that "[u]nless 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."<sup>53</sup> Our regulations reflect express Congressional recognition in section 121 of the GLBA that national banks may own subsidiaries that engage "solely in activities that national banks are

permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."<sup>54</sup> The "terms and conditions" that govern the conduct of operating subsidiary activities referenced in this provision include how, and by whom, the operating subsidiary is examined and supervised. Thus, operating subsidiaries are licensed, examined and supervised by the same Federal banking agency—the OCC—that examines and supervises national banks, using the same methodology as in the case of national banks.

Courts that have recently considered the issue have confirmed this conclusion. In *Wells Fargo Bank, N.A. v. Boutris*,<sup>55</sup> a Federal district court issued a permanent injunction enjoining the California Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. The court noted the existing case law and concluded that the OCC's operating subsidiary regulation is within the agency's authority delegated to it by Congress and is a reasonable interpretation.<sup>56</sup>

Section 7.4006 of our rules already provides that State law applies to national bank operating subsidiaries to the same extent as it applies to the parent bank.<sup>57</sup> Thus, state laws purportedly forming the basis for the exercise of state regulatory or supervisory authority over national bank operating subsidiaries, which are inapplicable to the parent national bank, are similarly inapplicable to the bank's operating subsidiary. This conclusion is reinforced by the holdings of the court in the *Wells Fargo* and *National City* cases, just described.

#### b. The Tenth Amendment

Recent case law also confirms that the final rule does not conflict with the 10th Amendment. In the *Wells Fargo* case,

*supra*, the California commissioner argued that the OCC was interfering with the state's sovereignty under the 10th Amendment by taking away its power to regulate and enforce laws against state-chartered corporations. The court held that once the OCC authorized the operating subsidiary of the national bank, it ceased being subject to the visitorial power of the state commissioner and that this change was not shown to infringe on California's rights under the 10th Amendment. The court noted that "the Constitution authorizes Congress to establish national banks" and that "[t]he *National Bank Act's* effect of 'carving out from state control supervisory authority' over an OCC-authorized operating subsidiary of a national bank does not violate California's Tenth Amendment rights."<sup>58</sup>

A few commenters cite *Hopkins Federal Savings & Loan Association v. Cleary*,<sup>59</sup> as support for the assertion that the 10th Amendment prohibits the Federal government from interfering with a state's jurisdiction over corporations created under that state's laws. In that case, the court held that a Federal statute (HOLA), which permitted the conversion of state savings associations into Federal savings associations notwithstanding state law to the contrary, was unconstitutional because it conflicted with the 10th Amendment.

The essence of the *Hopkins* case was that Congress had attempted to confer rights on a state-chartered entity that were greater than those conferred by the state, namely a more liberal voting requirement for a conversion. As stated by the *Hopkins* Court, "[t]he critical question [was] whether along with such a power [of the U.S. Congress to create Federal building and loan associations] there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation."<sup>60</sup> The Court's characterization of the issue highlights the distinction between the state-chartered building and loan associations in the *Hopkins* case and national bank operating subsidiaries. The Court found the law—unconstitutionally—attempted to displace a preexisting state interest by permitting the abandonment of a state bank charter notwithstanding contrary state law. After discussing why the state should retain the right to determine

published in the Comptroller's Manual in the mid-1960s permitted national banks to own, e.g., mortgage companies and finance companies. A July 30, 1965 letter by Comptroller James J. Saxon concluded that the prohibition on stock ownership by national banks in 12 U.S.C. § 24 (Seventh) does not apply "when such ownership is a proper incident to banking," as is the case with operating subsidiaries. See also 12 CFR 250.14, an interpretation by the Board of Governors of the Federal Reserve System adopted in 1968, which reaches the same conclusion regarding state member banks.

<sup>48</sup> 12 CFR 5.34(e)(3); 12 CFR 7.4006.

<sup>49</sup> 12 U.S.C. 1844(c)(4).

<sup>50</sup> 15 U.S.C. 41 note. See *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001). In addition, in the case of national bank "financial subsidiaries," which engage in activities beyond those permissible for the bank itself, Congress provided special standards regarding the application of state laws. Pub. L. 106-102, section 104, 113 Stat. 1338, 1352 (1999), codified at 15 U.S.C. 6701.

<sup>51</sup> See 12 CFR 5.34(e)(1).

<sup>52</sup> 12 CFR 5.34(e)(3).

<sup>53</sup> 12 CFR 7.4006.

<sup>54</sup> Pub. L. 106-102, section 121, 113 Stat. 1338, 1373 (1999), codified at 12 U.S.C. 24a(g)(3)(A).

<sup>55</sup> 265 F. Supp. 2d 1162 (E.D. Cal. 2003).

<sup>56</sup> See also *National City Bank of Indiana v. Boutris*, 2003 WL 215367818 (E.D. Cal. July 2, 2003) (also enjoining California officials from exercising visitorial powers over a national bank operating subsidiary); *Budnik supra* note 45, at 5-7 citing the *Wells Fargo* case with approval.

Moreover, the Office of Thrift Supervision (OTS) takes the same approach with respect to operating subsidiaries of Federal thrifts that we take for national banks. 12 CFR 559.3(n) of the OTS regulations provides that state law applies to Federal savings associations' operating subsidiaries to the extent that the law applies to the parent thrift. This OTS regulation has been upheld by both Federal and state courts. See *WFS Financial Inc. v. Dean*, 79 F. Supp. 2d 1024 (W.D. Wis. 1999); see also *Chaires v. Chevy Chase Bank, F.S.B.*, 748 A.2d 34, 44 (Md. App. 2000).

<sup>57</sup> 12 CFR 7.4006.

<sup>58</sup> *Wells Fargo*, 265 F. Supp. 2d at 1170, (citing *McCulloch*, 17 U.S. at 424-25 and *First Union Nat'l Bank*, 48 F. Supp. 2d at 148 (emphasis added). See also *Nat'l City Bank of Indiana*, 2003 WL 21536818 at 3 and 4.

<sup>59</sup> 296 U.S. 315 (1935).

<sup>60</sup> *Id.* at 336.

when and how a state thrift is dissolved, the court noted that it would be “an intrusion for another government to regulate by statute or decision, *except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.*”<sup>61</sup>

*Hopkins* is thus factually inapposite for two reasons. First, nothing in this final rule addresses changes in charter type or *corporate* status by state-chartered entities. Second, as we have explained, once it is established or acquired, a national bank operating subsidiary is a means by which the national bank exercises Federally authorized powers. The operating subsidiary conducts its activities pursuant to a license granted under OCC regulations, which also constitutes a Federal “license” under the Administrative Procedure Act.<sup>62</sup> In contrast to the state-chartered thrift institutions in *Hopkins*, its operation and activities are thus properly within the purview of Federal regulation.<sup>63</sup>

Later, the Court stated “[w]e are not concerned at this time with the applicable rule in situations where the central government is at liberty (*as it is under the commerce clause when such a purpose is disclosed*) to exercise a power that is exclusive as well as paramount \* \* \* *No question is here as to the scope \* \* \* of the power to regulate transactions affecting interstate or foreign commerce.*”<sup>64</sup> Thus, *Hopkins* explicitly does not address the limits of state and Federal government authority, respectively, when a state corporation is engaged in activities that are carried out under Federal law subject to Federal authority.

Case law since *Hopkins* has clarified the interplay between the 10th Amendment and the Commerce Clause. As noted by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court in the first half of the 19th century viewed the

Commerce Clause as a limit on state legislation that discriminated against interstate commerce. Now, however, the Commerce Clause is viewed more as a grant of authority to Congress. *Id.* at 556. That power has its limits; it “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” *Id.* at 557, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). But if an activity fits within one of the categories of activity that Congress may regulate under its commerce power,<sup>65</sup> or other Constitutional authority, the regulation will be upheld.

This year the U.S. Supreme Court affirmed *per curiam* that the Commerce Clause permits Congress to regulate activity affecting intrastate lending. In *Citizens Bank v. Alafabco Inc.*, 123 S. Ct. 2037 (2003), the Court found that a debt restructuring agreement, involving a national bank located in Alabama and an Alabama corporation, had a sufficient nexus with interstate commerce to make an arbitration provision in that agreement enforceable under the Federal Arbitration Act, 9 U.S.C. 2. The Court stated, “Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice \* \* \* subject to federal control.’” *Citizens Bank*, 123 S. Ct. at 2040 (emphasis in original) (citations omitted). After articulating the reasons why the debt restructuring agreements involved commerce within the meaning of the Commerce Clause, the Court stated “[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress’ power to regulate that activity pursuant to the Commerce Clause.”<sup>66</sup>

<sup>65</sup> Those categories were articulated in *Lopez* as follows: “First Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *Id.* at 558–59 (citations omitted)

<sup>66</sup> *Citizens Bank*, 123 St. 2041. *See also Lewis v. BT Investments Managers, Inc.* 447 U.S. 27, 38–39(1980), (“[B]anking and related financial activities are of profound local concern \* \* \* Nonetheless, it does not follow that these same

Clearly, national bank operating subsidiaries, licensed by the OCC, engaging in activities permissible for their parent national banks and subject to the same terms and conditions are on the same footing for purposes of the 10th Amendment. Given that they, like their parent banks, engage in activities that have a substantial effect on interstate commerce, regulation of the subsidiaries’ activities would be within Congress’ authority under the 10th Amendment.

#### E. Description of the Final Rule

Based upon the foregoing discussion and analysis, the OCC has adopted the final rule with certain modifications that do not alter the fundamentals of the rule as proposed. We have amended the language in § 7.4000(a)(3) slightly to simplify it. In addition, we have amended the regulation text in the final rule in § 7.4000(b)(2). This provision no longer makes reference to the specific powers of the courts of justice “to issue orders or writs compelling the production of information or witnesses” since this is implicit. In addition, we have simplified the language which states that the exception for courts of justice does not authorize states or other governmental entities to exercise visitatorial powers over national banks.

#### F. Regulatory Analysis

##### *Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the regulations simply identify the scope of activities for which the agency’s visitatorial powers are exclusive and clarify how an exception to such powers applies. These amendments do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

activities lack important interstate attributes”); *Perez v. United States*, 402 U.S. 146, 154 (1971) “Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce”).

<sup>61</sup> *Id.* at 337 (emphasis added).

<sup>62</sup> Under the Administrative Procedure Act, Federal agencies may grant licenses after following certain procedures. 5 U.S.C. 558(c). National banks must comply with licensing requirements contained in 12 CFR 5.34(b) in order to establish or acquire an operating subsidiary. These requirements are consistent with the Administrative Procedure Act.

<sup>63</sup> Where a state entity is not within the purview of Federal regulations, the OCC’s rules require consideration of state law before any approval or changes in corporate form. For example, where a state-chartered nonbank affiliate of a national bank wishes to merge with a national bank (with the resulting entity being a national bank), the law of the state in which the nonbank affiliate is organized must permit the state entity to engage in the merger. *See* 12 CFR 5.33(g)(4)(i) as set forth in a final rule published on December 17, 2003, 68 FR 70122.

<sup>64</sup> *Hopkins*, 296 U.S. at 338, 343 (emphasis added) (citations omitted).



*Executive Order 12866*

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

*Executive Order 13132*

Executive Order 13132, entitled "Federalism," (Order) requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has Federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In the proposal, we noted that the regulation may have Federalism implications. It is not clear that the Order applies in situations where an

agency is implementing a statute that has preemptive effect. Nevertheless, in formulating the proposal and the final rule, the OCC has adhered to the fundamental Federalism principles and the Federalism policymaking criteria.

Moreover, the OCC has satisfied the requirements set forth in the Order for regulations that have Federalism implications and preempt state law. The steps taken to comply with these requirements are set forth below.

*Consultation.* The Order requires that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Federalism implications and that preempts state law unless, prior to the formal promulgation of the regulation, the agency consults with state and local officials early in the process of developing the proposed regulation. We have consulted with state and local officials on the issues addressed herein through the rulemaking process. Following the publication of the proposed rule, representatives from the Conference of State Bank Supervisors (CSBS) met with the OCC to clarify their understanding of the proposal and, subsequently, the CSBS submitted a detailed comment letter regarding the proposal. Thirty-two additional comments were also submitted on the proposal by other state and local officials and state banking regulators. Pursuant to the Order, we will make these comments available to the Director of the OMB. Subsequent public statements by representatives of the CSBS have restated their concerns, and CSBS representatives have further discussed these concerns with the OCC on several additional occasions.

The Order requires a Federalism summary impact statement which addresses the following in addition to the consultation discussed above:

*Nature of concerns expressed.* The Order requires a summary of the nature of the concerns of the state and local officials and the agency's position supporting the need to issue the regulation. The nature of the state and local official commenters' concerns and the OCC's position supporting the need to issue the regulation are set forth in the preamble, but may be summarized as follows. Broadly speaking, the states disagree with our interpretation of the applicable law, they are concerned about the impact the proposal will have on the dual banking system, and they are concerned about the ability of the OCC to protect consumers adequately.

*Extent to which the concerns have been addressed.* The Order requires a statement of the extent to which the concerns of state and local officials have

been met. The concerns are addressed in order.

a. There is fundamental disagreement between state and local officials and the OCC regarding the meaning of section 484 as well as the Congressional intent behind the statute. The nature of the disagreement is discussed at length in the materials that precede this Federalism impact statement. For the reasons set forth in those materials, we believe that the language of section 484, its legislative history, and the application of that section by courts lead to the conclusion that the OCC has exclusive visitorial authority to enforce applicable state laws. The concerns of the state and local officials could only be fully met if the OCC were to take a position that is contrary to the express provisions of the statute and judicial precedent. Nevertheless, to respond to some of the issues raised, the language in the final regulation has been refined, and this preamble further explains that the OCC's visitorial powers are exclusive with respect to the Federally-authorized banking business of national banks.

b. Similarly, we fundamentally disagree with the state and local officials about whether this proposal will undermine the dual banking system. As set forth in the preamble, differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. The dual banking system is universally understood to refer to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by Federal authority, the OCC. Thus, we believe that the final rule preserves, rather than undermines, the dual banking system.

c. Finally, we stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling of consumer complaints and the pursuit of remedies, and we remain eager to do so.

We believe the OCC has the resources to enforce applicable laws, as is evidenced by the enforcement actions that have generated hundreds of millions of dollars for consumers in restitution, that have required national banks to disassociate themselves from payday lenders, and that have ordered national banks to stop abusive practices. These actions are listed on the OCC's Web site at <http://www.occ.treas.gov/>

*enforce/enf\_search.htm*. Indeed, as recently observed by the Superior Court of Arizona, Maricopa County, in an action brought by Arizona against a national bank, among others, the restitution and remedial action ordered by the OCC in that matter against the bank was “comprehensive and significantly broader in scope than that available through [the] state court proceedings.” *State of Arizona v. Hispanic Air Conditioning and Heating, Inc.*, CV 2000–003625, Ruling at 27, Conclusions of Law, paragraph 50 (Aug. 25, 2003). Thus, the OCC has ample legal authority and resources to ensure that consumers are adequately protected.

#### List of Subjects in 12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

#### Authority and Issuance

■ For the reasons set forth in the preamble, the OCC amends part 7 of chapter I of title 12 of the Code of Federal Regulations as follows:

#### PART 7—BANK ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 71, 71a, 92, 92a, 93, 93a, 481, 484, 1818.

#### Subpart D—Preemption

■ 2. In § 7.4000:

- a. Add a new paragraph (a)(3); and
- b. Revise paragraph (b) to read as follows:

#### § 7.4000 Visitorial powers.

(a) \* \* \*

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC’s exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by

shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank’s records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers 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.

\* \* \* \* \*

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

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