"An Historical Perspective on Current Issues Facing the National Banking System"

Remarks by
Julie L. Williams
1st Senior Deputy Comptroller and Chief Counsel
Office of the Comptroller of the Currency
to the
OCC Alumni Association
May 14, 2003
Washington, D.C.

It is remarkable how many of the significant issues facing the OCC and national banks today have their roots -- and their answers -- in fundamental characteristics of the national bank charter and the original design of the national banking system. So, I thought, what could be a better topic for remarks to a group of OCC alumni? I'm going to talk about three of those issues today:

What activities may national banks conduct as part of, or incidental to, the "business of banking"? To what extent do national banks operate under uniform national standards and when do State laws apply to their activities? And, if a State law applies to a national bank, who enforces it?

Earlier this year, I prepared a paper on "The OCC, the National Bank Charter and Current Issues Facing the National Banking System,"[1] which described the origins of banking in the United States and the circumstances leading up to the creation of the national banking system and establishment of the Office of the Comptroller of the Currency in 1863. I believe that Bob Serino has provided many of you with a copy of that paper as your "homework" assignment in preparation for today's lunch, and it goes into considerably more detail than I will confront you with as a luncheon speaker. As the paper recounts, the Civil War did, in fact, provide the catalyst for establishing a new system of national banks that were capitalized in a manner that aided the Federal government in financing the Civil War. That financing role occurred because new national banks, upon being chartered by the Comptroller, were required to use a portion of their paid-in capital to purchase U.S. Treasury securities. The money received by the Treasury, in turn, was used to fund the Union efforts in the War.

But the design of the national banking system evidences creation of more than just a financing arm for the government's war effort. In an extraordinary step for the time, President Lincoln sought an entirely new system of federally-chartered, but privately-owned enterprises, whose powers and responsibilities were established under federal law, whose duration could be perpetual, and which were made subject to uniform federal supervision by a new federal

[1] "The OCC, the National Bank Charter & Current Issues Facing the National Banking System," presented to the Financial Services Regulatory Conference, March 17, 2003, Washington, D.C.

regulator. The Treasury securities that new national banks were required to buy were pledged as backing for a new species of circulating notes issued by the banks with the Comptroller's approval. With capital in the form of government securities, these circulating notes were designed to be a new national currency that would hold a stable value and could be used, reliably, across the Nation.

Thus, from the very outset, national banks were unique federal enterprises. It was envisioned that they would be located throughout the country, and that wherever located, they would exercise a uniform set of federal powers, under federal standards of operation, and federally-mandated capitalization, with a federal supervisor overseeing all of the foregoing. Regardless of their short-term role in Civil War finance, this was a system of financial institutions designed to far outlast the aftermath of the War, with attributes that would enable them to play a powerful and evolving role in the national economy.

A vital attribute of national banks' ability to play this role was how their powers were – and, perhaps as importantly, were not – defined.

The Powers of National Banks -- What is the "Business of Banking?"

The centerpiece for powers of national banks is language set forth at 12 U.S.C. § 24 (Seventh), which provides that national banks are authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes…."

It is stunning, but it was deliberate, that this central source of national bank powers is contained in just these fifty-three words. Congress modeled this authority on the bank charter authorized by the New York Free Banking Act; a type of charter that the New York courts explicitly had found to possess flexible and adaptive powers. Shortly before enactment of the National Bank Act, in a case called Curtis v. Leavitt, the New York Court of Appeals described the dynamic nature of the New York bank charter, stating that "[t]he implied powers [of a bank] exist by virtue of the grant [to do the banking business] and are not enumerated and defined; because no human sagacity can foresee what implied powers may in the progress of time, the discovery and perfection of better methods of business, and the ever-varying attitude of human relations, be required to give effect to the express powers."[2]

According to the court, the specifications of certain permissible banking activities in the New York banking laws, (and subsequently copied into the National Bank Act), were "eminently useful," but "not indispensable." Put more directly, banks' permissible activities were not limited to just the activities listed in the statute. Based on this lineage, in determining what activities are permissible for national banks, the OCC typically looks to both the literal language and the objectives of the Act, approaching the statute, as one commentator picturesquely put it, as "an architect's drawing and not a set of specifications."[3] The result is that, in effect, the

[2] Curtis v. Leavitt, 15 N.Y. 9 (1857).
[3] Harfield, "The National Bank Act and Foreign Trade Practices," 61 Harv. L. Rev. 782 (1948).

content of the powers of national banks has been continually under construction under the careful administration of the OCC for 140 years. In this role, the OCC consistently has viewed the powers of the national bank charter as fundamentally evolutionary, capable of developing and adjusting as needed to support the changing financial and economic needs of the Nation and bank customers of all types.

Any doubt concerning the validity of this approach was settled with the Supreme Court's decision in NationsBank v. Variable Annuity Life Insurance Co. (VALIC) in which the Court expressly held that the "business of banking" is not limited to the enumerated powers in § 24(Seventh) and that the Comptroller has discretion, within reason, to authorize activities beyond those specifically enumerated in the statute.[4] In the same decision, the Court also reiterated a previous admonition that the Comptroller's determinations regarding the scope of permissible national bank activities pursuant to this authority should be accorded great deference, stating emphatically that "it is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws."[5]

The OCC makes its decisions concerning the content and boundaries of permissible national bank activities carefully and systematically, using a framework of analyses that looks both to the vitality of the national bank charter in the environment in which it is then operating, and the safety and soundness considerations associated with the proposed new activity. For example, in determining whether an activity is part of the business of banking, the OCC considers whether the activity is a contemporary functional equivalent or logical outgrowth of a recognized permissible banking function, whether the activity benefits customers and/or strengthens the bank, and whether the risks of the activity are similar to the type of risks already assumed by banks. In evaluating whether an activity is "incidental" to banking, the OCC will look to whether the activity facilitates the operation of the bank as a business enterprise, whether it enhances the efficiency and quality of the content or delivery of banking services or products, and whether it optimizes the use and value of a bank's facilities and competencies, or enables the bank to avoid economic waste in its banking franchise.

A glance at recent installments of OCC's *Interpretations and Actions* publication reflects how these progressive standards have enabled national banks of all sizes to engage in new activities that contribute importantly to their ability to remain competitive and serve changing needs of their customers – new technology-based products and services, new types of advisory and consulting services, and new risk mitigation and risk management techniques for themselves and their customers, are just a few examples. Indeed, one reason for national banks' strength and strong earnings in current, less -than-ideal economic conditions is the diversification of their earnings that has resulted from decisions by the OCC to recognize new types of activities and new risk management techniques as part of the dynamic and evolving nature of the business of banking.

---

[4] NationsBank of North Carolina v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995).

[5] Clarke v. Securities Industry Assn., 479 U.S. 388, 403-404 (1987) (quoting Investment Company Institute v. Camp, 401 U.S. 617, 626-627.

Preemption

Preemption, in the context of national banks, is an often misunderstood and mischaracterized question. Fundamentally, national bank preemption issues raise the same question: To what extent are national banks, as federally-created and federally supervised enterprises able to operate under *federal standards*? Individual skirmishes concerning displacement of particular State laws miss the key point: Preemption is a means by which national banks are enabled to operate under the uniform national standards that Congress intended from the very outset of the national banking system. Resistance to preemption is essentially resistance to the uniform standards inherent in a national system.

While the subject of preemption may not be popular in some quarters, principles of preemption flow directly from the Supremacy Clause of the United States Constitution,[6] which provides that Federal law prevails over any conflicting state law, and has long been recognized with respect to authority granted national banks under the National Bank Act. An extensive body of judicial precedent has developed over the 140 years of existence of the national banking system, explaining and defining the standards of Federal preemption of state laws as applied to national banks.[7] Together, the uniformity of powers and operating standards that result from Federal preemption, coupled with the OCC's exclusive visitorial authority, which I will discuss in a moment, are defining characteristics of the national bank charter. Together, they constitute essential distinctions between the national banking system and the system of state-chartered and state-regulated banks that comprise the other half of our "dual banking system."

---

[6] U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[7] See, e.g., Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 26, 32, 33 (1996) ("grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." States may not "prevent or significantly interfere with the national bank's exercise of its powers."); Franklin National Bank, 347 U.S. at 378-379 (1954) (federal law preempts state law when there is a conflict between the two; "The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful [the state's] policy, . . . it must give way to contrary federal policy."); Anderson National Bank v. Luckett, 321 U.S. 233, 248, 252 (1944) (state law may not "infringe the national banking laws or impose an undue burden on the performance of the banks' functions" or "unlawful[ly] encroac[h] on the rights and privileges of national banks"); First National Bank v. Missouri, 263 U.S. 640, 656 (1924) (Federal law preempts state laws that "interfere with the purposes of [national banks'] creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); First National Bank of San Jose v. California, 262 U.S. 366, 368-369 (1923) ("[National banks] are instrumentalities of the federal government. * * * [A]ny attempt by a state to define their duties or control the conduct of their affairs is void, whenever it conflicts with the laws of the United Sates or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created."); McClellan v. Chipman, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national bank functions); First National Bank of Louisville v. Commonwealth of Kentucky, 76 U.S. (9 Wall.) 353, 362-63 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government"); Association of Banks in Insurance, Inc. v. Duryee, 270 F.3d 397, 403-404 (6th Cir. 2001) ("The Supremacy Clause 'invalidates state laws that "interfere with, or are contrary to," federal law.' * * * A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal.") (citations omitted).

Ironically, many opponents of preemption are also fervent defenders of the "dual banking system." I have to confess to being perplexed when I hear State authorities on the one hand embracing as sacrosanct the "dual banking system," while at the same time criticizing national banks for taking advantage of the very characteristics of the national bank charter that distinguish national and state banks and make the system "dual." Similarly, the dual banking system is sometimes praised because of the *variety* of activities that may be allowed in different states, and for that reason the state banking component of the dual banking system is touted by its supporters as providing laboratories for innovation. It should be noted, however, that the attribute of the state system that is being extolled is the potential state-by-state *diversity* of standards applicable to state banks. That's fine. But it makes no sense then to criticize the other half of the dual banking system – national banks – for seeking uniform, *national* standards of operation, consistent with the *national* character of their charter.

Preemption is simply the legal theory that enables national banks to operate nationwide, under the uniform national standards, subject to the oversight of a federal regulator, just as Congress originally intended. As the Supreme Court noted in 1939, in Deitrick, Receiver v. Greaney,[8] "[t]he National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks.'" In a much earlier case, decided in 1896, the Supreme Court stated that "[n]ational 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. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created."[9]

This independence from State direction and control both recognizes the essential federal character of national banks and protects them from conflicting local laws that may undermine the uniform, nationwide character of the national banking system. Indeed, the Supreme Court consistently has held that subjecting national banks' exercise of their federally authorized powers to State regulation or supervision would be inconsistent with the system that Congress designed.[10] The Court also has recognized that because national banks are Federal creations, State law aimed at regulating national banks and their activities applies to national banks only when Congress directs that result,[11] and, as

---

[8] 309 U.S. 190, 194 (1939).

[9] Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896).

[10] See, e.g., Marquette Nat. Bank of Minneapolis, 439 U.S. at 314-315 ("Congress intended to facilitate a 'national banking system.'"); First National Bank of San Jose, 262 U.S. 366, 369 (1923) (national banks are instrumentalities of the Federal government; "any attempt by a State to define their duties or control the conduct of their affairs is void, whenever it conflicts with the laws of the United States or frustrates the purpose of national legislation or impairs the efficiency of the bank to discharge the duties for which it was created.").

[11] Of course, Congress may specifically require the application of state law to national banks for certain purposes. See, e.g., 12 U.S.C. 92a(a) (the extent of a national bank's fiduciary powers is determined by reference to the law of the state where the national bank is located). Congress may also, more generally, establish standards that govern when state law will apply to national banks' activities. See, e.g., 15 U.S.C. 6701 (codification of section 104 of the Gramm-Leach-Bliley Act, which establishes standards for determining the applicability of state law to

the Court said in 1875, "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."[12]

The Court's decisions also have agreed that Congress was concerned not just with the application of certain States' laws to individual national banks but also with the application of multiple states' standards, which would undermine the uniform, national character of the powers of national banks throughout the system. This point was highlighted by the Supreme Court in 1891, in Talbott v. Silver Bow Country Commissioners where the Court stressed that the "entire body of the Statute respecting national banks emphasize that which the character of the system implies – an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits.…"[13] A similar point was made by the Court 100 years ago, in 1903, in Easton v. Iowa, which stressed that the national banking system was "a system extending throughout the country, and independent, so far as the 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.[14]

This Federal character has consistently informed the decisions of the Supreme Court when the Court has considered whether particular State laws apply to national banks. In a recent instance in which the Supreme Court had occasion to review the Federal constitutional foundations of the national banking system, the Court concluded that, because of the Federal status and purpose of national banks, national bank powers are not normally limited by State law.[15]

Visitorial Powers

Closely related to preemption, the OCC's authority to regulate, supervise and examine national banks is extensive, and in many respects, exclusive. This authority, referred to in old English common law terminology as "visitorial powers," has recently given rise to issues with State authorities on several fronts, including whether the scope of OCC's exclusive visitorial powers applies to national bank operating subsidiaries. Under OCC regulations, national bank operating subsidiaries conduct their activities pursuant to the same authorization, terms and conditions that apply to the conduct of those activities by their parent national bank, and are subject to State law only to the extent of their parent bank. Recent State efforts to examine and regulate mortgage lending "op subs" of national banks has led to litigation on this point that is currently ongoing in California. I am happy to report that, just last week, the Federal district court in California upheld our regulations on this point and agreed with our position that the

---

different types of activities conducted by national banks, other insured depository institutions, and their affiliates). In such cases, the OCC applies the law or the standards that Congress has required or established.

[12] Farmers' & Mechanics' National Bank v. Dearing, 91 U.S. 29, 33-34 (1875).

[13] Talbott v. Silver Bow County Commissioners, 139 U.S. 438, 443 (1891).

[14] Easton v. Iowa, 188 U.S. 220, 229, 231-232 (1903)(emphasis added).

[15] Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (the history of the legal concept of national bank powers "is one of interpreting 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.").

OCC has exclusive visitorial authority over national bank operating subsidiaries to the same extent as it has that authority over their parent national bank.

As has recently been the case in California, some state authorities have balked at recognizing the scope of the OCC's exclusive visitorial powers. Suggestions have been offered that the OCC's visitorial powers contain an unwritten distinction between safety and soundness and consumer protection laws and that the OCC's exclusive visitorial authority should be read as limited to safety and soundness issues. Even more remarkably, others have suggested that the ability of *States* to regulate *national banks* is a fundamental tenet of the dual banking system.

These suggestions lack support, and the latter assertion, in particular, has things utterly backward. Differences in national and state bank powers and in supervision and regulation of national and state banks are not inconsistent with the dual banking system, they are the defining characteristics of it. To the extent that state authorities resist or try to blur those distinctions, their actions, not the actions of the OCC, dilute the character of the dual banking system. Familiarity with a little bit of history helps a lot to understand this point in the context of the issue of visitorial powers.

At the beginning of the national banking system, both proponents and opponents of the new system expected that it would supersede the existing system of State banks.[16] Given this anticipated impact on State banks and the resulting diminution of control by the States over banking in general,[17] proponents of the national banking system were concerned that States

---

[16] 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 [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 (March 23, 1864). While he did not believe that the legislation was necessarily harmful to the state bank system, he 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 (March 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' 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 (March 24, 1864). See also John Wilson Million, The Debate on the National Bank Act of 1863, 2 Journal of Political Economy 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.").

[17] See, e.g., Tiffany v. National Bank of the State of Missouri, 85 U.S. 409, 412-413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the 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."). See also B. Hammond, Banks and Politics in America from the Revolution to the Civil War, 725-34 (1957); P. Studenski & H. Krooss, Financial History of the United States, 155 (1st ed. 1952).

would attempt to undermine it. Remarks of Senator Sumner in 1864, the first year of the national banking system, addressing the prospect of state taxation of national banks, illustrate the sentiment of many legislators of the time. He said, "[c]learly, 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." [18]

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. Congress, accordingly, established a Federal supervisory regime and vested responsibility to carry it out in the newly created OCC. Congress granted the OCC the broad authority "to make a thorough examination of all the affairs of [a national] bank,"[19] and solidified this Federal supervisory authority by vesting the OCC with exclusive "visitorial" powers over national banks. These provisions assured, among 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 national banks is vested only in the OCC, unless otherwise provided by federal law.[20]

Courts have consistently recognized the distinct status of the national banking system and the limits placed on state involvement in national bank supervision and regulation by the National Bank Act. For example, in Guthrie v. Harkness,[21] the Supreme Court stated that "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 of justice, this act was to be the full measure of visitorial power".[22]

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. As the Court stated in Easton v. Iowa,[23] the National Bank Act "has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as

---

[18] Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864). See also Anderson v. H&R Block, __ F.3d __, 2002 U.S. App. LEXIS 5978, at 15-16 (No 01-11863, April 3, 2002) ("congressional debates amply demonstrate Congress's desire to protect national banks from state legislation . . . .").

[19] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

[20] 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 . . . ." Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (April 23, 1866).

[21] 199 U.S. 148 (1905).

[22] Id. at 159.

[23] 188 U.S. 220 (1903).

numerous as the States. * * * If [the States] 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.[24]

The Court in Farmers' and Mechanics' Bank, similarly found that "States can exercise no control over [national banks] 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."[25]

Consistent with the need for a uniform system of laws and uniform supervision that would foster the nationwide banking system, courts have interpreted the OCC's visitorial powers expansively. The Supreme Court in Guthrie noted that the term "visitorial" 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 (citing First National Bank of Youngstown v. Hughes[26]).[27] "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." The Guthrie Court also specifically noted that visitorial powers include bringing "judicial proceedings" against a corporation to enforce compliance with applicable law.[28] Thus, section 484 establishes the OCC as the exclusive regulator of the business of national banks, except where otherwise provided by Federal law.

Congress affirmed the OCC's exclusive visitorial powers recently with respect to national banks operating on an interstate basis in the Riegle-Neal Interstate Banking Act of 1994 (Riegle-Neal).[29] Although Riegle-Neal clarifies that interstate branches of national banks are subject to specified types of laws of a "host" State in which the bank has an interstate branch to the same extent as a bank based in that state, potentially including consumer protection laws -- except when Federal law preempts the application of such State laws to national banks -- the statute then

---

[24] Id. at 229, 231-232 (emphasis added); see also Marquette National Bank v. First of 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 National 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 Savings 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.").

[25] Farmers' and Mechanics' National Bank v. Dearing, 91 U.S. 29, 34 (1875).

[26] 6 F. 737, 740 (6th Cir. 1881), appeal dismissed, 106 U.S. 523 (1883).

[27] Guthrie, 199 U.S. at 158. See also Peoples Bank v. Williams, 449 F. Supp. 254, 259 (W. D. Va. 1978) (visitorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs).

[28] Enforcement through judicial proceedings was the most common—and perhaps exclusive—means of exercising the visitorial power to enforce compliance with applicable law at the time section 484 was enacted into law. Administrative actions were not widely used until well into the 20th century. Thus, by vesting the OCC with exclusive visitorial power, section 484 vests the OCC with the exclusive authority to enforce, whether through judicial or administrative proceedings.

[29] Pub. L. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

makes crystal clear that even where the State law is applicable, authority to enforce the law is vested in the OCC.[30]

While all this means that the national banking system and the State banking system are distinct -- indeed the differences that I've discussed are at the very heart of the "dual" character of the dual banking system that we highly value today -- the distinct character of the national banking system definitely does *not* mean that national banks operate with lesser standards or less rigorous oversight than generally applicable to state banks. While state laws and the resources of state supervisors necessarily will vary state-by-state, national banks are subject to rigorous standards and systemic supervision, administered from the Federal level, that applies uniformly to their business, wherever and in whatever form, they conduct it.

We are recognized for our "sophisticated credit examination and risk management capabilities" by leaders in the banking industry,[31] and we have taken a leadership role in ensuring that the business practices of national banks are of the highest caliber. We not only have a progressive approach to bank powers to enable national banks to better serve their customers through new products and services and new technology, we also have taken a pioneering position to ensure national bank customers are treated fairly by using our cease-and-desist powers to prevent unfair or deceptive practices. National bank customers, as well as national banks themselves, are the beneficiaries of our regulatory and supervisory efforts.

We recognize that the OCC bears a heavy responsibility as administrator of the national banking system. The national banking system portion of the dual banking system is designed and premised on the OCC carrying out *multiple* responsibilities that trace to the agency's origins: ensuring the safety and soundness of national banks' operations, overseeing the standards by which national banks operate, and assuring that national banks are playing an appropriate role in the national economy. In this mix, the safety and soundness of national banks is of obvious importance, but so too is the fairness and integrity national banks display in conducting their business. As Judge Posner of the Seventh Circuit observed in Central National Bank of Mattoon v. U.S. Dept of Treasury, "[national] banks are [the Comptroller's] wards, and his only wards; if they fail in droves, he will be blamed."[32] And so too will the Comptroller's Office be criticized if national banks fail to conduct their operations fairly and with integrity. And so too will the OCC be blamed if national banks fail to provide products and services that support a healthy, stable and growing economy.

---

[30] See 12 U.S.C. 36(f)(1)(B) ("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.").

[31] Kenneth Lewis, Chairman and Chief Executive Officer, Bank of America, "Regulatory Reform for the American People," presented to the FDIC Symposium on The Future of Financial Regulation, March 13, 2003.

[32] 912 F 2.2d 897, 905 (7th Cir. 1990).

Conclusion

This journey from the roots of the national banking system, to the present-day issues we face at the OCC, provides context and the foundation for how we face those issues – and the future. The national banking system is a unique asset of the U.S. financial system and valuable pillar of our national economy. At the OCC, our responsibilities for overseeing the system, are in fact, multi-dimensional. As Carter Golembe put it in one of his famous commentaries -- "to assure that national banks are safe and sound, competitive and profitable, and capable of serving in the best possible manner the banking needs of their customers."

Thank you very much.