

these questions reflect a need for clarification of the circumstances when state laws or regulations apply to activities and operations of national banks. Without further clarification, national banks, particularly those with customers in multiple states, face uncertain compliance risks and substantial additional compliance burdens and expense that, for practical purposes, materially impact their ability to offer particular products and services.

A recent inquiry by National City Bank, National City Bank of Indiana, and two operating subsidiaries of these banks (collectively, National City) concerning the Georgia Fair Lending Act (GFLA)<sup>3</sup> illustrates the impact that state laws can have on a national bank's lending activities. Our analysis of the issues raised by National City in the response to the bank, which is discussed below and published in full elsewhere in this edition of the **Federal Register** (National City Order), underscores the need for clarity and more predictability in our regulations concerning the extent to which state laws apply to national banks' real estate lending activities as well as other aspects of national bank activities.

Due to the number and significance of the questions that continue to arise with respect to the preemption of state laws in these areas, we believe it is now timely to provide more comprehensive standards regarding the applicability of state laws to lending, deposit-taking, and other authorized activities of national banks. Accordingly, we are proposing to amend our regulations to provide such standards.

### B. Principles of Preemption in the National Bank Context

Preemption is not a new concept. It is a doctrine, based on Constitutional principles, that has been recognized by the Supreme Court since the earliest years of our Nation's history. In 1819, in the landmark case of *McCulloch v. Maryland*, the Court held that under the Supremacy Clause of the U.S. Constitution, states "have no power, by taxation or otherwise, to retard, impede,

burden, or in any manner control, the operations" of an entity created under Federal law.<sup>4</sup> Notably, the entity involved in that case was a bank chartered under Federal law, the Second Bank of the United States. As discussed below, since the creation of the national banking system in 1863, courts have applied comparable principles of Federal preemption in connection with many aspects of national banks' operations, and have repeatedly found that the exercise by Federally-chartered national banks of their Federally-authorized powers is ordinarily not subject to state law.

#### 1. Legislative History of the National Banking Laws

Congress enacted the National Currency Act (Currency Act) in 1863 and modified it with the National Bank Act a year thereafter 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 the National Bank Act were intended to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the national economy both during and after the Civil War.

Both proponents and opponents of the new national banking system expected that it would replace the existing system of state banks.<sup>5</sup> Given this anticipated

impact on state banks and the resulting diminution of control by the states over banking in general,<sup>6</sup> proponents of the national banking system were concerned that states would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the [national] 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>7</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. 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 of all the affairs of [a national bank],"<sup>8</sup> and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks, except where Federal law provided otherwise. These provisions assured, among other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank and protect national banks from potentially hostile state interference by establishing that the authority to examine, supervise, and regulate

<sup>4</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

<sup>5</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>6</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 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).

<sup>7</sup> Cong. Globe, 38th Cong., 1st Sess., at 1893 (Apr. 27, 1864). See also *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.'") (citations omitted.).

<sup>8</sup> Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

collect fees for the provision of electronic services through ATMs; municipal ordinances prohibiting such fees are invalid under the Supremacy Clause); *Wells Fargo Bank, Texas, N.A. v. James*, 321 F.3d 488 (5th Cir. 2003) (Texas statute prohibiting certain check cashing fees is preempted by the National Bank Act); *Metrobank v. Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (national bank authority to charge fees for ATM use preempted Iowa prohibition on such fees). See also *Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999), cert. denied sub nom *Foster v. Bank One*, Utah, 529 U.S. 1087 (2000) (holding that Federal law preempted Iowa restrictions on ATM operation, location, and advertising).

<sup>3</sup> GA Code Ann. §§ 7–6A–1 et seq.