

our exclusive authority that are created by Federal law.⁸

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

No national bank shall be subject to any visitatorial 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 visitatorial 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* visitatorial powers? At one end of the spectrum of activities, for example, are those, comprising the content of the business of banking and activities incidental thereto, expressly authorized or recognized as permissible for national banks by Federal statute or regulation, or by OCC issuance or interpretation. At the other end would be activities, not necessarily unique to a particular business, subject to public safety standards, such as fire codes and zoning requirements, that typically apply without reference to the content of an entity's business. Second, what is the meaning of certain exceptions to the OCC's exclusive visitatorial powers that are provided in the statute, specifically the exception for visitatorial powers "vested in the courts of justice?"

This rulemaking contains amendments to § 7.4000 to clarify the application of section 484 to both areas. The first amendment adds a new paragraph (3) to § 7.4000(a) that clarifies the extent of national bank activities subject to the OCC's exclusive visitatorial authority. The second amendment revises § 7.4000(b) to reflect the exceptions explicitly set out in section 484(a) for visitatorial powers "vested in the courts of justice" and for Congress, and clarifies the OCC's interpretation of the "vested in the courts of justice" exception.

⁸ 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.

To present these proposed changes in context, we first discuss the background and purpose of section 484, and then summarize case law and OCC interpretations in which questions concerning visitatorial powers are addressed. We conclude with a summary of the proposed amendments to § 7.4000.

2. The National Charter and the Role of Visitatorial Powers

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.⁹ Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general,¹⁰

⁹ 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.").

¹⁰ 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

proponents of the national banking system were concerned that states¹¹ 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." Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864).¹²

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,"¹³ and solidified this Federal supervisory authority by vesting the OCC with exclusive visitatorial 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 and supervise national banks is vested *only* in the OCC, unless otherwise provided by Federal law.¹⁴

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).

¹¹ For ease of reference, we use the term "state" in this preamble in a way that includes other non-Federal governmental entities.

¹² See also *Anderson v. H&R Block*, 287 F.3d 1038, 1045 (11th Cir. 2002) ("congressional debates amply demonstrate Congress's desire to protect national banks from state legislation. * * *").

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

¹⁴ 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).