

related authority, which Congress specifically addressed in section 484 to enable national banks to avoid inconsistent and potentially hostile application of standards by state authorities. Together, Federal preemption and the OCC's exclusive visitorial authority are defining characteristics of the national bank charter, which have fostered the development of the nationwide system of Federally chartered banks envisioned by Congress which now operates as part of the flourishing dual banking system of national and state-chartered banks in the United States.

Congress recently affirmed the OCC's exclusive visitorial powers with respect to national banks operating on an interstate basis in the Riegle-Neal Interstate Banking Act of 1994 (Riegle-Neal).<sup>18</sup> Although Riegle-Neal makes interstate branches of national banks subject to specified types of laws of a "host" state in which the bank has an interstate branch to the same extent as a branch of a state bank of that state, *except* when Federal law preempts the application of such state laws to national banks, the statute then makes clear that even where the state law is applicable, authority to enforce the law is vested in the OCC. *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."). This approach is another, and very recent, recognition of the broad scope of the OCC's exclusive visitorial powers with respect to national banks.

#### B. Description of the Visitorial Powers Proposal

This rulemaking proposes to amend § 7.4000 in two ways. First, it adds 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. Second, it amends § 7.4000(b) to reflect the exceptions to our exclusive visitorial authority as set out in section 484. We have also added an exception in proposed new § 7.4000(b)(vi) recognizing the authority for functional regulators to exercise the authority provided under the Gramm-Leach-Bliley Act.<sup>19</sup>

*Circumstances when OCC visitorial authority is exclusive.* As we have discussed, the purpose of section 484 is to enable national banks to conduct the banking business they are authorized to conduct under Federal law, subject only to the "visitation," *i.e.*, inspection and supervision of their activities and the ability to compel compliance with standards for their operations, that is authorized under Federal law. Consistent with this purpose, the OCC's visitorial powers are exclusive (except where otherwise provided by Federal law) with respect to activities comprising or in furtherance of the content of national banks' business, that are expressly authorized or recognized as permissible for national banks under Federal law, including the OCC's regulations and interpretations. Examples include application of state standards (to the extent they are not preempted) to the content of the business conducted by a national bank, such as standards concerning the bank's transactions and relations with its customers, or directives or prescriptions regarding the components of, or income or expenses of, the bank's business. In these situations, section 484 directs that, unless Federal law supplies an exception, the OCC is exclusively authorized to determine what standards apply to a national bank's activities and whether a national bank's conduct complies with applicable standards, and to enforce adherence to those standards.

Proposed new § 7.4000(a)(3) would embody this clarification. It states, in paragraph (i), that, unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted. Proposed paragraph (ii) then provides that the question of whether the OCC possesses the exclusive authority to assess the applicability of a state law and determine and enforce compliance by

national banks is determined solely by Federal law, including section 484 and § 7.4000.<sup>20</sup> Pursuant to § 7.4006, these standards also determine the scope of the OCC's exclusive visitorial authority with respect to national banks' operating subsidiaries.<sup>21</sup>

*Exceptions to OCC exclusive visitorial authority.* Section 484 also creates several exceptions to the exclusive visitorial authority it creates. Our current rule acknowledges, in § 7.4000(a), that our exclusive authority is subject to various exceptions created by Federal law. Current § 7.4000(b) lists several instances where Federal law creates such an exception. However, the current rule does not address two exceptions expressly set out in section 484(a): the exceptions "vested in the courts of justice" and for Congress (and its committees). We propose to amend § 7.4000(b) to include the exceptions for courts of justice and Congress, and, in so doing, clarify how the "vested in the courts of justice" exception operates.<sup>22</sup>

The "vested in the courts of justice" exception to the OCC's exclusive visitorial powers is best understood by referring to the purpose of the statute, the plain language of the "vested in the courts of justice" exception, and the structure of section 484. These points are addressed in order, below.

Courts must be able to compel a national bank to produce books and records in connection with private litigation involving the bank. However, one might argue that the issuance of a subpoena by a court would itself be a "visitation," even if the underlying litigation was not. Such a reading would effectively immunize national banks from civil litigation, a result that Congress clearly did not intend.

Accordingly, section 484 recognizes an exception to the OCC's exclusive visitorial authority for visitorial powers "vested in the courts of justice." This exception is consistent with case law, settled well before section 484 was

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"); *Bank of America et al. v. City and County of San Francisco et al.*, 309 F.3d 551, 561 (9th Cir. 2002) ("[s]tate attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties.") (citation omitted); *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).

<sup>18</sup> Pub. L. 103–328, 108 Stat. 2338 (Sept. 29, 1994).

<sup>19</sup> Pub. L. 106–102, § 302, 113 Stat. 1338, 1407–08 (Nov. 12 1999), codified at 15 U.S.C. 6712.

<sup>20</sup> To the extent questions arise as to whether an activity is within the scope of the OCC's exclusive visitorial powers as defined in the regulation, the OCC is prepared to issue interpretive opinions on a case-by-case basis.

<sup>21</sup> *See* 66 FR 34784, 34788 (July 2, 2001). In the preamble to our final rule containing § 7.4006 we noted that the OCC's operating subsidiary regulation, 12 CFR 5.34(e)(3), states that "an operating subsidiary conducts its activities subject to the same authorization, terms, and conditions that apply to the conduct of those activities by its parent [national] bank." Further, we noted that "[o]perating subsidiaries often have been described as the equivalent of departments or divisions of their parent banks."

<sup>22</sup> We have not encountered questions concerning the application of the exception for Congress and its committees. Therefore, we propose only to include that exception in our rule without elaboration.