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Preemption and Visitorial Rules of the Comptroller of the Currency

QUESTIONS

The Office of the Comptroller of the Currency ("OCC") recently published final rules regarding preemption of state law and visitorial authority of state regulators with regard to national banks (the "Regulations").

1. Under the Regulations, what Tennessee laws would not apply to national banks because they would obstruct, in whole or in part, impair, or condition a national bank's exercise of powers granted to it under federal law?

2. The Regulations preempt state requirements concerning abandoned and dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, and state licensing or registration requirements.

   a. Does this affect the State's escheat laws?

   b. Does this affect the duty of a national bank or operating subsidiary to disclose information in connection with an investigation of abuse under Tenn. Code Ann. § 71-6-103(j)(4) and (5)?

   c. What other state and local laws would be preempted under this provision of the Regulations?

3. OCC's explanation of the Regulations indicates that they extend to operating subsidiaries of national banks.

   a. What subsidiaries do the Regulations cover?

   b. Do the Regulations remove banks or their subsidiaries from any and all state laws concerning the subjects addressed in the Regulations and, if so, to what extent?

   c. Do the Regulations remove all visitorial powers from state regulators to enforce state consumer protection and privacy laws against national banks and their operating subsidiaries?

4. The State's "wild card" statute appears at Tenn. Code Ann. § 45-2-601. It provides in relevant part that "any state bank may exercise any power or engage in any activity which it could exercise or engage in if it were a national bank located in Tennessee, subject to regulation by the commissioner for the purpose of maintaining the state bank's safety and soundness." Through the operation of the "wild card" statute and the Regulations, are all state banks and their subsidiaries now exempted from state law to the same extent national banks and their subsidiaries are exempted?

OPINIONS

1. Whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the Regulations. Clearly, the Regulations target state laws that specifically regulate activities in which national banks may engage directly, such as financial transactions like lending and deposit-taking, including, for example, Tenn. Code Ann. § 47-18-104. This statute, part of the Tennessee Consumer Protection Act of 1977, lists prohibited unfair or deceptive acts applicable to bank services, lending, or other activities conducted by national banks. At the same time, however, the Regulations explicitly preserve state laws on eight specific subjects: contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, zoning, and certain types of homestead exemptions. But the OCC's discussion of the Regulations indicates that even state laws that govern these areas are subject to analysis to determine whether they obstruct, in whole or in part, impair, or condition a national bank's exercise of powers granted to it under federal law.

2. a. State escheat laws may constitutionally apply to national banks.

b. The Regulations do not prevent the enforcement of disclosure provisions under Tenn. Code Ann. § 71-6-103(j)(4) and (5). But enforcement could be limited if a national bank's compliance conflicts with its duties under federal laws like the Right to Financial Privacy Act, 12 U.S.C. §§ 3401, *et seq.*

c. As discussed above, whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the Regulations. Clearly, the Regulations target state laws that specifically regulate activities in which national banks may engage directly, such as financial transactions like lending and deposit-taking.

3. a. The Regulations, by their terms, apply to the operating subsidiaries of national banks. Under OCC regulations, this term includes an entity that a national bank controls and that engages in activities in which the national bank may engage directly. This Office is unable to predict the scope of subsidiaries and their activities intended to be covered by the Regulations. It is clear that the OCC intends the Regulations to include organizations controlled by a national bank that engage in lending activities, such as mortgage lenders and industrial loan and thrift companies.

Under the Regulations, these operating subsidiaries of a national bank are exempt from state licensing and examination requirements. Because the OCC broadly interprets the powers which national banks may exercise directly, the OCC may interpret the Regulations to include national bank operating subsidiaries that engage in a broad range of financial activities. At the same time, it is clear that the Regulations do not preempt state regulation of any organization in the business of insurance or the enforcement of state securities laws, to the extent that these laws are expressly preserved under the Gramm-Leach-Bliley Act. Financial subsidiaries of national banks continue to be subject to state regulation.

b. The Regulations preempt any state law that obstructs, in whole or in part, impairs, or conditions a national bank's exercise of powers granted to it under federal law. The Regulations also apply to the operating subsidiaries of national banks. Whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the Regulations.

c. OCC regulations provide that the OCC has exclusive visitorial authority with regard to national banks and their operating subsidiaries. As discussed above, the OCC has taken the position that various state laws regulating consumer loans are preempted. Even if a state law on this subject does apply to a national bank or its operating subsidiary, OCC regulations indicate that the OCC retains exclusive visitorial authority to enforce the state law against that organization. Similarly, to the extent that any state privacy laws obstruct, impair, or condition a national bank's exercise of powers granted to it under federal law, either directly or through an operating subsidiary, the OCC takes the position that they are preempted. Even if a state law on this subject does apply to a national bank or its operating subsidiary, OCC regulations indicate that the OCC retains exclusive visitorial authority to enforce the state law against that organization.

4. Through the operation of the "wild card" statute, state banks and their operating subsidiaries may exercise the same powers granted national banks, free from the same state laws, subject only to the terms and conditions imposed by federal regulations. The exercise of these powers is subject to regulation by the Commissioner of Financial Institutions for a state bank's safety and soundness. The statute, of course, continues to be subject to amendment by the General Assembly.

ANALYSIS

This opinion concerns the effect of final regulations recently issued by the Office of the Comptroller of the Currency (the "OCC"). These regulations appear at 69 F.R. 1895 (January 13, 2004) and 69 F.R. 1904 (January 13, 2004) (the "Regulations"). Of course, only the OCC can authoritatively interpret its regulations. This opinion is based on a review of the Regulations and accompanying explanation, as well as other interpretive rulings of the OCC.

Introduction: the Regulations

A. Preemption

New rules effective February 12, 2004, regarding which state laws apply to national banks and which do not were published at 69 F.R. 1904 (January 13, 2004). These regulations amend 12 C.F.R. part 7, governing bank activities and operations, and 12 C.F.R. part 34, governing bank real estate lending. The regulations add the following section 7.4007 to 12 C.F.R. part 7:

> (a) Authority of national banks. A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.
>
> (b) Applicability of state law. (1) Except where made applicable by Federal law, state laws that *obstruct, impair, or condition* a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.
>
> (2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:
>
> (i) Abandoned and dormant accounts;
> (ii) Checking accounts;
> (iii) Disclosure requirements;
> (iv) Funds availability;
> (v) Savings account orders of withdrawal;
> (vi) State licensing or registration requirements (except for purposes of service of process); and
> (vii) Special purpose savings services;
>
> (c) State laws that are not preempted. State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks *to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers*:
>
> (1) Contracts;
> (2) Torts;
> (3) Criminal law;
> (4) Rights to collect debts;
> (5) Acquisition and transfer of property;

> (6) Taxation;
> (7) Zoning; and
> (8) Any other law *the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks* or otherwise consistent with the powers set out in paragraph (a) of this section.

69 F.R. 1916 (emphasis added) (to be codified at 12 C.F.R. § 7.4007).

The regulations add a new section 7.4008 to 12 C.F.R. part 7. Paragraph (a) of the new regulation provides:

> Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, *subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.*

69 F.R. 1916 (emphasis added) (to be codified at 12 C.F.R. § 7.4008).

Paragraph (b) of the new section 7.4008 prohibits a national bank from making a consumer loan based predominantly on the value of the collateral rather than the borrower's ability to pay. Paragraph (c) of the new section prohibits a national bank from engaging in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act in connection with loans made under the regulation. Paragraph (d) addresses the applicability of state law and provides:

> Applicability of state law. (1) Except where made applicable by Federal law, state laws *that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers* are not applicable to national banks.
>
> (2) A national bank may make non-real estate loans without regard to state law limitations concerning:
>
> (i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;
> (ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;
> (iii) Loan-to-value ratios:
> (iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan,

> including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
>
> (v) Escrow accounts, impound accounts, and similar accounts;
>
> (vi) Security property, including leaseholds;
>
> (vii) Access to, and use of, credit reports:
>
> (viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
>
> (ix) Disbursements and repayments; and
>
> (x) Rates of interest on loans.

Id. (emphasis added). Paragraph (e) of the regulation provides that state laws on contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, and zoning are not inconsistent with non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of this power. The regulation also provides that any other law the effect of which the OCC determines to be "incidental" to the non-real estate lending operations of national banks or otherwise consistent with the powers described in Paragraph (a) of the regulation is not preempted.

The regulations add a new section 7.4009 to 12 C.F.R. part 7. This section provides similar preemption provisions with regard to all other powers of a national bank under federal law, "including conducting any activity that is part of, or incidental to, the business of banking . . .." 69 F.R. 1917 (to be codified at 12 C.F.R. § 7.4009). Paragraph (b) of the regulation provides that "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks." *Id.* Paragraph (c)(2) provides that state laws on the same seven subjects listed above apply to national banks to the extent that they only incidentally affect the exercise of national bank powers. The paragraph also provides that any other law "the effect of which the OCC determines to be incidental to the exercise of national bank powers" will also apply to national banks. *Id.*

Finally, the Regulations amend federal regulations on real estate lending by national banks. Section 12 C.F.R. § 34.3 is amended by adding new paragraphs (b) and (c). These paragraphs provide standards for real estate lending that are similar to those provided for non-real estate lending in paragraphs (b) and (c) of the new section 12 C.F.R. § 7.4008. New section 12 C.F.R. § 34.4 addresses the applicability of state law with regard to real estate lending by national banks. The regulation is similar to regulations regarding the exercise of other powers by national banks but contains some additional provisions particularly applicable to real estate lending. Paragraph (a) of this section provides:

> (a) Except where made applicable by Federal law, *state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers* do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:
>
> (1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;
>
> (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;
>
> (3) Loan-to-value ratios;
>
> (4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
>
> (5) The aggregate amount of funds that may be loaned upon the security of real estate;
>
> (6) Escrow accounts, impound accounts, and similar accounts;
>
> (7) Security property, including leaseholds;
>
> (8) Access to, and use of, credit reports;
>
> (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
>
> (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
>
> (11) Disbursements and repayments;
>
> (12) Rates of interest on loans;
>
> (13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and
>
> (14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

69 F.R. 1917 (emphasis added) (to be codified at C.F.R. § 34.4). Paragraph (b) of the section is similar to the paragraphs discussed above preserving state laws on various subjects, with the addition of homestead laws specified in 12 U.S.C. § 1462a(f). *Id.*

B. Visitorial Powers

New OCC regulations on visitorial powers effective February 12, 2004, were published at 69 F.R. 1895 (January 13, 2004). The rule amends 12 C.F.R. § 7.4000 to add a new paragraph (a)(3) and to revise paragraph (b). As revised, these provisions state:

> (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.

69 F.R. 1904 (emphasis added) (to be codified at 12 C.F.R. § 7.4000).

This Office, along with the Attorneys General of the remaining 49 states and the Virgin Islands and the District of Columbia Office of Corporation Counsel, signed a letter dated October 6, 2003, opposing the promulgation of the Regulations on both policy and legal grounds. A copy of that letter is attached to this opinion. Lawsuits pending in other states challenge preemption positions of the OCC that are based on the principles articulated in the Regulations. We anticipate that lawsuits challenging the OCC's legal authority to promulgate the Regulations will arise in the future. A legislative response to the Regulations may also be forthcoming on the congressional level. This opinion will not attempt to outline the bases on which the Regulations may be challenged. Those matters are addressed in the letter of October 6, 2003. Once they become effective, and until withdrawn, amended, impacted by an act of Congress, or found invalid in a binding opinion by a court of competent jurisdiction, the Regulations are valid. This opinion will address the questions raised in the request regarding the scope of the Regulations as they are written and discussed by the OCC. Again, only the OCC can authoritatively interpret its own regulations.

1. State Laws Preempted by the Regulations

The first question is, under the Regulations, what Tennessee laws would not apply to national banks because they would obstruct, in whole or in part, impair, or condition a national bank's exercise of powers granted to it under federal law. This Office is unable to provide a comprehensive list of Tennessee laws that would not apply to national banks under the Regulations. By their terms, the Regulations explicitly preempt any state law that obstructs, impairs, or conditions a national bank's ability to fully exercise any of its federally authorized powers, including its ability to accept deposits and make real estate and other types of loans. Comments to the rules indicate that the Regulations are intended to preempt laws that have created "higher costs and increased operational

challenges" for national banks, many of which operate in more than one state. 69 F.R. *at* 1908. As an example, the OCC cites the Georgia Fair Lending Act, which it found preempted in 68 F.R. 46264 (August 5, 2003). The comments note that the act caused secondary market participants to stop buying some Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. The OCC also notes that "[n]ational banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities." *Id.* The comments then state:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.

Id. (footnote omitted). Under this standard, then, the Regulations preempt any state law that makes a national bank's exercise of its deposit-taking, lending, and other powers more expensive or burdensome, interferes with its ability to plan its business and manage its risks, and subjects it to uncertain liabilities and potential exposure. The Regulations explicitly preempt state law restrictions on a national bank's deposit-taking powers that concern abandoned and dormant accounts;[1] checking accounts; disclosure requirements; funds availability; savings account orders of withdrawal; state licensing and most registration requirements; and special purpose savings services, including the right of national banks to charge various service fees. The Regulations explicitly preempt state law restrictions on national banks' lending powers that concern licensing; insurance on collateral, private mortgage insurance, or other credit enhancements; loan-to-value ratios; terms of credit, including repayment and amortization; escrow accounts; security property; access to and use of credit reports; disclosure and advertising; disbursements and repayments; and interest rates, sale and purchase of mortgages, due-on-sale clauses, and covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan. Finally, the Regulations explicitly preempt any state law that obstructs, impairs, or conditions a national bank's ability to fully exercise any of the activities it is authorized to conduct under federal law.

Whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the

[1] But see the answer to question 2.a.

Regulations.[2] Clearly, the Regulations target state laws that specifically regulate activities in which national banks may directly engage, such as financial transactions like lending and deposit-taking, including, for example, Tenn. Code Ann. § 47-18-104. This statute, part of the Tennessee Consumer Protection Act of 1977, lists prohibited unfair or deceptive acts applicable to bank services, lending, or other activities conducted by national banks.[3]

At the same time, however, the Regulations explicitly preserve state laws on eight specific subjects: contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, zoning, and certain types of homestead exemptions. The OCC discussion with regard to national banks' real estate lending powers notes, however, that the preemption analysis of any particular statute will depend on its effect, not on "[t]he label a state attaches to its laws . . .." 69 F.R. *at* 1912, n. 59. Therefore, even state laws that govern these areas are subject to analysis to determine whether they obstruct, in whole or in part, impair, or condition a national bank's exercise of powers granted to it under federal law.

Discussion of the Regulations with regard to national banks' real estate lending powers states:

> In addition, any other law the effect of which is incidental to national banks' lending authority or otherwise consistent with national banks' authority to engage in real estate lending would not be preempted. In general, these would be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power.

69 F.R. *at* 1912 (footnote omitted). Discussion of the Regulations with regard to national banks' other powers states:

> . . . in some circumstances, of course, Federal law directs the application of state standards to a national bank. The wording of § 7.4009 reflects that a Federal statute may require the application of state law, or it may incorporate — or "Federalize" — state standards. In those circumstances, the state standard obviously applies. State law may also apply if it only incidentally affects a national bank's

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[2] Examples of state laws that the OCC has already concluded are preempted include Pennsylvania statutes governing auctioneers (65 F.R. 15037 (March 20, 2000)) and certain provisions of the Michigan Motor Vehicle Sales Act (66 F.R. 28593 (May 23, 2001)).

[3] The United States District Court for the Western District of Tennessee has already found that a claim under this section was preempted under the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq. Carney v. Experian Information Solutions, Inc.*, 57 F.Supp.2d 496 (W.D. Tenn. 1999).

> Federally authorized powers or if it is otherwise consistent with national banks' uniquely Federal status. Like the other provisions of this final rule, § 7.4009 recognizes the potential applicability of state law in these circumstances. This approach is consistent with the Supreme Court's observation that national banks "are governed in their daily course of business far more by the laws of the state than of the nation." However, as noted previously, these types of laws typically do not regulate the manner or content of the business of banking authorized for national banks, but rather establish the legal infrastructure that makes practicable the conduct of that business.

69 F.R. *at* 1912-13 (footnotes omitted). The OCC reserves the right to examine any state statute to determine whether it is preempted with regard to national banks. 69 F.R. *at* 1911, 1912,

2. Statutes Related to Deposit-Taking

a. Escheat Laws

As cited above, new regulation 12 C.F.R. section 7.4007(b) provides:

> (b) Applicability of state law. (1) Except where made applicable by Federal law, state laws that *obstruct, impair, or condition* a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.
>
> (2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:
>
> (i) Abandoned and dormant accounts;
> (ii) Checking accounts;
> iii) Disclosure requirements;
> (iv) Funds availability;
> (v) Savings account orders of withdrawal;
> (vi) State licensing or registration requirements (except for purposes of service of process); and
> (vii) Special purpose savings services[.]

The first question is whether this regulation would preempt state laws on escheat. We assume this question refers to the State's unclaimed property laws, Tenn. Code Ann. §§ 66-29-101, *et seq.* OCC discussions of the Regulations acknowledge that they do not preempt laws of the type found not to be preempted in *Anderson National Bank v. Luckett,* 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944). 69 F.R. *at* 1916, n. 3. In that case, the United States Supreme Court found that Kentucky escheat statutes could constitutionally apply to national banks. In addition, the

Regulations providing that the OCC has exclusive visitorial powers with regard to national banks expressly except inspections for compliance with state unclaimed property laws. The Regulations provide that national banks are subject to visitorial powers provided by federal law, including the federal law authorizing state officials to:

> (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));

New regulation, 12 C.F.R. § 7.4000(b)(1)(ii). Tennessee's unclaimed property laws, therefore, apply to national banks.

b. Disclosure Laws on Elderly Abuse

The next question is whether the Regulations regarding visitorial authority affect Tennessee laws regarding disclosure of elderly abuse. This question appears to refer to the Tennessee Adult Protection Act, Tenn. Code Ann. §§ 71-6-101, *et seq.* Under Tenn. Code Ann. § 71-6-103, various individuals are required to report abuse, neglect, or exploitation of an incompetent or dysfunctional adult, including an adult incompetent by reason of age, to the Tennessee Department of Human Services. Willful abuse, neglect, or exploitation of a person in violation of the act is a Class A misdemeanor. Tenn. Code Ann. § 71-6-117. The statute provides that the Department may have access to financial records contained in any "financial institution." The statute provides:

> (j)(4) (A) The department may be allowed access to financial records that are contained in any financial institution, as defined by § 45-10-102(3) regarding:
>
> (i) The person who is the subject of the investigation;
>
> (ii) Any caretaker of such person; and
>
> (iii) Any alleged perpetrator of abuse, neglect or exploitation of such person;
>
> (B) By the issuance of an administrative subpoena in the name of the commissioner or an authorized representative of the commissioner which is:
>
> (i) Directed to the financial institution, and
>
> (ii) which complies with the provisions of §§ 45-10-106 and 45-10-107; or
>
> (C) By application, as otherwise required pursuant to § 45-10-117, to the circuit or chancery court in the county in which the financial institution is located, or in the court in which any proceeding

> concerning the adult may have been initiated or in which the investigation is being conducted, for the issuance of a judicial subpoena that complies with the requirements of § 45-10-107; provided that the department shall not be required to post a bond pursuant to § 45-10-107(4).
>
> (D) Nothing in this subdivision shall be construed to supersede the provision of financial records pursuant to the permissible acts allowed pursuant to § 45-10-103.
>
> (5) Any records received by the department, the confidentiality of which is protected by any other statute or regulation, shall be maintained as confidential pursuant to the provisions of such statutes or regulations, except for such use as may be necessary in the conduct of any proceedings pursuant to its authority pursuant to this part of title 33 or 34.

Tenn. Code Ann. § 71-6-103(j)(4) and (5). The term "financial institution" under Tenn. Code Ann. § 45-10-102(3) includes a "bank, savings and loan association, industrial loan and thrift company, credit union, mortgage broker, mortgage banker, or leasing company accepting deposits, making or arranging loans and making or arranging leases[.]" On its face, therefore, this statute applies to national banks and their operating subsidiaries.

Again, it is impossible to predict how broadly the OCC will interpret the Regulations. We think, however, that neither the Regulations governing preemption nor the provisions governing visitorial powers were intended to affect the authority of state officials to obtain records under this statute. The statute is a criminal statute. The Regulations expressly provide that state criminal statutes are not preempted. 12 C.F.R. § 7.4007(c)(3), as amended. Further, in its discussion of its amendment to the visitorial regulations, the OCC acknowledges that application of criminal, as well as certain other state laws, to national banks "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." 69 F.R. *at* 1896 (footnote omitted). These 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." *Id.* (footnote omitted).

In any case, it is not clear whether the request for records under this statute constitutes an exercise of visitorial authority. The statute is intended to aid state officials in enforcing laws against abuse of elderly or dependent adults. It is not intended to condition or regulate a bank's exercise of its authority to take deposits. Further, the OCC expressly cites *First National Bank of Youngstown v. Hughes,* 6 F. 737 (C.C.D. Ohio 1881), *appeal dismissed*, 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed. 268 (1883). 69 F.R. *at* 1899, n. 35. In that case, a federal court affirmed an order by a state court requiring national bank officials to produce their records and testify to deposits owned by certain

named customers. The Court noted that the order was in aid of the state revenue laws and did not constitute an exercise of visitorial authority within the meaning of federal law. The OCC notes that this case is "inapposite" to its regulation on visitorial powers. 69 F.R. *at* 1899. For these reasons, we conclude that the Regulations do not prevent the enforcement of disclosure provisions under Tenn. Code Ann. § 71-6-103(j)(4) and (5). Enforcement would still be prevented if the state law conflicts with a national bank's duties under other federal laws, such as the Right to Financial Privacy Act, 12 U.S.C. §§ 3401, *et seq.*

c. Other Laws Preempted

The next question is what other state and local laws would be preempted under this provision of the Regulations. As discussed above, whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the Regulations. Clearly, the Regulations target state laws that regulate activities in which national banks may directly engage, such as financial transactions like lending and deposit-taking.

3. Application of the Regulations to National Bank Subsidiaries

The next question concerns to which national bank subsidiaries the Regulations apply. The OCC takes the position that Regulations on banking activities apply to the operating subsidiaries of national banks.[4] The OCC discussion of the Regulations states:

> As a matter of Federal law, national bank operating subsidiaries conduct their activities under a Federal license, subject to the same terms and conditions as apply to the parent banks, except where Federal law provides otherwise. *See* 12 CFR 5.34 and 7.4006. *See also* 12 CFR 34.1(b)(real estate activities specifically). Thus, by virtue of preexisting OCC regulations, the changes to parts 7 and 34, including the new anti-predatory lending standards applicable to lending activities, apply to both national banks and their operating subsidiaries. The final rule makes no change to these existing provisions.

[4] Even before the Regulations were issued, OCC rules provided that state laws apply to national bank operating subsidiaries to the same extent they apply to the parent national bank. 12 C.F.R. § 7.4006. The United States District Court for the Eastern District of California ruled that this regulation was a reasonable interpretation of the National Bank Act, and that California state authorities could not examine a national bank subsidiary licensed as a mortgage lender under California law. *Wells Fargo Bank, N.A. v. Boutris*, 265 F.Supp.2d 1162 (E.D.Cal. 2003). *But see Minnesota v. Fleet Mortgage Corp.*, 181 F.Supp.2d 995 (D. Minn. 2001) (a bank subsidiary was not a "bank" exempt from the Federal Trade Commission's telemarketing sales rule, and the Minnesota Attorney General could enforce the rule against it).

69 F.R. *at* 1913 (footnotes omitted). But the OCC also indicates that the final rule will not apply to the activities of national bank *financial* subsidiaries. 69 F.R. *at* 1906. The OCC also states that the rules on exclusive visitorial authority will not apply to "functionally regulated bank subsidiaries conducting securities and insurance activities . . .." 69 F.R. *at* 1901.

a. "Operating Subsidiaries"

Again, the scope of this regulation depends on the OCC's interpretation of various regulatory definitions. OCC regulations governing operating subsidiaries of national banks appear at 12 C.F.R. § 5.34. A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly, either as a part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under any other statutory authority. 12 C.F.R. § 5.34(e)(1). An operating subsidiary includes a legal entity in which the parent bank owns more than fifty percent of the controlling interest, or the parent bank otherwise controls the operating subsidiary and no other party controls more than fifty percent of the controlling interest of the subsidiary. 12 C.F.R. § 5.34(e)(2). Under OCC regulations, therefore, "operating subsidiary" includes an entity that a national bank controls and that engages in activities in which the national bank may engage directly. At the same time, the Regulations expressly acknowledge that they do not preempt state law or visitorial powers of state officials with regard to "financial subsidiaries." Under the Gramm-Leach-Bliley Act, enacted in 1999, national banks are permitted to invest in financial subsidiaries that carry on activities in which national banks may not engage directly. 12 U.S.C. § 24a(g)(3).

This Office is unable to predict the scope of subsidiaries and their activities intended to be covered by the Regulations. It is clear that the OCC intends the Regulations to include organizations controlled by a national bank that engage in lending activities, such as mortgage lenders and industrial loan and thrift companies.[5] The Tennessee Residential Lending, Brokerage and Servicing Act of 1988, Tenn. Code Ann. §§ 45-13-101, *et seq.*, does not require mortgage lenders that are subsidiaries of national and state banks to be licensed. Organizations that engage in other financial activities, such as industrial loan and thrift companies, however, must register and submit to state regulation regardless of whether they are subsidiaries of a state or national bank. Tenn. Code Ann. §§ 45-5-101, *et seq.* Under the Regulations, these operating subsidiaries of a national bank are exempt from state licensing and examination requirements. Because the OCC broadly interprets the powers in which national banks may engage directly, the OCC may interpret the Regulations to include national bank operating subsidiaries that engage in a broad range of financial activities. At the same time, however, it is clear that the Regulations do not preempt state regulation of any organization in the business of insurance, to the extent that these laws are expressly preserved under the Gramm-Leach-Bliley Act. *See, e.g.*, 15 U.S.C. § 6701; 12 U.S.C. § 1844(c)(4)(B). The same act preserves state regulation of securities activities in a "functionally regulated" subsidiary of a national bank. That term generally includes registered securities dealers and insurance companies.

[5] In this respect, the Regulations are consistent with interpretative letters issued by the OCC before the Regulations' effective date. *See, e.g.*, OCC Inter. Letter 958 (January 27, 2003) (the OCC has exclusive visitorial authority with regard to mortgage banking and servicing subsidiaries of a national bank).

b. Other State Laws Preempted

The next question is whether the Regulations remove national banks and their operating subsidiaries from state laws regarding, among other areas, credit, insurance, investments, reporting and record keeping requirements, securities, and surety bonds. As discussed above, the Regulations preempt any state law that obstructs, in whole or in part, impairs, or conditions a national bank's exercise of powers granted to it under federal law. The Regulations also apply to the operating subsidiaries of national banks. Whether any particular statute has been preempted under the Regulations will require an analysis of that statute and its effect on a national bank's exercise of its authorized powers. This Office is unable to predict how broadly the OCC will interpret the scope of preemption under the Regulations.

c. Visitorial Powers

The next question is whether the Regulations remove all visitorial powers from state regulators to enforce state consumer protection and privacy laws against national banks and their operating subsidiaries. As amended, 12 C.F.R. § 7.4000(a)(3) provides that, "[u]nless 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." Subparagraph (a)(2) of the same regulation provides:

> (2) For purposes of this section, visitorial powers include:
> (i) Examination of a bank;
> (ii) Inspection of a bank's books and records;
> (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and
> (iv) Enforcing compliance with *any applicable federal or state laws concerning those activities.*

12 C.F.R. § 7.4000(a)(2) (emphasis added). By its terms, therefore, this regulation states that the OCC has exclusive visitorial authority with regard to national banks and their operating subsidiaries. This authority includes enforcement authority of any state laws that the OCC, or a federal court, determines are applicable to national banks or their subsidiaries, unless federal law provides otherwise. 69 F.R. *at* 1900. As discussed above, the OCC has taken the position that various state laws regulating consumer loans are preempted. Even if a state law on this subject does apply to a national bank or its operating subsidiary, OCC regulations indicate that the OCC retains exclusive visitorial authority to enforce the state law against that organization.

To the extent that any state privacy laws obstruct, impair, or condition a national bank's exercise of powers granted to it under federal law, either directly or through an operating subsidiary, the OCC takes the position that they are preempted. Even if a state law on this subject does apply to a national bank or its operating subsidiary, OCC regulations indicate that the OCC retains exclusive visitorial authority to enforce the state law against that organization.

4. Tennessee "Wild Card" Statute

The last question addresses the effect of the Regulations on state banks. The State's "wild card" statute appears at Tenn. Code Ann. § 45-2-601. It provides in relevant part that "any state bank may exercise any power or engage in any activity which it could exercise or engage in if it were a national bank located in Tennessee, subject to regulation by the commissioner for the purpose of maintaining the state bank's safety and soundness." The question is whether, through the operation of the "wild card" statute and the Regulations, all state banks and their subsidiaries are now exempted from state law to the same extent national banks and their subsidiaries are exempted.

Under the last sentence of this statute, any power accorded by federal law to a national bank located in Tennessee is automatically extended to state banks, subject to regulation by the Commissioner of Financial Institutions for the purpose of maintaining the state bank's safety and soundness. Op. Tenn. Atty. Gen. 86-156 (September 2, 1986). Historically, this Office has interpreted this provision to permit state banks to exercise any power that national banks may exercise, subject to the same terms and conditions, and subject to state regulation to maintain the state bank's safety and soundness. Op. Tenn. Atty. Gen. 02-013 (February 1, 2002) (state banks may invest in a subsidiary licensed as a title insurance agent on the same terms and conditions as national banks); Op. Tenn. Atty. Gen. 89-69 (May 1, 1989) (state banks operating in towns of 5,000 or less, like national banks, may engage in insurance activities); Op. Tenn. Atty. Gen. 87-192 (December 16, 1987) (since national banks are not prohibited from charging document preparation fees in connection with their loans, state banks may also do so); Op. Tenn. Atty. Gen. 86-156 (September 2, 1986) (as a result of OCC regulations and federal case law, a state bank may operate an ATM without being subject to state law regulations and geographic restrictions).

Legislative history supports this construction. The present language was added in 1986 by Public Chapter 666. Senator Albright sponsored the bill in the Senate. He explained the bill as follows:

> This bill permits state banks to exercise the same powers as national banks. They have that power now, but under certain circumstances they may not. For instance, the federal regulators, the Comptroller of the Treasury that controls the national banks, may make a ruling that changes the scope of the national banks, but the state banks because it was not by statute would not come under that. This bill, or there could be a court decision, and by the time the legislature could meet to make that change is that [sic] the state banks would be at a disadvantage. This bill would give the state banks the same powers as national banks, and state banks' power would, if the powers of a national bank were changed, the state bank's would automatically be, too.

Senate Session March 19, 1986, Tape No. 53 (Remarks of Sen. Albright). The purpose of the "wild card" statute, therefore, is to preserve the competitive equality of state and national banks. Under the Regulations, national banks and their subsidiaries may exercise their powers free from any state law that obstructs or conditions the exercise of those powers. The national banks and their operating subsidiaries are subject to certain federal regulations. Through the operation of the "wild card" statute, state banks and their operating subsidiaries may exercise the same powers granted national banks, free from the same state laws, subject to the terms and conditions imposed by federal regulations but enforced by state authorities. The exercise of these powers is subject to regulation by the Commissioner of Financial Institutions to maintain a state bank's safety and soundness. The statute, of course, continues to be subject to amendment by the General Assembly.

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