Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #957
March 2003
12 USC 484
12 CFR 7.4006
12 CFR 5.34(e)(3)

January 27, 2003

Scott A. Cammarn, Esq.
Associate General Counsel
Bank of America
NC1-002-29-01
101 South Tryon Street
Charlotte, NC 28255

Dear Mr. Cammarn:

This responds to your letter of January 23, 2003, on behalf of Bank of America, N.A. ("Bank") in which you request a determination (i) whether Federal law prevents the California Department of Corporations (the "Department") from conducting an examination of the Bank's operating subsidiary, BA Mortgage LLC ("Operating Subsidiary"), and (ii) whether the Operating Subsidiary is required to maintain a license under the California Residential Mortgage Lending Act.

You represent that the Operating Subsidiary is a wholly-owned operating subsidiary of the Bank and engages solely in the servicing of residential mortgage loans originated or held by its predecessor, NationsBanc Mortgage Corporation, or by its parent, the Bank. As an operating subsidiary of a national bank, the Operating Subsidiary is subject to ongoing supervision and examination by the OCC in the same manner and to the same extent as the Bank.[1] You represent

[1] Twelve C.F.R. § 5.34(e)(3) provides that –

> [a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the,[1] other provisions of the California Act may be preempted as well operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act [GLBA] (12 U.S.C. 1820a).

The provisions of the Federal Deposit Insurance Act and the GLBA referenced in the regulation pertain to the functional regulation of securities, insurance, and commodities firms. These provisions are not relevant to mortgage lending and servicing activities conducted by The Operating Subsidiary.

that the Operating Subsidiary has maintained a license under the California Residential Mortgage Lending Act ("California Act"). The Bank believes, however, that recent changes to the OCC's regulations clarify that the Operating Subsidiary is not required to maintain a license under the California Act. The Bank further believes that the Department is barred by Federal law from conducting an examination of the Operating Subsidiary. The Bank is requesting a determination that the OCC concurs with the Bank's positions.[2]

As discussed in detail below, pursuant to 12 U.S.C. § 484, and 12 C.F.R. §§ 5.34(e)(3) and 7.4006, the OCC has exclusive visitorial authority over national banks and their operating subsidiaries except where *Federal* law provides otherwise. This authority pertains 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. As a result, States are precluded from examining or requiring information[3] from national banks or their operating subsidiaries or otherwise seeking to exercise visitorial powers with respect to national banks or their operating subsidiaries in those respects. Thus, Federal law precludes examination of the Operating Subsidiary by the Department. Moreover, for the reasons discussed below, operating subsidiaries – like their parent national banks – need not obtain the approval of a State to engage in an activity permissible under Federal law. Accordingly, State licensing requirements do not apply to the Bank or the Operating Subsidiary.[4]

Background

The OCC's exclusive visitorial authority over national bank operations is established by 12 U.S.C. § 484.[5] Paragraph (a) of that section states that --

[2] OCC Advisory Letter 2002-9 (Nov. 25, 2002) ("AL 2000-9") generally describes the principles that govern the applicability of State law and the OCC's exclusive visitorial authority to national banks and their operating subsidiaries. That advisory letter indicates that national banks should contact the OCC in situations where a State official seeks to assert supervisory authority or enforcement jurisdiction over the bank.

[3] The OCC currently maintains information sharing agreements with 48 States, the District of Columbia, and Puerto Rico. These agreements provide a mechanism through which State regulators may seek and obtain supervisory information from the OCC. Typically, the OCC will make confidential bank examination information available to State bank regulatory agencies if they demonstrate a specific regulatory need for the examination information (*e.g.*, in connection with a merger of a national bank into a State bank, where the State bank regulator must approve the transaction), and if the State agency has entered into an appropriate information sharing/confidentiality agreement with the OCC governing the use of the information. In AL 2002-9, the OCC outlined a procedure to address circumstances when State officials raise issues concerning potential violations of laws by national banks, including when State officials may seek information from a national bank about its compliance with any law or for other purposes. The advisory letter is available on the OCC's website at www.occ.treas.gov/ftp/advisory/2002%2D9.txt.

[4] We note that the California Act already contains an exemption from State licensing requirements for national banks, Cal. Fin. Code § 50003(g), but fails to recognize the status of national bank operating subsidiaries under Federal law and regulations.

[5] "Visitorial powers" generally refers to the power to "visit" a national bank to examine the conduct of its business and to enforce its observance of applicable laws. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (the word "visitation" means "inspection; superintendence; direction; regulation") (internal quotations omitted).

> [n]o national bank shall be subject to any visitorial 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."

This provision, enacted with the creation of the national banking system in 1863, is integral to the design and structure of the national banking system and fundamental to the character of national banks. 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. At that time, both proponents and opponents of the new national banking system expected that it would supersede the existing system of State banks.[6] Given this anticipated impact on State banks and the resulting diminution of control by the States over banking in general,[7] proponents of the national banking system were concerned that States would attempt to undermine it.

The allocation of any supervisory responsibility for the new national banking system to the States would have been inconsistent with the 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]

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[6] 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 (March 23, 1864). 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). *See also* statement of Rep. Pruyn (stating that the legislation would "be the greatest blow yet inflicted upon the States . . . .") Cong. Globe, 38th Cong., 1st Sess. 1271 (March 24, 1864); statement of Sen. Sumner ("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.") Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864).

[7] *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).

bank,"[8] 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 action by establishing that the authority to examine and supervise national banks is vested *only* in the OCC, unless otherwise provided by *Federal* law.[9]

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), the Supreme Court recognized how the National Bank Act was designed to operate:

> Congress had in mind, in passing this section [*i.e.*, 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.

Id. at 159. 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. For instance, in *Easton v. Iowa*, 188 U.S. 220 (1903), the Court stated that Federal legislation affecting national banks—

> has in view the erection of a system extending throughout the country, and independent, so far as 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 . . . . It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute . . . . [W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they 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.*

Id. at 229, 231-232 (emphasis added). The Court in *Farmers' and Mechanics' Bank*, 91 U.S. 29 (1875), after observing that national banks are means to aid the government, stated—

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

[9] 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).

> Being such means, brought into existence for this purpose, and intended to be so employed, 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. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."

Id. at 34 (citation omitted).

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").[10] Riegle-Neal makes interstate operations 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, *unless* the State law is preempted by Federal law. For those State laws that are not preempted, the statute makes clear that the 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.

The OCC's exclusive visitorial authority complements principles of Federal preemption, to accomplish the objectives of the National Bank Act. The Supremacy Clause of the United States Constitution[11] provides that Federal law prevails over any conflicting State law. An extensive body of judicial precedent has developed over the nearly 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.[12] Visitorial power is a closely related authority, which Congress

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

[11] 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.").

[12] *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 States or frustrates the purposes of the national legislation,

specifically addressed in section 484 to enable national banks to avoid inconsistent and potentially disruptive application of standards by State authorities. Together, Federal preemption and the OCC's exclusive visitorial authority are defining characteristics of the national bank charter.

Application of Federal Law to the Operating Subsidiaries

In section 121 of the GLBA, Congress expressly acknowledged that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[13]

Consistent with section 121, the OCC regulations state that "[a]n operating subsidiary conducts activities authorized under [12 C.F.R. § 5.34] pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[14] Addressing this point in the context of State laws, our regulations state that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[15]

In order for a subsidiary to operate in the manner contemplated by section 121 of GLBA, the subsidiary must be subject to the same regulation and supervision as is its parent national bank. As described at the outset of this letter, our regulations at § 5.34(e)(3) require that result. The terms and conditions governing the conduct of activities in an operating subsidiary include being subject to the same visitorial powers as are exercised with respect to the parent. Accordingly, the OCC's exclusive visitorial authority extends to operating subsidiaries of national banks.

The Operating Subsidiary conducts mortgage servicing activities permissible for a national bank pursuant to 12 U.S.C. § 24(Seventh), 12 U.S.C. § 371, and 12 C.F.R. § 5.34(e)(5)(v). As such, it is subject to the OCC's exclusive visitorial authority, and, pursuant to 12 U.S.C. § 484, State

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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"); *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).

[13] Pub. L. No. 106-102, § 121, 113 Stat. at 1378, *codified at* 12 U.S.C. § 24a(g)(3).

[14] 12 C.F.R. § 5.34(e)(3).

[15] 12 C.F.R. § 7.4006.

regulatory authorities do not have the right to exercise visitorial powers over the Bank or the Operating Subsidiary in the conduct of these activities, except where that visitorial authority is specifically granted by *Federal* law, which is not the case here.

It is relevant to observe that while State authorities may not examine and supervise the Operating Subsidiary, the Operating Subsidiary is subject to an extensive regime of Federal law and regulations and the Bank and the Operating Subsidiary are subject to comprehensive and continuous supervision by the OCC. Since the Bank is part of the OCC's Large Bank Program, its activities and those of its subsidiaries are examined on a continuous basis by teams of examiners specifically assigned to, and in most cases physically present at the facilities of, the Bank and its subsidiaries.

Finally, a State may not condition a national bank's exercise of a permissible Federal power on obtaining the State's prior approval. It is well established that a national bank's exercise of its Federally authorized powers is not subject to conditions or restrictions imposed by State law,[16] including State licensing requirements.[17] Accordingly, pursuant to 12 C.F.R. § 7.4006, the Operating Subsidiary also is not subject to State or local licensing requirements and is not required to obtain a license from the State of California in order to conduct business in that State.

This conclusion that the OCC's exclusive visitorial powers preclude the State of California from asserting supervisory authority or enforcement jurisdiction over the Operating Subsidiary is not intended to imply that any of the substantive provisions of the California Act apply to the Operating Subsidiary. Instead, under Federal law[18] and principles of preemption established by the courts,[19] provisions of the California Act may well be preempted. This opinion, however, addresses only the issues of licensing and visitorial authority.

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[16] *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 34 (1996); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 378 (1954); *Bank of America National Trust & Savings Association v. Lima*, 103 F. Supp. 916, 918, 920 (D. Mass. 1952); Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, to Thomas A. Plant and Daniel W. Morton ("To the extent that a state asserts the right to restrict or condition a national bank's exercise of . . . Federally granted powers, that state's law will be preempted."). 66 Fed. Reg. 28593 (May 23, 2001).

[17] *See First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990) (the National Bank Act precludes a State regulator from prohibiting a national bank, through either enforcement action or a license requirement, from conducting an activity that the Comptroller has reasonably determined is authorized by the National Bank Act); *Ass'n. of Banks in Insurance, Inc. v. Duryee,* 55 F. Supp. 2d 799, 812 (S.D. Ohio 1999), *aff'd,* 270 F.3d 397 (6th Cir. 2001) (even the most limited aspects of State licensing requirements such as the payment of a licensing fee are preempted because they "constitute impermissible conditions upon the authority of a national bank to do business within the state"). The OCC also has opined previously that State laws purporting to require the licensing of activities authorized for national banks under Federal law are preempted. *See* OCC Interpr. Ltr. No. 749 (Sept. 13, 1996) *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-114 (State law requiring national banks to be licensed by the State to sell annuities would be preempted); OCC Interpr. Ltr. No. 644 (March 24, 1994), reprinted in [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,553 (State registration and fee requirements imposed on mortgage lenders would be preempted).

[18] *See*, *e.g.*, 12 U.S.C. §§ 371, 1735f-7, 1735f-7a, and 3801 *et. seq*.

[19] *See, e.g.,* the cases cited in note 12, *supra.*

I hope the foregoing is helpful in explaining the applicability of the OCC's exclusive visitorial powers and the inapplicability of State licensing laws to the Operating Subsidiary. Please do not hesitate to contact my office at (202) 874-5200 or MaryAnn Nash, Counsel, in our Law Department at (202) 874-5090 if you have any questions or if you need any additional information.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel