Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #788
July 1997
12 C.F.R. 4, Subpart C

June 18, 1997

The Honorable Terry D. Terrell, Judge
Circuit Court in and for Santa Rosa County
c/o M.C. Blanchard Judicial Center
190 Governmental Center
Pensacola, Florida 32501

Re: First National Bank of Florida v. Austin, No. 96-1790-CA-01-CON

Dear Judge Terrell:

Counsel to First National Bank has informed the Office of the Comptroller of the Currency (OCC), as he is required to do by OCC regulations, that your court has ordered the bank to produce 12 years of OCC examination reports for in camera inspection by June 20. Because the production would cause a violation of federal law, we have directed bank counsel not to produce the reports to you. This letter explains our action and suggests a means of resolving the matter.

Examination reports are not public documents. Because they are sensitive, Congress has seen fit to exempt them from the mandatory disclosure provisions of the federal Freedom of Information Act. See 5 U.S.C. § 552(b)(8). Moreover, the federal appellate courts have held that examination reports are protected by the bank examination privilege. In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992). The privilege belongs to the OCC. First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994).

Under federal law, an examination report is non-public OCC information, as that term is defined in 12 C.F.R.§ 4.32(b). As such, the examination report "is the property of the Comptroller [and] is loaned to the bank or holding company for its confidential use only." 12 C.F.R. § 4.32(b)(2). Further,

> Without OCC approval, no person, national bank or other entity, including one in lawful possession of non-public OCC information under paragraph (b)(2) of this section, may disclose information covered by this subpart in any manner, except: (A) After the requester has sought the

> information from the OCC pursuant to the procedures set forth in this subpart; and (B) As ordered by a Federal court in a judicial proceeding in which the OCC has had the opportunity to appear and oppose discovery.

12 C.F.R. § 4.36(b). The federal regulation goes on to provide that "Any person who discloses or uses non-public OCC information except as expressly permitted by the Comptroller of the Currency or as ordered by a Federal court . . . may be subject to the penalties provided in 18 U.S.C. 641." 12 C.F.R. § 4.36(b)(1)(ii).

These regulations are valid federal regulations adopted after notice and comment, and the bank is expected to comply with them.

The state court lacks the authority to order the production of federal property. Under the Supremacy Clause of the U.S. Constitution, the state court must allow federal law to prevail over state rules of civil procedure that otherwise would authorize the state court to order production. Moreover, an order by a state court disposing of federal property is an action against the federal government and is barred by the doctrine of sovereign immunity. See Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989) (assertion of state court authority to override EPA regulation "clearly violates the Constitution's Supremacy Clause."); Houston Business Journal, Inc. v. OCC, 86 F.3d 1208, 1211-1213 (D.C. Cir. 1996)("In state court the federal government is shielded by sovereign immunity, which prevents the state court from enforcing a subpoena.").

In a virtually identical situation, a federal court issued an injunction against a state court judge "from attempting to coerce First Federal Savings and Loan Association, through the use of any sanction authorized by Rule 37, Arizona Rules of Civil Procedure, into disclosing any examination reports prepared by examiners of the Federal Home Loan Bank Board." Federal Home Loan Bank Board v. Superior Court of the State of Arizona, 494 F. Supp. 924, 927 (D. Ariz. 1980). As the court noted, the examination reports are not the property of the financial institution but of the federal regulatory agency. Id. The OCC discussed a similar situation in a Jan. 5, 1993 letter to a state court judge in Illinois, which letter interpreted the predecessor regulation to 12 C.F.R. 4, Subpart C. This letter is reprinted in Fed. Banking L. Rep. (CCH) ¶ 83,450 [1992-93 Transfer Binder].

The proper course of action here is for the party seeking access to the examination reports to file a request with the OCC's Director of the Litigation Division in Washington, D.C., as specified in 12 C.F.R. § 4.34(a). The request should contain the material required in 12 C.F.R. § 4.33. Of particular importance is an explanation of why the OCC's examination reports may be relevant to the issues in the case and why other, less sensitive material (e.g., bank-created documents and testimony) will not suffice. Since it is unlikely that examination reports spanning 12 years could be relevant to this case, the requester should at a minimum provide the date of the loan and the name of the appraiser, if known.

Please bear in mind that the examination reports may contain nothing of relevance to this case. A typical bank examination report discusses only a small fraction of the loans in a bank's portfolio. Even when a loan is discussed, most of the material is drawn from the bank's loan file, which is available for discovery to the litigants. Any opinions expressed by the examiner are privileged under the bank examination privilege, unless the OCC elects to waive the privilege. In re Subpoena, supra.

The procedure outlined above does not apply to formal agreements and cease and desist orders. By law, 12 U.S.C. § 1818(u)(1)(A), these enforcement documents are public and, if any exist with respect to this bank, we will supply them on request.

Sincerely yours,

/s/

Robert B. Serino
Deputy Chief Counsel