



---

Comptroller of the Currency  
Administrator of National Banks

---

Washington, DC 20219

**Interpretive Letter #971**  
**September 2003**  
**12 USC 24(7)**

January 16, 2003

Reginald S. Evans, Esq.  
Chief Counsel  
Pennsylvania Department of Banking  
333 Market Street, 16th Floor  
Harrisburg, PA 17101-2290

Subject: [ *Op. Sub* ]

Dear Mr. Evans:

This letter responds to your letter dated September 17, 2002, in which you ask a number of questions concerning the manner in which the Office of the Comptroller of the Currency (“OCC”) supervises operating subsidiaries of national banks. Many of these questions relate specifically to the OCC’s supervision of [ ] (“[ *Op. Sub* ]”), an operating subsidiary of [ *NB* ], [ *City, State* ] (“the Bank”). [ *Op. Sub* ] is incorporated in [ *State2* ].

The tenor of your questions suggests that Pennsylvania has the authority to supervise the activities of [ *Op. Sub* ] and, by implication, other operating subsidiaries of national banks. However, federal law and OCC regulations vest the OCC with exclusive “visitorial” powers over national banks and their operating subsidiaries.<sup>1</sup> Those powers include examining national banks, inspecting their books and records, regulating and supervising their activities pursuant to federal banking law, and enforcing compliance with federal or any applicable state law concerning those activities.<sup>2</sup> Federal law thus limits the extent to which any other governmental entity may exercise visitorial powers over national banks and their operating subsidiaries. Our response to your letter is provided to further the state’s understanding of the OCC’s supervision of national bank subsidiaries, but does not alter the jurisdiction established by federal law.

The OCC has urged state officials to contact the OCC if they have any information regarding allegations of violation of particular state laws by national banks or their subsidiaries.<sup>3</sup> In

---

<sup>1</sup> 12 U.S.C. § 484(a); 12 C.F.R. § 7.4006.

<sup>2</sup> Advisory Letter No. 2002-9 (Nov. 25, 2002); 12 C.F.R. § 7.4000(a)(2).

<sup>3</sup> Advisory Letter No. 2002-9 at 4.

addition, any consumer complaints concerning any part of the operations of any national bank or operating subsidiary, including the Bank and [ **Op. Sub** ], are referred to the OCC Customer Assistance Group (“CAG”), which is located in Houston, Texas. The CAG investigates the complaint, with the assistance of other OCC units where appropriate,<sup>4</sup> and recommends appropriate action.

### The Nature and Scope of OCC Examinations

Many of your questions relate to the OCC’s examination policies and procedures. For example, you ask questions concerning the scope of OCC examinations and the laws with which national banks and their operating subsidiaries must comply. The OCC conducts comprehensive examinations of a national bank’s business, including its compliance with principles of safe and sound banking and its compliance with applicable laws. In addition, the OCC conducts targeted examinations that may cover one or more elements of a comprehensive examination, such as compliance with specific laws. The OCC has issued substantial guidance, which should provide more detailed answers to your questions. Copies of those materials are enclosed.

National banks have express authority to create operating subsidiaries, which may engage in any activity permissible to the parent bank itself.<sup>5</sup> Generally, an operating subsidiary is a corporation or similar entity, in which a national bank owns more than 50 percent of the voting interest, or otherwise maintains a controlling interest.<sup>6</sup> Because the activities of an operating subsidiary are limited to activities in which the parent bank could engage directly, an operating subsidiary is in practice a separately incorporated division or department of the parent bank. Thus, the OCC’s standards in examining [ **Op. Sub** ] are the same standards that apply to OCC examinations of the Bank. Consistent with the guidance enclosed with this letter, the OCC’s examination of [ **Op. Sub** ] addresses compliance with applicable laws, such as consumer protection laws, as well as compliance with standards of safe and sound banking.

[ **Op. Sub** ] engages in subprime mortgage lending. Because of the safety and soundness and compliance risks posed by these lending programs, the OCC has published additional guidance relating to subprime lending activities. The OCC relies on this guidance in examining [ **Op. Sub** ] and other subprime lenders and, therefore, applies the same standards to [ **Op. Sub** ] as it would to any national bank or operating subsidiary engaged in subprime lending activities. Copies of this guidance are enclosed for your reference.

In examining the lending function of a national bank or an operating subsidiary, the OCC typically reviews a sample of loans owned by the institution. This sample generally will include larger loans and loans that the institution has previously identified as problem loans. Through this review, the OCC will determine the quality of the loans (*e.g.*, the likelihood of repayment),

---

<sup>4</sup> For example, attorneys in the Law Department may provide legal advice if the matter involves questions of law.

<sup>5</sup> See generally 12 C.F.R. § 5.34.

<sup>6</sup> 12 C.F.R. § 5.34(e)(2).

the adequacy and completeness of the information concerning the loan and the borrower, and whether the lending function is being carried out in compliance with applicable laws. The OCC evaluates the adequacy of all elements of the institution's business, including earnings, assets, management, liquidity, sensitivity to market risk, and information systems, as well as specialty areas such as any trust operations that may exist. The examination process is intended to provide a high level of assurance that each aspect of an institution's business is conducted on a safe and sound basis and in compliance with applicable laws.

[ *Op. Sub* ] generally does not retain the loans that it originates, but instead sells them in the secondary market shortly after origination. Based on those activities, the OCC reviews [ *Op. Sub* ]' lending function to determine compliance with all applicable laws and principles of safety and soundness.

### Applicability of State Law

Some of your questions relate to the applicability of state (and federal) law to operating subsidiaries. For example, you ask whether state consumer protection laws apply to national bank operating subsidiaries. The OCC's regulations provide that state law applies to the operating subsidiary of a national bank "to the same extent that those laws apply to the parent national bank."<sup>7</sup> Questions about the applicability of state laws to national banks may be addressed in a variety of ways. In some cases, our regulations contain express provisions that address the applicability of state law to a national bank.<sup>8</sup> From time to time, the OCC also provides legal opinions that respond to specific requests and express our views about the applicability of particular state laws to national banks.<sup>9</sup> Preemption issues also may be resolved through litigation over the applicability of particular state laws to national banks.<sup>10</sup>

For example, courts have repeatedly recognized the essentially federal character of national banks,<sup>11</sup> and the Supreme Court has held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.<sup>12</sup> In one such

---

<sup>7</sup> 12 C.F.R. § 7.4006.

<sup>8</sup> *E.g.*, 12 C.F.R. §§ 7.5002(c) (furnishing products and services by electronic means), 34.4 (real estate lending), and 37.1(c) (debt cancellation contracts).

<sup>9</sup> *E.g.*, 66 Fed. Reg. 28,593 (May 23, 2001) (Michigan statute concerning motor vehicle loans); 65 Fed. Reg. 15,037 (March 20, 2000) (Pennsylvania statute concerning auctions and auctioneers).

<sup>10</sup> *The Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9<sup>th</sup> Cir. 2002); *Bank One Utah, N.A. v. Guttau*, 109 F.3d 844 (8<sup>th</sup> Cir. 1999).

<sup>11</sup> *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

<sup>12</sup> *See Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903), in which the Supreme Court explained:

decision, the Court noted that national banks are “instrumentalities” of the federal government and stated that “any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created.”<sup>13</sup>

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.<sup>14</sup> To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been “expressly and exclusively” given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with the national bank’s exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as “contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.”<sup>15</sup>

You also ask whether a litigant in a lawsuit against [ *Op. Sub* ] could pierce the corporate veil to recover damages from the Bank. This question would be more appropriately discussed in the context of litigation between [ *Op. Sub* ] and a customer or other third party involving a specific factual situation. In general, though, mere ownership of a subsidiary corporation does not result in liability on the part of the parent for acts of its subsidiary.

---

[Federal legislation concerning 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 numerous as the states. ... [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.

*See also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (the powers of national banks are “grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law”).

<sup>13</sup> *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 368, 369 (1923). *See also Bank of America*, 309 F.3d at 561 (state 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”).

<sup>14</sup> Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. *See* 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.*; 15 USC 1693 *et seq.*; 12 USC 2601 *et seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC’s supervisory standards.

<sup>15</sup> *Bank of America*, 309 F.3d at 559.

## OCC Supervision of [ *Op. Sub* ]

The OCC examines national banks and their operating subsidiaries on a regular basis. Federal law requires that the OCC examine national banks, such as the Bank, at least once every 12 months.<sup>16</sup> However, the OCC may examine an institution more frequently if warranted by the institution's asset size, condition, or other factors. For example, the largest national banks have on-site examination teams conducting continuous examinations. Thus, while it is impossible to predict the exact timing of OCC examinations of [ *Op. Sub* ] in the future, it appears very likely that the OCC will continue to conduct an examination of [ *Op. Sub* ] at least every 12 months, consistent with the federal statutory schedule for examining the Bank.

The OCC generally prepares letters transmitting the examination findings to [ *Op. Sub* ] and the Bank. Those letters are the equivalent of examination reports and, therefore, are considered confidential. Examination reports, along with other bank examination information, are exempt from disclosure under the Freedom of Information Act.<sup>17</sup> This information is also subject to a limited privilege from discovery in third-party litigation.<sup>18</sup> These protections reflect the sensitive nature of bank examination information and support the longstanding policy of the OCC not to provide examination reports to third parties. 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.*, 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 use of the information.

I hope the foregoing has been of assistance to you in understanding the nature of the OCC's supervision of [ *Op. Sub* ]. If you have any questions concerning this letter, please contact Frederick Petrick, Counsel, Litigation Division, at 202-874-5280, or Mary Ann Nash, Counsel, Legislative & Regulatory Activities Division, at 202-874-5090.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

Enclosures

---

<sup>16</sup> 12 U.S.C. § 1820(d)(1). If a bank has less than \$250,000,000 in assets and is in good condition, the OCC need only examine it at least once every 18 months. 12 U.S.C. § 1820(d)(4).

<sup>17</sup> 5 U.S.C. § 552(b)(8).

<sup>18</sup> *In re Subpoena Duces Tecum Served Upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System*, 967 F.2d 630 (D.C. Cir. 1992).