XII. Allowing States to Walk on Wall Street: The Proposed Accountability for Wall Street Executives Act

A. Introduction

One of the key features of the U.S. banking system is the dual-system of banking.[1] A bank in the United States can register with and be licensed by either a state or the Federal government.[2] Importantly, this creates different spheres of authority for states and the federal government when regulating banks.[3] Depending on its charter, a bank may be subject to oversight by the Office of the Comptroller of the Currency (OCC) or the appropriate state agency.[4] However, there is significant overlap in state and federal authority over banks.[5] In this way, the dual banking system generates issues concerning preemption, state regulatory authority, and consumer protection.[6]

In December 2017, a handful of Democratic Senators introduced the Accountability for Wall Street Executives Act (the Act).[7] The Act, if passed into law, would amend a section of the National Bank Act (NBA), 12 U.S.C. § 484, to include two new grants of authority to state governments.[8] First, the Act gives state financial regulators explicit authority to exercise visitorial powers over nationally

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[1] Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 1 (discussing proponents' and critics' views of the dual banking system as a feature of U.S. banking regulation).
[2] *Id*. at 3.
[3] *Id*. at 5.
[4] *Id*.
[5] *Id*. at 14 (recognizing that there are three general sources of authority operating over any financial institution that include: (1) the Federal Constitution; (2) the relevant state or federal law; and (3) the relevant administrative agency).
[6] *See* V. Gerard Comizio & Helen Y. Lee, *Understanding the Federal Preemption Debate and a Potential Uniformity Solution*, 6 BUS. L. BRIEF 51, 51 (2010).
[7] Press Release, Office of Sen. Dianne Feinstein, Feinstein, Harris, Warren, Blumenthal Introduce Bill to Empower State AG Enforcement for National Banks (Dec. 22, 2017), [hereinafter Feinstein Press Release] www.feinstein.senate.gov/public/index.cfm/press-releases?id=704125AF-78F9-479D-9C6F-A5E95419 CA2E [https://perma.cc/C8G7-CWDQ].
[8] Accountability for Wall Street Executives Act, S. 2272, 115th Cong. (2017).

chartered banks.[9] Second, the Act would allow state attorneys general to issue subpoenas to enforce applicable state law.[10] This Act is meant to address what some critics see as a flawed decision by the Supreme Court in *Watters v. Wachovia Bank*, N.A.[11] The Court held, under the National Bank Act, the federal government has exclusive domain in exercising "visitorial powers" over nationally charted banks.[12]

This article will examine the background behind state visitorial powers and regulatory authority over national banks and the consequences of the Accountability for Wall Street Executives Act for both states and banks. Section B defines "visitorial powers" and examines the critical cases of *Watters v. Wachovia Bank*, *N.A.* and *Cuomo v. Clearing House Association, L.L.C.* Section C then details the Accountability for Wall Street Executives Act. Finally, Section D explains some of the potential consequences for banking regulation if the Act becomes law.

B. The Background

1. Visitorial Powers and National Bank Oversight

The main issue the Act seeks to address is the exclusion of state banking authorities from exercising "visitorial powers" over national banks.[13] The term, used in the context of banking regulation, originates in the NBA, which states, "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ."[14] The term "visitorial powers" is not defined in the statute, but has been in use in the United States since "shortly after the Civil

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[9] *Id.* ("State auditors and examiners may . . . review [a bank's] records solely to ensure compliance with applicable State . . . laws upon reasonable cause to believe that the bank has failed to comply with such laws . . . .").

[10] *Id.* ("[A]n attorney general (or other chief law enforcement officer) of a State may issue subpoenas or administer oversight and examination to national banks or officers of national banks based upon reasonable cause to believe that the national bank or an officer of a national bank has failed to comply with applicable State laws.").

[11] 550 U.S. 1 (2007); *see* Feinstein Press Release, *supra* note 7 (characterizing the Act's language as repairing "language in the National Bank Act that the Supreme Court interpreted as limiting the visitorial powers of state law enforcers").

[12] *Watters*, 550 U.S. at 8.

[13] *See* S. 2272; Feinstein Press Release, *supra* note 7.

[14] National Bank Act, 12 U.S.C. § 484(a) (2012).

War."[15] In *Watters*, the Court detailed the common interpretation of visitorial powers in the context of the NBA.[16] The Court, in interpreting visitation in this context, stated, "'[v]isitation . . . is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.'"[17] The Court accepted acts of visitation include those found in current federal banking regulations.[18] 12 C.F.R. § 7.4000 codifies four actions included under visitorial powers:

> (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, including through investigations that seek to ascertain compliance through production of non-public information by the bank . . . .[19]

The OCC promulgated this rule as an interpretation of 12 U.S.C §458, and these four provisions are meant to be non-exhaustive.[20]

Visitorial powers are tools that states can utilize to enforce state laws against nationally chartered banks operating in their territory.[21] The ability to enter into a bank and seize its financial records is

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[15] Marcel C. Duhamel, *Predatory Lending and National Banks: The New Visitorial Powers*, *Preemption and Predatory Lending Regulations*, 121 BANKING L.J. 455, 456 (2004).
[16] *Watters*, 550 U.S. at 14.
[17] *Id*. (quoting Guthrie v. Harkness, 199 U.S. 148 (1905)).
[18] *Id.*
[19] 12 C.F.R. § 7.4000 (2015).
[20] Duhamel, *supra* note 15, at 457 ("The rule sets out a nonexhaustive list of activities that the OCC considers to represent an exercise of visitorial power . . . .").
[21] *See* Justin O'Brien & Olivia Dixon, *The Common Link in Failures and Scandals at the World's Leading Banks*, 36 SEATTLE U. L. REV. 941, 965 (2013) (detailing the power of the New York State Attorney General to issue subpoenas against banks and the Court's treatment of that power in *Cuomo*).

a key tool for building and prosecuting a case against a bank.[22] One area in which states seek to enforce their laws against nationally chartered banks is consumer protection.[23] However, in the case of *Watters v. Wachovia Bank, N.A.*,[24] the Supreme Court found Michigan was preempted from using visitorial powers to regulate the state chartered real-estate subsidiary of Wachovia Bank.

2. The Watters *Decision*

In the 1990s, Wachovia Bank, a nationally charted bank, exercised its mortgage lending capacity through a state-charted subsidiary, Wachovia Mortgage.[25] Wachovia Mortgage operated in the state of Michigan and under Michigan law, was subject to supervision by the Office of Financial and Insurance Services (OFIS).[26] The question was whether Wachovia's "mortgage lending activities remain outside the governance of state licensing and auditing agencies when those activities are conducted, not by a division or department of the bank, but by the bank's operating subsidiary."[27] Wachovia Bank and Wachovia Mortgage believed they were not subject to OFIS licensing and auditing authority and filed suit in 2003, claiming Wachovia Mortgage, as a subsidiary of a nationally charted bank, was only subject to supervision by the OCC.[28] The Supreme Court decided in favor of Wachovia.[29]

The Court relied on the doctrine of preemption to hold that the state of Michigan could not exercise visitorial powers over the Wachovia Mortgage subsidiary.[30] The Court stated, "[r]ecognizing the burdens and undue duplication state controls could produce, Congress

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[22] *See generally id.* (discussing various enforcement actions in New York in which the Attorney General utilized the subpoena power to build cases that would ultimately be brought to court).
[23] *See* Duhamel, *supra* note 15, at 469.
[24] 550 U.S. 1 (2007).
[25] *Id*. at 8.
[26] *Id*.
[27] *Id*. at 7.
[28] *Id*. at 9 (stating Wachovia's position that Michigan could not interfere with the OCC's exclusive visitorial authority over Wachovia and its subsidiaries).
[29] Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007) ("Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses . . . .").
[30] *Id*. at 18 ("We have never held that the preemptive reach of the NBA extends only to a national bank itself.").

included in the NBA an express command: 'No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . .'"[31] Accordingly, the Court held Michigan could not exercise the supervision and regulation it sought to employ over Wachovia Mortgage.[32] If Michigan was allowed to exercise such authority, it could significantly interfere with the federal regulatory scheme.[33] Therefore, due to the clear regulatory scheme established by and the exclusive grant of visitorial powers inherent in the NBA, Michigan could not subject Wachovia to its state licensing and auditing regime.[34]

Importantly, the Court's decision in *Watters* applied to a state-chartered subsidiary of a national bank.[35] While it was clear the state could exercise no visitorial authority over the national bank itself, the Court's decision in *Watters* appears to prevent states from exercising any authority over the national bank's state-chartered subsidiary.[36] However, the Court would later clarify that states are not wholly powerless in regulating banking within their borders.[37]

3. The Cuomo *Clarification*

In *Cuomo v. Clearing House Ass'n, LLC*, New York's Attorney General sent information requests "in lieu of subpoena" to several large banks in order to determine if the banks were in violation of the state's fair lending laws.[38] The banks, through the Clearing House Association, filed suit to enjoin the Attorney General from asking for any non-public information, as such a request would be an impermis-

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[31] *Id*. at 14 (quoting 12 U.S.C. §484(a)).
[32] *Id.* at 14–15 ("Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks.").
[33] *Id*. at 17–18.
[34] *Id.* at 21–22.
[35] *Id*. at 21 ("The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary . . . .").
[36] *See id*. at 21–22. ("[S]tate regulators cannot interfere with the 'business of banking' by subjecting national banks or their OCC-licensed operating subsidiaries to . . . surveillance under rival oversight regimes.").
[37] *See* Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 536 (2009).
[38] *Id*. at 522–23 (detailing the history of the controversy between the NY Attorney General and the Clearing House Association).

sible exercise of visitorial powers by the state.[39] Writing for the Court, Justice Scalia narrowed the preemption issue.[40] The Court determined "the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign's 'visitorial powers' and its power to enforce the law are two different things."[41] Therefore, the OCC, in promulgating 12 C.F.R. § 7.4000, erred when it included "prosecuting enforcement actions" as a part of the interpreted visitorial powers precluded by 12 U.S.C. § 484.[42] The Court explained, "[w]hen . . . a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer."[43] The "sovereign-as-law-enforcer" may utilize court processes, such as a subpoena during discovery, to gather information to enforce a state law in court.[44]

However, while the Court made a clarifying distinction in *Cuomo*, it also further muddied the waters. A central issue in *Cuomo* was the New York Attorney General's information request.[45] This request was sent "in lieu of subpoena," but the implication was that non-compliance with the information request would lead to the issuance of an actual subpoena.[46] The Court, however, stated the Attorney General's use of the subpoena in this instance would be an impermissible exercise of visitorial powers because the Attorney General had filed no action against the banks. The Attorney General must first file an action and then secure information as part of that litigation in order to properly execute the role of sovereign-as-law-enforcer.[47] Because the Attorney General had no pending action against the banks but was instead seeking information not in connection with any enforcement litigation, he was improperly exercising the visitorial

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[39] *Id*. at 523 (explaining that the banks claimed, "that the Comptroller's regulation promulgated under the National Bank Act prohibits that form of state law enforcement against national banks").
[40] Notably, Justice Scalia dissented in Watters.
[41] *Cuomo*, 557 U.S. at 529.
[42] *Id.* at 536 ("Such a lawsuit is not an exercise of 'visitorial powers' and thus the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts.").
[43] *Id*.
[44] *Id*. at 531.
[45] *Id*. at 536.
[46] *Id*.
[47] *Id.*

power of a regulator.[48] Therefore, the information request was improper because the Attorney General had no power to acquire the information; the Attorney General can secure a subpoena through the courts, but cannot issue a subpoena for information against a national bank under their own authority.[49] Thus, while the Court affirmed states can enforce their laws against national banks by filing an action in court and acquiring information through court processes, the Court failed to provide for how a state enforcement official might build a case to the point where a lawsuit could be filed.[50] If a state attorney general cannot gain access to a bank's financial information though an information request or subpoena prior to filing an action, it becomes difficult for the attorney general to know if the bank is actually violating the law. The Accountability for Wall Street Executives Act was introduced to clear the murky waters stemming from *Watters* and *Cuomo*.[51]

C. The Accountability for Wall Street Executives Act

The Accountability for Wall Street Executives Act was introduced in the U.S. Senate on December 22, 2017 by Senators Feinstein, Harris, Warren, and Blumenthal.[52] According to its sponsors, the Act aims to give state attorneys general "all the tools they need to investigate potential violations of state laws."[53] The bill would do this by accomplishing three main goals: (1) clarify that states can exercise visitorial powers contrary to the Supreme Court's interpretation of 12 U.S.C. § 484; (2) ensure that state attorneys general can utilize the subpoena against national banks; and (3) build a more stable financial system by putting "two cops on the block" to supervise national banks at the state and federal levels.[54] Interestingly two of the Act's sponsors, Senators Harris and Blumenthal, are both former state attorneys

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[48] *Id.*
[49] *Id*. ("Here the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General's issuance of subpoena on his own authority . . . .").
[50] *See id*. at 531 (discussing how the Attorney General should utilize the power of the court and of court processes such as court orders and discovery to gather information).
[51] Feinstein Press Release, *supra* note 7.
[52] *Id.*
[53] *Id.*
[54] *Id*.

general for California and Connecticut, respectively.[55] Senator Harris, while attorney general, actually experienced the direct consequences of the Supreme Court's decisions in *Watters* and *Cuomo* when she was unable to pursue a fraudulent mortgage and foreclosure investigation of Steven Mnuchin, then head of OneWest Bank, due to limited authority under the *Watters* ruling.[56]

The Act mechanically functions as an addition of new statutory language inserted after 12 U.S.C. §484(a).[57] First, the Act adds language concerning state exercise of visitorial powers.[58] It details that state authorities "may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws . . . ."[59] Second, the Act clarifies the use subpoena power by state attorneys general.[60] The Act reads, "an attorney general . . . may issue subpoenas or administer oversight and examination to national banks or officers of national banks based upon reasonable cause to believe that the national bank or an officer of a national bank has failed to comply with applicable State laws."[61] As this language demonstrates, the Act addresses both the preemption issue in *Watters* and the subpoena issue in *Cuomo*.

D. Consequences of the Accountability for Wall Street Executives Act

If Congress enacts the Accountability for Wall Street Executives Act into law, it will undoubtedly change the regulatory environment for national banks by increasing state level regulation. National banks oppose the addition of state oversight on top of OCC oversight because they distrust the experience of state regulators.[62] On the other

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[55] *Id.*
[56] Nash Jenkins, *Exclusive: Senate Democrats Are Gunning for Greater Wall Street Oversight*, TIME (Dec. 22, 2017), http://time.com/5077068/accountability-wall-street-executives-congress/ [https://perma.cc/2FXS-YL6W] (discussing the controversy over Senator Harris's actions in not prosecuting the executives of OneWest Bank).
[57] Accountability for Wall Street Executives Act, S. 2272, 115th Cong. (2017).
[58] *Id.*
[59] *Id.*
[60] *Id*.
[61] *Id.*
[62] *See Bank Regulation*, 36 BANKING & FIN. SERVICES POL'Y REP. 20, 22 (2017) ("According to [the Comptroller], the label 'national bank' has helped bestow confidence in individual institutions and the system as a whole

hand, critics of the current system see the OCC as an ineffective regulator and believe national banks use their national status to escape liability under state laws.[63] Furthermore, proponents of greater state regulatory authority over national banks are particularly concerned about preventing another housing crisis.[64]

Cuomo reopened the door to continued state action against national banks but removed the door handle by rejecting New York's Attorney General's use of the subpoena. As *Cuomo* articulated, a subpoena to secure information from national banks is an impermissible exercise of visitorial powers while enforcement of state law through court procedures is permissible.[65] If a state attorney general can neither exercise visitorial powers to examine a national bank's finances nor secure that information via subpoena, it becomes incredibly difficult to bring an enforcement action in court. The attorney general needs to be able to gather information about any alleged wrongdoing by a bank prior to bringing an action in court. The language of the Act would allow state attorneys general to better enforce state laws against national banks in court by attorneys general a tool to conduct proper investigations before bringing an action.

Surprisingly, the language in the Act on visitorial powers is remarkably limited. States are given the right to exercise visitorial powers only in the limited circumstances of enforcing "unclaimed property or escheat laws."[66] The Act's sponsors must have understood that giving states concurrent visitorial authority with the OCC has the

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because that label is accompanied by value-added supervision and access to the best experts in regulation, risk management, compliance, legal, and economics available.").

[63] Comizio & Lee, *supra* note 6 (reporting that critics argue "that national banks, with a willing partner in recent years in their primary federal regulator, the [OCC] . . . have invoked preemption to escape a wide range of state consumer protection laws, exposing consumers to abusive and predatory lending practices").

[64] *Id*. ("[Critics] also charge that during the boom preceding the financial crisis, the OCC and other federal regulators failed to police mortgage and credit card lending abuses, even when state regulators offered specific warnings.").

[65] Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 531 (2009) (observing that, in court processes, "[j]udges are trusted to prevent 'fishing expeditions,'" while visitorial powers are broader in application, and the use of the subpoena by the attorney general has the same broad investigative scope traditionally understood as a visitorial power).

[66] Accountability for Wall Street Executives Act, S. 2272, 115th Cong. (2017).

potential to create significant confusion.[67] The real regulatory teeth from this legislation appear in the form of the subpoena—this is the tool state regulators will use to gather information from banks for enforcement actions in court.[68]

E. Conclusion

As of March 2018, the Accountability for Wall Street Executives Act remains only a proposed bill in the Senate Judiciary Committee.[69] It seems likely, given the current political climate, that the bill will die in committee. However, it is still worthwhile to consider the bill's potential effects. A new election cycle could bring change that would put this bill on the path to becoming law. The Act's passage would enable states to exercise greater regulatory authority over national banks than they may currently exercise by granting the use of the subpoena. Accordingly, regulators should keep the Act in mind when formulating future regulatory regimes, as the Act would expand state oversight of national banks, an ability currently limited by *Watters* and *Cuomo*.

Connor O'Dwyer[70]

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[67] Watters v. Wachovia Bank, N.A., 550 U.S. 1, 13–14 (2007) (describing the motivations of Congress in passing the NBA as preventing "diverse and duplicative superintendence of national bank's engagement in the business of banking," and the court stated Congress recognized "the burdens and undue duplication state controls could produce").

[68] *See* Feinstein Press Release, *supra* note 7.

[69] *All Information (Except Text) for S.2272*, CONGRESS.GOV (Mar. 2, 2018, 6:00 PM), https://www.congress.gov/bill/115th-congress/senate-bill/2272/all-info?r=1 [https://perma.cc/LK33-A8Z4].

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THE DEVIL YOU KNOW: A SURVEY EXAMINING HOW RETAIL INVESTORS SEEK OUT & USE FINANCIAL INFORMATION AND INVESTMENT ADVICE

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