

the rule lists several types of state laws that, as a general matter, are not preempted. In § 7.4009, the proposal first states that national banks may exercise all powers authorized to it under Federal law. Second, the proposal states that except as otherwise made applicable by Federal law, state laws that obstruct, in whole or in part, or condition, a national bank's exercise of powers granted under Federal law are not applicable. Finally, the proposal lists several types of state laws that, as a general matter, are not preempted.

As with the proposed amendments to part 34, the proposed amendment to part 7 governing non-real estate lending includes a safety and soundness-based anti-predatory lending standard. As proposed, § 7.4008(b) states that a national bank shall not make a loan described in § 7.4008 based predominantly on the foreclosure value of the borrower's collateral, rather than on the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources. As noted in the discussion of proposed amendments to part 34, this requirement reflects a bedrock principle of sound banking practices and is consistent with views repeatedly expressed by the OCC concerning the safety and soundness implications arising from loans made in reliance on the foreclosure value of the borrower's home or other collateral.

Non-real estate lending also is subject to section 5 of the FTC Act, which makes unlawful "unfair or deceptive acts or practices" in interstate commerce.⁸⁹ Together, the new prudential standard proposed in § 7.4008(b) and the preexisting standard under the FTC Act, plus Federal laws such as the Truth-in-Savings Act, ensure that national banks are subject to consistent and uniform Federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their deposit-taking and lending activities. We invite interested parties to suggest other general standards that would be appropriate to apply to national bank lending activities that would further these objectives.

Deposit-taking and lending are powers specifically enumerated in statute. The same Federal statute—12 U.S.C. 24 (Seventh)—also grants to national banks the broader power to engage in activities that are part of, or incidental to, the business of banking. Questions about the applicability of

state law are resolved, as we have described, with reference to the Federal character of the national bank charter; the fact that national bank powers derive exclusively from Federal law; and the purposes of the National Bank Act, including Congress's creation of a "complete" national banking system, free from state control, and subject to uniform, national standards. In this context, the Supreme Court and the lower Federal courts have said that state laws affecting the exercise of Federally authorized powers ordinarily do not apply to national banks.⁹⁰ This is so whether the Federal grant of authority is specific, as in the case of deposit-taking or lending, or general, like the powers clause in section 24 (Seventh).

The OCC's regulations already address the applicability of state law with respect to a number of specific types of activities. The question may persist, however, about the extent to which state law may govern powers or activities that have not been addressed by Federal court precedents or OCC opinions or orders. Accordingly, proposed new § 7.4009 provides that state laws do not apply to national banks if they obstruct, in whole or in part, or condition, a national bank's exercise of powers granted under Federal law.⁹¹

In some circumstances, of course, Federal law directs the application of state standards to a national bank. The wording of § 7.4009 reflects the fact that a Federal statute may require the application of state law,⁹² or it may incorporate—or "Federalize"—state standards.⁹³ In those circumstances, the state standard applies. State law may also apply if it has only an incidental

effect on a national bank's exercise of its Federally authorized powers or if it is otherwise consistent with national banks' uniquely Federal status. Like the other provisions we are proposing, § 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."⁹⁴ As the Ninth Circuit recently has said: "[S]tates 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."⁹⁵ 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 surrounds and supports the conduct of that business. They promote national banks' ability to conduct business; they do not obstruct the ability of national banks to exercise their Federally-granted powers.

E. Application of Proposed Changes to Operating Subsidiaries

In accordance with our regulation set out in 12 CFR 7.4006, the rules governing national bank deposit-taking and lending apply equally to national bank operating subsidiaries. The OCC and Federal courts long have recognized that national banks may exercise permissible Federal powers through the separately incorporated operating subsidiary. Our regulations make clear that activities conducted in operating subsidiaries must be permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking.⁹⁶ Moreover, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."⁹⁷ These regulations reflect express Congressional recognition in section 121 of the Gramm-Leach-Bliley Act 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

⁸⁹ See *Barnett*, 517 U.S. at 32.

⁹⁰ We note that the OTS has issued a regulation providing generally that state laws purporting to address the operations of Federal savings associations are preempted. See 12 CFR 545.2. The extent of Federal regulation and supervision of Federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized activities of both types of entities. Compare, e.g., 12 U.S.C. 1464(a) (OTS authorities with respect to the organization, incorporation, examination, operation, regulation, and chartering of Federal savings associations) with 12 U.S.C. 21 (organization and formation of national banking associations), 481 (OCC authority to examine national banks and their affiliates), 484 (OCC's exclusive visitorial authority), 93a (OCC authority to issue regulations).

⁹¹ See, e.g., 15 U.S.C. 6711 (insurance activities of national banks are "functionally regulated" by the states, subject to the provisions on the operation of state law contained in section 104 of the Gramm-Leach-Bliley Act).

⁹² See, e.g., 12 U.S.C. 92a (permissible fiduciary activities for national banks determined by reference to state law).

⁹³ *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (holding that shares held by shareholders of a national bank were lawfully subject to state taxation) ("All [national banks'] contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect debts, and their liability to be sued for debts, are also based on State law.").

⁹⁴ *Bank of America*, 309 F.3d at 559.

⁹⁵ See 12 CFR 5.34(e)(3).

⁹⁶ *Id.*

⁸⁹ 15 U.S.C. 45(a)(1).