

2. Federal Law and Regulations

The real estate lending activities covered by the GFLA are authorized for national banks by Federal law and regulated under Federal standards.

a. National banks' real estate lending authority. Federal law authorizes national banks to engage in real estate lending activities and vests in the OCC comprehensive authority to regulate and supervise those activities:

[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.⁶ The exercise of the powers granted by section 371 is not conditioned on compliance with any state requirement, but subject only to a Federal law and such rules and regulations as the Comptroller may prescribe.⁷

The OCC has implemented section 371 in regulations set forth at 12 CFR part 34.⁸ Twelve CFR 34.3 establishes the general rule that a national bank and its operating subsidiaries may engage in real estate lending, and qualifies this rule by reference only to the "terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." Twelve CFR 34.4(a) expressly provides that five types of state law limitations are not applicable to real estate loans made by national banks and their operating subsidiaries:

(a) *Specific preemption.* A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to State law limitations concerning:

- (1) The amount of a loan in relation to the appraised value of the real estate;
- (2) The schedule for the repayment of principal and interest;

(3) The term to maturity of the loan;

(4) The aggregate amount of funds that may be loaned upon the security of real estate; and

(5) The covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan. Twelve CFR 34.4(b) states:

The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.

b. Permissible rate of interest for national banks. The limitations on charges that comprise rates of interest on loans by national banks are determined exclusively by Federal law.⁹ Under 12 U.S.C. 85, a national bank is authorized to charge interest based on the laws of the state in which the bank is located.¹⁰ OCC regulations further provide that:

A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state.¹¹

This "most favored" lender status permits a national bank to contract with borrowers in *any state* for interest at the maximum rate permitted for any state-chartered or licensed lending institution by the *law of the state in which the national bank is located.*

c. National banks' authority to charge fees. Twelve U.S.C. 24(Seventh)

authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking¹² as well as to engage in certain specified activities listed in the statute. Mortgage lending is expressly authorized for national banks and is thus inarguably part of the business of banking. Moreover, "negotiating * * * promissory notes" is one of the activities specified in section 24(Seventh). A bank's authority to provide these products or services to its customers necessarily encompasses the ability to charge a fee for the product or service.¹³

⁹ See *Beneficial Nat'l Bank v. Anderson*, 123 S.Ct. 2058 (2003).

¹⁰ See *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

¹¹ 12 CFR 7.4001(b); see also *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972).

¹² The powers clause of section 24(Seventh) provides that a national bank may "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24(Seventh). See *NationsBank v. Variable Annuity Life Ins. Corp.*, 513 U.S. 251 (1995) (the "business of banking" is not limited to the list of powers enumerated in section 24(Seventh)).

¹³ Cf. *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954) (stating, in the context of bank

The authority to charge fees for the bank's services is expressly set out in 12 CFR 7.4002(a), which provides:

(a) Authority to impose charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges.¹⁴

d. Standards applicable to national bank operating subsidiaries. Pursuant to their authority under 12 U.S.C. 24(Seventh) to exercise "all such incidental powers as shall be necessary to carry on the business of banking," national banks may use separately incorporated entities to engage in activities that the bank itself is authorized to conduct. The OCC's Operating Subsidiary Rule, codified at 12 CFR 5.34, specifies the licensing requirements when national banks seek permission from the OCC to conduct business through an operating subsidiary.¹⁵ Pursuant to this licensing process, the OCC licenses the operating subsidiary as a means through which a national bank is authorized to conduct activities permissible for the bank itself. Under this regulation, "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority."¹⁶

The regulation further clarifies that in conducting permissible activities on behalf of its parent bank, 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."¹⁷ When established in

advertising, "[w]e cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business."

¹⁴ A bank's authority in this, as in all other, areas must be exercised in a manner that is consistent with safe and sound banking practices. Paragraph (b) of section 7.4002 sets out the factors that the bank should consider to ensure that its process for setting its fees and charges is consistent with safety and soundness. If a bank uses a decisionmaking process that takes these factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges pursuant to § 7.4002(a). National City has not sought, nor provided information to support, a determination by the OCC that its processes in deciding to charge the fees at issue here are consistent with safe and sound banking. However, as we have pointed out in other contexts, national banks are not required to obtain a determination from the OCC that their fees comport with § 7.4002 in order to be able to exercise the federal power to charge fees. See, e.g., OCC Interpretive Letter No. 934 (Aug. 20, 2001).

¹⁵ See 12 CFR 5.34(b).

¹⁶ 12 CFR 5.34(e)(1).

¹⁷ 12 CFR 5.34(e)(3).

⁶ 12 U.S.C. 371(a). The cross-reference in this provision is to the Federal requirement for safety and soundness standards that apply to real estate lending. The standards for national banks and their operating subsidiaries are set forth in 12 CFR part 34, Subpart D, Appendix A.

⁷ Federal legislation occasionally provides that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross-marketing activities subject to certain types of state restrictions expressly set out in the Gramm-Leach-Bliley Act (GLBA). See 15 U.S.C. 6701(d)(2)(B). There is no similar Federal legislation subjecting national banks' real estate lending activities to state law standards.

⁸ Some of the OCC's regulations, such as part 34, apply by their terms to national bank operating subsidiaries. See 12 CFR 34.1(b). As explained below, however, a national bank operating subsidiary is treated the same as its parent bank and, thus, is also subject to OCC regulations that do not expressly refer to national bank operating subsidiaries.