

law, the GFLA's attempt to prevent national banks from charging these fees is, therefore, preempted.

D. Certain GFLA Provisions Are Moot in Light of the Preceding Analysis

- *Structuring.* The GFLA provides that no person may avoid application of the law by dividing one loan transaction into separate parts or structuring a home loan transaction as an open-end loan for the purpose of evading a provision of the GFLA.

- *Severability.* As described above, the GFLA provides that if any portion of it is declared to be invalid or preempted by Federal law or regulation, the validity of its remaining provisions will not be affected.

- *Disclosure required.* Documents that create a debt or pledge property as collateral for a high-cost home loan must contain a notice specifying that the mortgage is subject to special rules under GFLA and that purchasers or assignees may be liable for all claims and defenses of the borrower.

The structuring provision has the salutary goal of preventing evasion of the state law. The question whether the provision applies to National City is moot, however, because, for the reasons set forth above, the substantive provisions of the GFLA are inapplicable. Accordingly, there is no state law to evade. For the same reason, the severability clause and disclosure requirements are also moot.

As mentioned above, some commenters argued that the OCC does not enjoy exclusive visitorial powers over national banks under 12 U.S.C. 484. These commenters assert that section 484 does not prevent state officials from suing in state courts to enforce applicable laws against national banks. It is unnecessary to address this issue, or other provisions related to enforcement of the GFLA, because the GFLA is not applicable to national banks.

E. Applicability of the GFLA to National Bank Operating Subsidiaries

As mentioned above, 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 have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct. This authority to operate through such subsidiaries has been expressly recognized for nearly 40 years.

In 1966, the OCC issued rules codifying and regulating the authority of national banks to engage in activities

through operating subsidiaries.¹⁰¹ The current version of this 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.¹⁰² 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. That this relationship involves the bank conducting activities through the operating subsidiary is reflected in the express language of the regulation, which provides that "[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."¹⁰³

Moreover, the regulation makes clear 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."¹⁰⁴ These regulations reflect express Congressional recognition in section 121 of the GLBA 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 conditions that govern the conduct of such activities by national banks."¹⁰⁵

¹⁰¹ See 31 FR 11459 (Aug. 31, 1966).

¹⁰² See 12 CFR 5.34(b).

¹⁰³ 12 CFR 5.34(e)(1).

¹⁰⁴ 12 CFR 5.34(e)(3).

¹⁰⁵ Pub. L. 106–102, section 121, 113 Stat. 1338, 1373 (1999), codified at 12 U.S.C. 24a(g)(3)(A) (emphasis supplied). One commenter argued that this section of GLBA only permits national banks to establish financial subsidiaries that are authorized to engage in activities that are not permissible for the bank and is intended solely to limit the authority of financial subsidiaries by stating that the definition of financial subsidiaries does not include operating subsidiaries. Thus, this commenter argues that this section of GLBA does not grant any powers and does not express any intent to bar the states from regulating operating subsidiaries. In *Nat'l City Bank of Indiana v. Boutris*, Civ. No. S–03–0655 GEB JFM (E.D.Cal. May 7, 2003), a Federal district court rejected a similar argument. In so doing, the Court noted that "[n]ot only does this language [of GLBA section 121] reference operating subsidiaries, it indicates the OCC exercises visitorial authority over them." *Id.* at 11. Moreover, as the Court also pointed out, the Report of the Senate Committee on Banking, Housing, and Urban Affairs on GLBA noted that:

For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national bank may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through

When established in accordance with the procedures mandated by the OCC's Operating Subsidiary Rule and approved by the OCC, the operating subsidiary is a Federally-authorized means by which a national bank may conduct Federally-authorized activities. Recognizing this status, courts have consistently treated the operating subsidiary and the national bank as equivalents, unless *Federal* law requires otherwise, in considering whether a particular activity was permissible for a national bank.¹⁰⁶ Recently, in *Wells Fargo Bank, N.A. v. Boutris*,¹⁰⁷ a Federal district court issued a permanent injunction enjoining the Commissioner of the California Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. In so doing, the Court took note of this well-established case law and concluded that "[t]he OCC's regulation authorizing national banks to conduct permissible banking business activities through operating subsidiaries is within its discretionary authority delegated to it by Congress and is a reasonable interpretation of the Act."¹⁰⁸ Similarly, in *National City Bank of Indiana v. Boutris*,¹⁰⁹ a Federal district court enjoined California officials from exercising visitorial powers over National City Bank of Indiana and its operating subsidiary, National City Mortgage Company.

In accordance with this longstanding regulatory and judicial recognition of operating subsidiaries as corporate extensions of the parent bank, OCC regulations specifically address the application of state law to national bank operating subsidiaries. That regulation provides:

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.¹¹⁰

subsidary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies.

S. Rep. No. 106–44, at 8 (1999).

¹⁰⁶ See *Variable Annuity Life Ins. Co.*, 513 U.S. at 254 (brokerage subsidiary acting as an agent in the sale of annuities); *Marquette*, 439 U.S. at 299 (credit card subsidiary); *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (subsidiary offering municipal bond insurance); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977) (motor vehicle leasing by subsidiary).

¹⁰⁷ 2003 WL 21277203 (E.D.Cal. May 9, 2003).

¹⁰⁸ *Id.* at *6.

¹⁰⁹ 2003 WL 21536818 (E.D.Cal. July 2, 2003).

¹¹⁰ 12 CFR 7.4006. One commenter argues that the OCC cannot rely on this regulation because the commenter contends that the OCC failed to abide by Executive Order 13132 in promulgating it. We