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(d) *Other legal requirements.* When entering into arrangements, of the types described in paragraphs (a) and (b) of this section, and in conducting operations pursuant to those arrangements the bank must ensure that each arrangement complies with 12 U.S.C. 29 and 36 and with any other applicable laws and regulations. If the arrangement involves an affiliate or a shareholder, director, officer or employee of the bank:

(1) The bank must ensure compliance with all applicable statutory and regulatory provisions governing bank transactions with these persons or entities;

(2) The parties must comply with all applicable fiduciary duties; and

(3) The parties, if they are in competition with each other, must consider limitations, if any, imposed by applicable antitrust laws.

Subpart D—Preemption

§ 7.4000 Visitorial powers.

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(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.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the

content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial

powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(c) *Report of examination.* The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60100, Nov. 4, 1999; 69 FR 1904, Jan. 13, 2004]

§ 7.4001 Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.

(a) *Definition.* The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) *Authority.* 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. If state law permits different interest charges on specified classes of loans, a national bank making such loans is

subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

(c) *Effect on state definitions of interest.* The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) *Usury.* A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by a corporate borrower.

[61 FR 4862, Feb. 9, 1996, as amended at 66 FR 34791, July 2, 2001]

§ 7.4002 National bank charges.

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

(b) *Considerations.* (1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

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(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:

(i) The cost incurred by the bank in providing the service;

(ii) The deterrence of misuse by customers of banking services;

(iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and

(iv) The maintenance of the safety and soundness of the institution.

(c) *Interest.* Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by §7.4001 and not by this section.

(d) *State law.* The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

(e) *National bank as fiduciary.* This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

[66 FR 34791, July 2, 2001]

§7.4003 Establishment and operation of a remote service unit by a national bank.

A remote service unit (RSU) is an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money. A national bank may establish and operate an RSU pursuant to 12 U.S.C. 24(Seventh). An RSU includes an automated teller machine, automated loan machine, and automated device for receiving deposits. An RSU may be equipped with a telephone or televideo device that allows contact with bank personnel. An RSU is not a "branch"

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within the meaning of 12 U.S.C. 36(j), and is not subject to state geographic or operational restrictions or licensing laws.

[64 FR 60100, Nov. 4, 1999]

§7.4004 Establishment and operation of a deposit production office by a national bank.

(a) *General rule.* A national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank. A deposit production office (DPO) may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account. A DPO is not a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30(d)(1) so long as it does not receive deposits, pay withdrawals, or make loans. All deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer.

(b) *Services of other persons.* A national bank may use the services of, and compensate, persons not employed by the bank in its deposit production activities.

[64 FR 60100, Nov. 4, 1999]

§7.4005 Combination of loan production office, deposit production office, and remote service unit.

A location at which a national bank operates a loan production office (LPO), a deposit production office (DPO), and a remote service unit (RSU) is not a "branch" within the meaning of 12 U.S.C. 36(j) by virtue of that combination. Since an LPO, DPO, or RSU is not, individually, a branch under 12 U.S.C. 36(j), any combination of these facilities at one location does not create a branch.

[64 FR 60100, Nov. 4, 1999]

§7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws

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apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

[66 FR 34791, July 2, 2001]

§ 7.4007 Deposit-taking.

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

- (i) Abandoned and dormant accounts;³
- (ii) Checking accounts;
- (iii) Disclosure requirements;
- (iv) Funds availability;
- (v) Savings account orders of withdrawal;
- (vi) State licensing or registration requirements (except for purposes of service of process); and
- (vii) Special purpose savings services;⁴

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

- (1) Contracts;
- (2) Torts;

³This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248-249.

⁴State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

- (3) Criminal law;⁵
- (4) Rights to collect debts;
- (5) Acquisition and transfer of property;
- (6) Taxation;
- (7) Zoning; and
- (8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

§ 7.4008 Lending.

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

⁵But see the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this §7.4008.

(d) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.⁶

⁶The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. See 12 U.S.C. 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;⁷

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

§7.4009 Applicability of state law to national bank operations.

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.* (1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

⁷See *supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

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(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

- (i) Contracts;
- (ii) Torts;
- (iii) Criminal law⁸
- (iv) Rights to collect debts;
- (v) Acquisition and transfer of property;
- (vi) Taxation;
- (vii) Zoning; and
- (viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1917, Jan. 13, 2004]

Subpart E—Electronic Activities

SOURCE: 67 FR 35004, May 17, 2002, unless otherwise noted.

§ 7.5000 Scope.

This subpart applies to a national bank's use of technology to deliver services and products consistent with safety and soundness.

§ 7.5001 Electronic activities that are part of, or incidental to, the business of banking.

(a) *Purpose.* This section identifies the criteria that the OCC uses to determine whether an electronic activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24 (Seventh) or other statutory authority.

(b) *Restrictions and conditions on electronic activities.* The OCC may determine that activities are permissible under 12 U.S.C. 24 (Seventh) or other statutory authority only if they are subject to standards or conditions designed to provide that the activities function as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

(c) *Activities that are part of the business of banking.* (1) An activity is au-

thorized for national banks as part of the business of banking if the activity is described in 12 U.S.C. 24 (Seventh) or other statutory authority. In determining whether an electronic activity is part of the business of banking, the OCC considers the following factors:

(i) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;

(ii) Whether the activity strengthens the bank by benefiting its customers or its business;

(iii) Whether the activity involves risks similar in nature to those already assumed by banks; and

(iv) Whether the activity is authorized for state-chartered banks.

(2) The weight accorded each factor set out in paragraph (c)(1) of this section depends on the facts and circumstances of each case.

(d) *Activities that are incidental to the business of banking.* (1) An electronic banking activity is authorized for a national bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking. In determining whether an activity is convenient or useful to such activities, the OCC considers the following factors:

(i) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and

(ii) Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

(2) The weight accorded each factor set out in paragraph (d)(1) of this section depends on the facts and circumstances of each case.

(3) In addition to the electronic activities specifically permitted in § 7.5004 (sale of excess electronic capacity and by-products) and § 7.5006 (incidental non-financial data processing),

⁸ *Id.*