State laws that affect the interest paid by national banks and federal savings associations on deposit accounts are governed by the OCC’s regulations and case law regarding preemption of state laws governing deposit-taking activities.170

With respect to state laws governing fees charged by financial institutions, if those fees are considered to be “interest” as defined in the National Bank Act and implementing regulations, the federal laws governing interest rate exportation apply.171 The Dodd-Frank Act did not change the rule that the interest rates charged for loans by national banks and federal savings associations are governed by the law of the bank’s home state. That is, if the bank’s home state does not cap interest rates, then no cap applies.

A third set of rules governs non-interest fees and charges imposed on bank customers. Overdraft fees, nonsufficient funds fees, and check cashing fees, among others, fall under these rules.172 An OCC regulation promulgated in 2001 states: “A national bank may charge its customers non-interest charges and fees, including deposit account service charges.”173 The regulation states that “[t]he 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.”174 The regulation then sets forth several considerations that banks should use in setting fees.175

The non-interest fees and charges rule does not directly preempt state law but instead sets forth the standards that the OCC will use to preempt state law. In doing so, the rule makes it clear that there is no categorical preemption of state laws that regulate non-interest fees and charges:

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.176

Thus, preemption of such laws is governed by conflict preemption under the Supreme Court’s Barnett Bank standard.177 However, some courts, ruling on pre-Dodd-Frank Act facts, have relied on the OCC regulation to preempt state laws that apply to non-interest fees and charges, generally without a careful analysis of the fact that the regulation does not preempt all state laws.178

Footnotes

170 [160] See § 1.5.5[1], supra.


172 [162] See §§ 1.5.10 [3], 1.5.11.1–1.5.11.3 [4], 1.5.12 [5], 2.7.7 [6], infra. Cf. Farrell v. Bank of Am., 224 F. Supp. 3d 1016 (S.D. Cal. 2016) (initial fee that bank imposes whenever a depositor overdraws her account, whether or not the bank covers overdraft, is not interest, but charge imposed if depositor does not remedy account’s negative balance within five days is interest).

173 [163] 12 C.F.R. § 7.4002(a). Subsection (c) of the rule provides that it does not apply to fees that are considered interest, which are covered by a separate regulation, 12 C.F.R. § 7.4001, which defines interest for purposes of rate exportation under section 85 of the National Bank Act.


175 [165] 12 C.F.R. § 7.4002(b):
(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.

(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.


177 [167] See § 1.5.2 [7], supra.

178 [168] See, e.g., Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012) (NBA preempts UDAP challenge to method of processing payments to determine overdraft fees); Baptista v. JPMorgan Chase Bank, 640 F.3d 1194 (11th Cir. 2011).