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Richard J. Weaver
Commissioner of Finance

May 13, 2011

Re: Interpretive Letter 1-2011

Application for Exemption under Section
362.106(4)(e), RSMo Supp 2010

In a letter dated April 20, 2011, you requested a determination that “state chartered banks and trust companies may charge an overdraft fee when a customer overdraws his or her account with the use of a debit card, check, ATM card or other means” because federal law allows national banks to charge such fees. The federal law basis for the national bank treatment of overdrafts is found in 12 USC section 24(Seventh), 12 CFR 7.4002(a) and Office of the Comptroller of the Currency Interpretive Letter 1082 dated May 17, 2007.

Your request is made pursuant to Missouri’s “wild card” statute. Under § 362.106(4)(e), RSMo, state-chartered banks may conduct any activity that national banks are expressly authorized to conduct, if the Missouri bank has provided notice to the Director of Finance who determines within the 30 day notice period that the proposed activity is not unsafe or unsound and the bank meets the conditions prescribed for national banks. The director may either take no action or issue an interpretive letter that specifically describes the activity permitted and any limitations on the activity.

NATIONAL BANK AUTHORITY

National banks are authorized to exercise “all such incidental powers as shall be necessary to carry on the business of banking.” 12 USC § 24(Seventh). Receiving deposits is specifically designated as a power incidental to banking. *Id.* Deposit taking powers are

confirmed in 12 CFR 7.4007(a). Federal regulations also authorize national banks to “charge its customers non-interest charges and fees, including deposit account service charges.” 12 CFR 7.4002(a).

If a national bank decides to charge a fee on a deposit account, regulations require the bank to address the enumerated considerations found in 12 CFR 7.4002(b). That regulation provides:

(b)(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 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.

To clarify the ability of a national bank to charge fees on deposit accounts, the Office of the Comptroller of the Currency (OCC) issued Interpretive Letter #1082 on May 17, 2007. The Letter provides “[i]f a bank uses a decision-making 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—such as the overdraft fees at issue here--pursuant to section 7.4002(a).” The OCC further explains that overdraft fees are not related to debt recovery. Instead, it is the balancing of debits and credits on a deposit account, an activity that is statutorily authorized for national banks.

MISSOURI LAW

State-chartered institutions derive power through § 362.105 and § 362.106 RSMo. State banks “may for a fee or other consideration...(1)conduct the business of receiving money on deposit and allowing interest thereon..” § 362.105.1(1) RSMo. Additionally, state banks “may exercise all powers necessary, proper or convenient to effect any of the purposes for which the bank or trust company has been formed and any powers incidental to the business of banking.” Additionally, § 362.111 RSMo allows state-chartered banks to “impose fees or service charges on deposit accounts.” Those fees or service charges cannot be more restrictive than those permitted for federally chartered depository institutions. *Id.*

SUMMARY AND FINDINGS

If the director chooses to grant a request made pursuant to § 362.106(4)(e) RSMo, the director must determine that the proposed activity is not an unsafe or unsound practice and that the bank meets the prescribed standards for conducting such activity. Charging an overdraft fee on a deposit account does not constitute an unsafe or unsound activity. Therefore, state-chartered banks may charge such a fee.

This issue was presented as a wild card request under § 362.106(4)(e) RSMo. Addressed in this manner, the federal authority outlined above clearly indicates that national banks are allowed to charge overdraft fees on deposit accounts provided they address the considerations outlined in 12 CFR 7.4002(b). Further, the OCC has established that such fees on deposit accounts are not interest because they are not related to a debt instrument.

It is relevant to note that state-chartered institutions also have this authority under state law. State banks may “for a fee...conduct the business of receiving money on deposit...” Similar to national banks, state-chartered institutions may “exercise all powers necessary, proper or convenient to affect any powers incidental to the business of banking.” Overdraft fees have always been treated as a “fee” received for receiving deposits and included in “powers incidental to the business of banking” by the Division of Finance. Fees and service charges on deposit accounts are specifically allowed under § 362.111 RSMo. Likewise, the Division treats overdraft fees differently from interest. Because overdraft fees are attached to deposit accounts and not a debt instrument, the Division does not subject overdraft fees to usury analysis.

Therefore, the policy of the Division is the same as the OCC with respect to the authority to charge overdraft fees. While the Division grants this wild card request, it in essence confirms that federal and state law both allow this activity. We would encourage state-chartered institutions to engage in the analysis outlined in 12 CFR 7.4002(b) when deciding whether to charge overdraft fees on deposit accounts.

Very truly yours,



Richard J. Weaver
Commissioner of Finance

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