Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

January 7, 1998

Interpretive Letter #817
February 1998
12 U.S.C. 85

Dear [ ]:

This is in response to your letter of December 10, 1997, seeking clarification as to whether certain fees levied by the bank in connection with its credit card accounts constitute "interest" for purposes of 12 U.S.C. § 85 (section 85) as that term is defined in 12 C.F.R. § 7.4001(a) (section 7.4001(a)). If the fees constitute "interest" and if they are permitted by the state where the national bank is located, then section 85 provides authority to the national bank to charge those fees to borrowers who reside in another state even if that other state prohibits the imposition of a particular fee in connection with credit card loans.[1]

The fees about which you inquire are late fees and non-sufficient funds (NSF) fees imposed by the bank after either the bank or the customer notifies the other that they are terminating credit privileges but before the outstanding credit balance is paid off. As you describe the facts, late fees are charged whenever a customer makes the minimum monthly payment after the date on which it is due and NSF fees are imposed whenever a borrower's check is presented in payment of an amount owed by the borrower to the bank and the check is returned by his or her bank.

Section 7.4001(a) specifically provides that late fees and NSF fees are considered interest for purposes of section 85 and, if permissible under the law of the state where the bank is located, may be charged without regard to the state of the residence of the borrower.[2] You are concerned, however, about the possible impact of a recent OCC letter addressing fees charged by a bank when it rejects items presented by a customer to draw against a home equity account

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[1] Marquette National Bank of Minneapolis v. First of Omaha Service Corp, 439 U.S. 299 (1978). The bank about which you inquire is an intrastate bank -- that is, its main office and any branch offices are located only in one state. Consequently, no issue arises about which state's interest rate law applies to loans made by an interstate national bank.

[2] 12 C.F.R. § 7.4001(a). This regulation has been upheld by the Supreme Court in Smiley v. Citibank (South Dakota) N.A., 135 L.Ed.2d 25 (1996).

following the termination of the account. The letter held that these fees were not "interest" for purposes of section 85 because "no debtor/creditor relationship exists at that point. . . ."[3] As that letter noted, under Regulation Z, banks may, under certain circumstances, terminate home equity lines of credit and demand repayment.[4]

However, the circumstances you describe differ in two respects. First, even after termination, the account retains an outstanding loan balance, incurred prior to termination, which the customer must repay. Second, you are not asking about fees charged in connection with impermissible new draws against the terminated account as described in Interpretive Letter No. 803, but about late fees and NSF fees charged in connection with repaying the outstanding balance that existed before termination of the account. Under these circumstances, the debtor/creditor relationship between the bank and customer remains; consequently late fees and NSF fees charged in connection with the repayment of the existing balance continue to be considered interest under sections 85 and 7.4001(a). Nothing in Interpretive Letter No. 803 compels a different conclusion.

I hope that this has been responsive to your inquiry.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

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[3] OCC Interpretive Letter No. 803, October 7, 1997, reprinted in [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,250.

[4] Id. at fn. 4.