Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 18, 1997

Interpretive Letter #776
April 1997
12 U. S.C. 85

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Dear [ ]:

This is in response to your inquiry concerning the use of interest rates permitted by the state of a Bank's main office in connection with credit card loans to the Bank's credit card holders who reside in other states where the Bank has branches. We note that the Bank currently does not have branches in more than one state but is considering acquiring interstate branches through mergers with affiliated banks in other states. Your question concerns the impact of these mergers on the Bank's ability to use interest rates permitted by the laws of its main office state. For the reasons set forth below, we find that the Bank may use the interest rates permitted by the law of its main office state with respect to extensions of credit made to holders of credit cards issued by the Bank regardless of the state in which they reside.

I. Background

A. Current and proposed structure of the Bank's credit card operations

You have stated that the Bank currently provides the vast majority of the credit card lending undertaken by the corporate family from its main office state. Following the mergers, you represent that the Bank intends to conduct its credit card operations as it currently conducts them[1] and seeks to continue to use the interest rates, as that term is used within the meaning of

[1] The Bank's credit card operations are conducted, as will be described, in the main office state at its credit card center located near the Bank's main office. Because the credit card center is simply a business unit within the Bank, for purposes of clarity, this opinion recognizes that its activities, operations and functions are those of the Bank.

12 U.S.C. § 85 and OCC regulations,[2] permitted by the main office state, to out-of-state customers.

You have represented that following the merger of the various affiliated banks, to avoid customer confusion regarding what usury laws govern credit card agreements, the Bank will make it clear to each borrower that the interest applicable to extensions of credit under the credit card is governed by applicable Federal and the Bank's main office state law.

B. Credit card lending activities undertaken in the main office state

According to your description, the Bank conducts virtually all of its credit card operations in and from its main office state.[3] These functions include:

- the setting of all credit and other policies and the making of all decisions regarding product pricing and terms[4];
- the drafting**,** approval, design and printing of all account agreements, billing statements, customer communications and other forms;
- the development and approval of all marketing plans, strategies and programs and product plans and product changes and related materials, documentation and customer communications;
- the design, development, printing and mailing of all materials, documentation and customer communications related to marketing plans, strategies and programs and product plans and product changes[5];
- the receipt and processing of all applications by mail and telephone, and applications that are transmitted electronically, including by facsimile, internal computer systems, and the internet;

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[2] See 61 Fed. Reg. 4849, 4869 (Feb. 9, 1996) (to be codified at 12 C.F.R. § 7.4001).

[3] The facts set forth in this letter are based on those set forth in your inquiry of November 5, 1996, as supplemented by information supplied by you in telephone conversations with OCC staff.

[4] We note that you have represented that strategic planning, significant capital expenditures and major policy decisions, such as changes in the credit approval criteria, are subject to the approval of executive management located at a site in the main office state certified as a branch of the Bank.

[5] You note, however, that from time to time these functions are performed at the Bank's direction through an outside, non-affiliated vendor which may be located anywhere. The location of services provided by third parties is irrelevant for purposes of section 85. See, e.g., Cades v. H&R Block, 43 F. 3d 869, 874 (4th Cir. 1994), cert. denied, 115 S. Ct. 2247 (1995) (Cades).

- the obtaining of credit reports and the gathering and verifying of other information necessary to evaluate applications and make credit decisions;

- the making of all underwriting and credit decisions;[6]

- the embossing and mailing of credit cards for most new accounts with the accompanying disclosures and agreements;

- the maintenance of all credit card accounts (the Bank, through the credit card center -- not the branches -- is considered to own all of the accounts);[7]

- the provision of customer service and collection functions.[8]

C. Credit card activities undertaken at the branches

For the most part, the role of branches of the affiliated banks (which would become branches of the Bank following the merger) in the Bank's credit card operations is to act, from time to time, as a facilitator of communication between the Bank in the main office state and the credit card holder. In this respect, you have identified the following communications that from time to time, may be facilitated at a branch:

- facilitating the application process by displaying application forms on lobby racks or otherwise providing them to customers; assisting customers in filling

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[6] You note that in a very small minority of instances, a credit which otherwise would be rejected may be approved by the Bank if the branch which has direct dealings with the customer assumes financial responsibility for that account. Even in these instances, however, the processing and servicing of the card is identical to those approved by the Bank in the usual manner. We understand that less than 1% of credit cards are issued under this alternative procedure.

[7] The Bank has advised that the accounts have not and will not be booked to individual branches though the Bank does retain information that indicates how a particular account was initiated such as through a direct mail solicitation, a telephone solicitation, receipt of an unsolicited application, or through an application forwarded by a branch.

[8] A few functions are performed, pursuant to the Bank's direction, by a nonaffiliated vendor located in a state where the Bank has neither its main office nor does it plan to have branches. These functions include mailing reissued cards, preparing and mailing monthly billing statements, processing payments where the third party is designated as the addressee, mailing credit cards and the accompanying disclosures for some limited programs and servicing and collecting accounts for some limited programs. As stated in footnote 5, supra, the location of functions performed by third parties is irrelevant for purposes of section 85.

out the forms; and if the forms are returned to the branch, forwarding them to the Bank in the main office state[9];

- orally informing customers of the credit decision made by the Bank in the main office state[10];

- in a small minority of cases, receiving credit card payments which are recorded on the company's computer system and forwarded to the Bank in the main office state for processing.

- with respect to complaints, assisting the customer in communicating with the Bank in the main office state, although the branches do have the capability to provide balance and credit limit information.[11]

II. Discussion

A. Applicability of the main office state's rates under the current structure

It is beyond dispute, under the corporate family's current structure, that the Bank may charge customers in both the Bank's main office state and in other states interest rates on its credit card loans in accordance with the rates permitted by the law of the Bank's main office state. See Marquette Nat'l Bank v. Firsts of Omaha Service Corp., 439 U.S. 299 (1978) (Marquette) (bank located in Nebraska may charge interest rates permitted by Nebraska law to Minnesota customers); Wiseman v. State Bank & Trust Co., N.A., 854 S.W.2d 725 (Ark. 1993) (national bank located in one state may use the interest rates permitted by that state for customers in a second state even though the national bank's parent company is incorporated in that second state); OCC Interpretive Letter No. 721, March 6, 1996, reprinted in [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-036 (national bank located in one state may use that state's interest rates for consumer loan borrowers in a second state where the bank has an affiliate that performed certain ministerial functions with respect to the making of the consumer loans).

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[9] You have represented that only a small minority of applications are forwarded by a branch and, of those, most are simply mailed by the branch to the Bank.

[10] You have represented that in-person notice of approvals rarely occurs and then only in connection with some of the applications that have been forwarded by a branch, itself a rare occurrence as discussed in footnote 9, supra.

[11] In this respect, you have represented that only a small minority of these types of contacts between the credit cardholder and the Bank occur at a branch and many of these contacts are limited to notifying the bank of address changes or obtaining copies of statements. Moreover, even with respect to these contacts, as stated, the branch merely acts as a conduit for communication between the Bank and the cardholder.

B. Applicability of the main office state's rates following the interstate mergers

You ask, however, whether following the acquisition of the Bank's affiliated banks in other states, resulting in the offices of the acquired banks becoming branches of the Bank, this practice can be continued if the Bank continues its current credit card lending procedures.

1. Statutory requirements and OCC precedent permitting a bank to charge rates permitted by branch state

Title 12 U.S.C. § 85 provides, in pertinent part, that a national bank "may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located." As the Supreme Court stated in Marquette:

> Section 85 was originally enacted as § 30 of the National Bank Act of 1864 [citation omitted]. The congressional debates surrounding the enactment of § 30 were conducted on the assumption that a national bank was 'located' for purposes of the section in the State named in its organization certificate. [Citation omitted.] Omaha Bank cannot be deprived of this location merely because it is extending credit to residents of a foreign state.

Marquette at p. 310.

It is thus clear that, prior to the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) (the Riegle-Neal Act) (which for the first time paved the way for general interstate branching by national banks), the interest rates authorized by the main office state could be applicable under the above-referenced clause of section 85 notwithstanding the fact that not all of the activities undertaken in connection with an interstate loan were undertaken at the main office or even in the main office state. Thus, as the OCC noted in Interpretive Letter No. 707, n. 9, January 31, 1996, reprinted in [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-022, the Supreme Court in Marquette recognized that the Nebraska bank involved in the case "systematically solicits" Minnesota residents for credit cards to be used in transactions with Minnesota merchants, and honors sales drafts from merchants who initially deposit them with Minnesota banks for forwarding to the Nebraska bank. Id. at 310-313. See also Cades, supra at n. 5, pp. 873-874 (face-to-face solicitation and signing of all loan documents by borrower in state other than state the interest rates of which were to be charged did not affect the legality of those rates). Likewise, the OCC has long recognized that essential activities associated with the lending function may occur in a multitude of locations and that such occurrences do not impact a bank's ability to charge the rates permitted by the main office state. These functions include accepting applications, processing

applications, approving loans, closing loans and disbursing funds.[12] Given modern banking technology and practices, it is not necessary and, in many cases, not feasible, to require that these functions occur at the main office in order to justify use of the interest rates permitted by the state of the bank's main office.

But the Court in Marquette also recognized the possible impact on the applicability of the main office state's interest rate laws of a branch of the bank in the state where the borrower resides.[13] The Court, however, had no reason to resolve this issue and did not resolve it.

As the OCC previously has recognized, for purposes of section 85, a national bank is "located" in any state in which it has its main office or a branch. See OCC Interpretive Letter No. 686, September 11, 1995, reprinted in [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-001[14]; Letter No. 707. Having determined in those letters that the bank may be located in more than one state for purposes of section 85, those letters then addressed the question of whether the bank could charge interest under the law of the *branch state* -- not the main office state -- with respect to certain loans made by the bank to residents of the branch state, the main office state and any other state. Both letters concluded that if a clear nexus exists between the branch and the loan, then the interest rates permitted by the law of the branch state could be utilized. In Letter No. 686, the loans inquired about were originated at the branch following application by the customer at that branch, loan proceeds were disbursed from the branch and the loan was booked at the branch. Interpretive Letter No. 707 reached a similar conclusion with respect to loans where application was made at the branch, loan closings occurred at the branch, loan proceeds were either disbursed at the branch or disbursal was initiated at the branch and the bank booked the loan, for its own internal operational purposes, at the branch.

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[12] See, e.g., Interpretive Letter No. 634, July 23, 1993, reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,518; Interpretive Letter No. 667, October 12, 1994 reprinted in [1994-1995 Decisions] Fed. Banking L. Rep. (CCH) ¶ 83,615; Interpretive Letter No. 636, July 23, 1993, reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH)¶ 83,520; Interpretive Letter No. 343, May 24, 1985, reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,513; Interpretive Letter by J.T. Watson, Deputy Comptroller of the Currency (February 5, 1974) (unpublished); Interpretive Letter by Thomas G. DeShazo, Deputy Comptroller of the Currency (April 5, 1973) (unpublished).

[13] The Court, citing Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974), recognized that a bank could be considered to be located in a state where it had a branch.

[14] There is no need in this letter to reiterate the full analysis set forth in this letter regarding the location of a bank for purposes of section 85. That analysis is summarized where necessary and fully incorporated into and relied upon in this letter.

2. Impact of the Riegle-Neal Act on a bank's ability to charge rates permitted by its main office state

The foregoing letters specifically held in abeyance the question of the circumstances under which the rates of the *main office state* could be charged to customers residing in branch states. See Letter 686 at n. 1 (stating that we "note that other questions may arise under Section 85 as a result of the advent of interstate banking by national banks . . . [including] whether a national bank may export interest rates permitted by the law of the state in which its main office is located to customers in another state where the bank has a branch"). Your inquiry now presents that issue and provides the first opportunity for the OCC to examine the issue of use of interest rates permitted by a bank's main office state following the enactment of the Riegle-Neal Act.

In adopting this Act, Congress provided in section 111 (the "usury savings clause") that:

> No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way--
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> (3) the applicability of [section 85] or [the usury provisions] of the Federal Deposit Insurance Act.

While this provision indicates that section 85 is to be interpreted without regard to the legal impact of any of the provisions of the Riegle-Neal Act, Sen. Roth, the sponsor of this provision, clearly stated the Congressional understanding of the usury provisions that underlay the usury savings clause. As sponsor of the provision, courts have recognized that Sen. Roth's views may provide a "weighty gloss" on the meaning of legislation. See, e.g., Galvin v. U.L. Press, 347 U.S. 522, 527 (1954).

As Sen. Roth stated:

> [I]t is clear that the conferees intend that a bank in State A that approves a loan, extends the credit, and disburses the proceeds to a customer in State B, may apply the law of State A even if the bank has a branch or agent in State B and even if that branch or agent performed some ministerial functions such as providing credit card or loan applications or receiving payments.

Id. at S12790. On the other hand, Sen. Roth stated that:

> [T]he savings clause is not intended to suggest that when a branch makes a loan to a borrower who resides in the same State as the branch that somehow the branch can use [section 85] . . . to impose the loan charges authorized by the laws of some other

> State. When the branch makes such an in-State loan to a local customer, the law of the State where the branch and customer are located applies.

140 Cong. Rec. S12789 (daily ed. Sept. 13, 1994).

As the OCC has noted, Sen. Roth was concerned that interstate branching not be used by a bank to charge interest rates permitted by a state in which the bank had branches but which had no nexus to a particular loan. See Interpretive Letter No. 707 at n. 11. The conclusion reached in this letter clearly does not implicate Sen. Roth's concern because the usury laws of the Bank's main office state are being applied by the Bank, and there are clearly a variety of significant contacts between the Bank's loans and its main office state.

This conclusion is fully consistent with the purposes underlying the usury savings clause as explained by Sen. Roth:

> The essential point of my amendment is that a branch of a bank that provides credit across State lines may impose its State law loan charges even though there is a branch of that same bank in the State of its customer. The savings clause is intended to preserve this efficiency of uniformity from the credit-provider's viewpoint, notwithstanding formal or structural changes that may occur through mergers within a bank holding company under this legislation . . . . [15]

III. Conclusion

For the foregoing reasons, based on the facts described herein, we agree that the Bank may charge interest rates permitted by the law of the Bank's main office state to credit card customers no matter where they reside.[16]

Sincerely,
/s/
Julie L. Williams
Chief Counsel

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[15] A more detailed discussion of the importance of uniformity is contained in Interpretive Letter No. 707 at n. 10 and the accompanying text.

[16] As stated, because of the conclusion that we reach under the facts presented we do not at this time address other theories which may permit the Bank to charge rates permitted by the main office state. Likewise, it is beyond the scope of this response to address whether factual circumstances, other than those posed by the Bank, would establish a nexus justifying the imposition of the rates of any particular state.