



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

July 21, 2003

Interpretive Letter #974
September 2003
12 USC 85

Dear []:

This is in response to your inquiry of June 10, 2003 on behalf of [] (the Bank) and its operating subsidiaries, [*OpSub1*] and [*OpSub2*] (the Operating Subsidiaries). In that letter, you request confirmation that the Operating Subsidiaries may originate mortgage loans and charge and export interest, including fees that constitute interest as defined in 12 C.F.R. § 7.4001, as authorized by 12 U.S.C. § 85 and applicable Indiana law to borrowers residing in all states and without regard to the site of the real property securing the loan. For the reasons described below, the Operating Subsidiaries may impose and export Indiana interest charges under the same terms and conditions applicable to the Bank.

The Bank has its main office in [*State*] and no branches in any other state. The Operating Subsidiaries are wholly owned by the Bank. The Operating Subsidiaries originate first and subordinate secured mortgage loans in their own names on a nationwide basis secured by real property consisting of one to four family residential dwellings. You note that the Operating Subsidiaries are subject to examination and supervision by the OCC and operate in compliance with requirements and limitations imposed by Section 85 and OCC regulations and interpretations regarding Section 85. The Bank seeks confirmation that it may establish, through the Operating Subsidiaries, nationwide lending programs with pricing policies consistent with the laws of the parent bank's home state, Indiana.

The Operating Subsidiaries are authorized operating subsidiaries of the Bank, approved by the OCC under 12 C.F.R. § 5.34. As such their activities are subject to the same terms and conditions that apply to the Bank. As stated in the relevant OCC regulations --

Examination and supervision. An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and

conditions that apply to the conduct of such activities by its parent national bank.¹

Elsewhere, our regulations specify that “[s]tate laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.”² Legislation also recognizes the permissibility of national banks engaging in activities through operating subsidiaries. In the Gramm-Leach-Bliley Act, Congress expressly acknowledged that national banks may own subsidiaries that engage “solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks.”³ Operating subsidiaries are often described as equivalent to a department or division of their parent bank, and our regulations ensure that operating subsidiaries will be subject to the same Federal laws and standards that govern their parent bank, including any state laws and standards that are made applicable to the parent bank by Federal law.⁴

One such law is section 85 governing the rate of interest a national bank may charge. Under section 85, the rate of interest a national bank is authorized to charge is based on the laws of the State in which the bank is located.⁵ OCC regulations provide that:

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.⁶

This “most favored lender” lender status permits a national bank to contract with borrowers in any state for interest at the maximum rate permitted by the law of the state in which the national bank is located. Generally, that is the state in which the main office of the national bank is located, and the bank may impose rates of interest without regard to the law of the state where the borrower resides.⁷

¹ 12 C.F.R. § 5.34(e)(3).

² 12 C.F.R. § 7.4006.

³ Pub. L. No. 106-102, § 121, 113 Stat. at 1378, *codified at* 12 U.S.C. § 24a(g)(3).

⁴ Letter from Charles F. Byrd, Assistant Director, Legal Advisory Services Division to (October 30, 1977), *reprinted in* [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,051 (national bank operating subsidiaries are in effect incorporated departments of the bank). *See also Wells Fargo v. Boutris*, No. Civ. S-03-0157, 2003 U.S. Dist. WL 21277203 at *6 (E.D. Cal. May 9, 2003); (operating subsidiary is “treated as department or division of its parent bank for regulatory purposes”); *National City Bank of Indiana v. Boutris*, No. Civ. S-03-0655 (E.D. Cal. July 2, 2003) (same).

⁵ 12 U.S.C. § 85.

⁶ 12 C.F.R. § 7.4001(b).

⁷ *Marquette National Bank of Minneapolis v. First of Omaha Service Corp*, 439 U.S. 299 (1978). Under certain circumstances, national banks with branches in more than one state may be required to impose interest rates permitted by the law of a state in which they have a branch. That would happen in circumstances where three functions -- loan approval, communication of loan approval, and disbursal of loan proceeds -- all occur in a branch or branches in the same branch state. OCC Interpretive Letter No. 822 (Feb. 17, 1998), *reprinted in* [1997-1998

Accordingly, pursuant to 12 C.F.R. §§ 5.34(e)(3) and 7.4006, the amount of interest the Operating Subsidiaries may charge is governed by section 85 to the same extent as section 85 is applicable to its parent bank.⁸ Thus, the permissible rates of interest authorized for the Operating Subsidiaries are based on [State] law, as are the Bank's.

I hope the foregoing is helpful in your analysis of your client's lending programs. Please do not hesitate to contact my office at (202) 874-5200; MaryAnn Nash, Counsel, at (202) 874-5090; Jerome L. Edelstein, Senior Counsel, at (202) 874-5300; or Coreen Arnold, District Counsel, at (312) 360-8805, if you have any questions or if you need any additional information.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265. Absent this set of circumstances, a national bank may impose rates permitted by the state where its main office is located. This issue does not arise with respect to the Bank because it has no branches outside of Indiana.

⁸ See OCC Interpretive Letter 954, December 16, 2002, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-479; OCC Interpretive Letter by Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, to L. Richard Fischer (February 12, 2003) (both letters determining that an operating subsidiary of national bank could rely on section 85 to the same extent that the parent bank could rely on section 85). This position was first expressed by the OCC in a 1979 letter. See OCC Interpretive Letter by John Shockey, Chief Counsel (May 18, 1979). See also *Moss v. Southtrust Mobile Services, Inc.*, No. CV-95-P-1647-W, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. Sept. 22, 1995) (court concluded, without analysis, that section 85 applied to the subsidiary in question pursuant to 12 C.F.R. § 5.34 because it was an operating subsidiary of a national bank).

We also confirm your conclusion that, as to loans secured by first liens on residential property, section 85 provides national banks with an alternative source of interest rate authority from that provided by 12 U.S.C. § 1735f-7a, which preempts state interest limitations on such loans. Section 1735f-7a, however, does not apply where a state has opted out of this federal preemption and it does not preempt state limits on prepayment fees and late charges. In adopting section 1735f-7a, however, Congress provided that where that section and section 85 apply to the same loan or mortgage, the loan or mortgage may be made at the highest possible rate. 12 U.S.C. § 1735f-7a note (Choice of Highest Applicable Interest Rate).