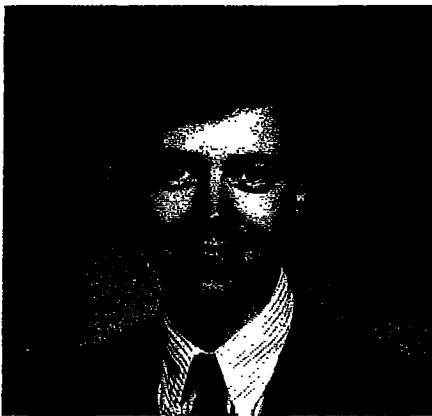


A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks

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Consumer credit transactions today are increasingly conducted across state lines. Interstate lending enables financial institutions to expand their loan portfolios and offer borrowers new sources of credit. Consequently, the interstate consumer lending market is becoming ever more competitive.¹ At the same time, the increasing frequency of interstate consumer credit transactions has propelled financial institutions, government regulatory agencies, and their legal counsel into strenuous and often complex debate over the legal requirements applicable to these transactions.² The complexity of this debate is not surprising, due to the presence of a variety of state and federal regulatory agencies overseeing financial institutions, as well as the broad range of state laws and the growing number of federal laws applicable to consumer credit transactions.³ Principles of federalism and choice-of-law accordingly play a prominent role in attempting to resolve the issues that may arise as a result of interstate lending programs.⁴

Interstate lending by federally-insured financial institutions involves one central issue: exportation of interest rates and other credit terms. What legal restrictions should govern an interstate credit transaction? May a financial insti-

tution "export" rates and terms to out-of-state borrowers by charging the rates and fees and imposing other contract terms authorized by the laws of the state where it is located? Is the financial institution subject to provisions of the law of the borrower's home state that may be more restrictive? To what extent does federal law preempt state law?

Despite nearly two decades of analysis and debate,⁵ only one issue has been conclusively resolved: a national bank may "export" the interest rate permitted by the law of the state where it is located to borrowers residing in other states.⁶ Some state regulators continue to assert that national banks and other federally insured financial institutions may not "export" fees and other terms, claiming that the "exporting" lender remains subject to all state law restrictions other than the interest rate.⁷ In two recently-filed actions against national banks,⁸ the Iowa Attorney General has asserted that several of the non-rate credit terms included in the defendants' credit card agreements⁹ violate Iowa law. These are

1. Cocheo, *Bank Cards at the Crossroads*, ABA Banking J., Sept. 1987, at 66, 68-69, 71-72, 75; McCoy and Swartz, *Plastic Battle: Big Credit Card War May Be Breaking Out, to Detriment of Banks*, Wall. St. J., Mar. 19, 1987, at 1, 20.

2. See, e.g., Burgess and Cioffi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929 (1987) [hereinafter cited as Burgess]; Rosenblum, *Exporting Annual Fees*, 41 Bus. Law. 1039 (1986) [hereinafter cited as Rosenblum]; Pulles, *Exporting Non-Interest-Rate Provisions*, 39 Bus. Law. 1271 (1984); Culhane and Kaplinsky, *Trends Pertaining to the Usury Laws*, 38 Bus. Law. 1329 (1983) [hereinafter cited as Culhane and Kaplinsky]; Burke and Kaplinsky, *Unraveling the New Federal Usury Law*, 37 Bus. Law. 1079 (1982) [hereinafter cited as Burke and Kaplinsky]; Arnold and Rohner, *The "Most Favored Lender" Doctrine for Federally Insured Financial Institutions—What Are its Boundaries?*, 31 Cath. U.L. Rev. 1 (1981) [hereinafter cited as Arnold and Rohner].

3. See Burgess, *supra* note 2, at 939-41.

4. *Id.* at 939. See, e.g., *infra* text accompanying notes 48-51, 177-186, 252-260, 270-275, & 305-316.

* The views expressed in this article are those of the authors and do not necessarily represent the views of Household Finance Corporation or its affiliates.

5. See Shanks, *Special Usury: Problems Applicable to National Banks*, 87 Banking L.J. 483 (1970) [hereinafter cited as Shanks], for an early treatment of some of these issues.

6. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313-19 (1978).

7. See generally Burgess, *supra* note 2. But see Letter from Sam Kelley, Texas Consumer Credit Commissioner, to George E. Henderson (Mar. 14, 1985) (unpublished) [hereinafter cited as Kelley opinion].

8. Iowa ex rel. Miller v. Citibank (South Dakota), Civ. No. 88-189-E (S.D. Iowa, filed Apr. 11, 1988); Iowa ex rel. Miller v. First Nat'l Bank, Civ. No. 88-20 (D. Del., filed Jan. 19, 1988, dismissed Apr. 15, 1988). The *First National Bank* suit has been settled, with the bank agreeing to comply prospectively with Iowa law on fees and charges on accounts held by Iowa residents, subject to amendments to federal or Iowa statutes, Comptroller of the Currency (OCC) regulations, Iowa regulations, or supervening case law. SO BNA's Banking Rep. 711 (1988); at 4; telephone interview with Walter Tuthill, attorney for First National Bank, Wilmington, Del. (Apr. 12, 1988). At least one private suit challenging the exportation of non-rate terms has been filed in the rural South. The suit developed from collection efforts by two banks against the same customer. Newman, *Iowa Nears Settlement in Card Fee Suit*, Am. Banker, Mar. 28, 1988, at 30.

9. The Attorney General challenged First National Bank of Wilmington's, Delaware choice-of-law provision, late charge, returned check charge, overlimit charge, court costs and attorney's fees provision, and notice of change of terms provision. Citibank (South Dakota), N.A.'s South Dakota choice-of-law provision, late charge, returned check charge, definition of "default," attorney's fees and collection costs provision and notice of change of terms provision are being challenged.

among the first cases in which a national bank's (or any other federally-insured institution's) authority to export non-rate terms has been challenged.

State legislatures have adopted conflicting positions concerning these institutions' rate and other term exportation rights. The Connecticut legislature has enacted a law regulating the interest rates that certain types of out-of-state financial institutions having offices or affiliates with offices in the state may charge to Connecticut borrowers,¹⁰ despite the clear¹¹ or arguable¹² rate exportation rights of various federally-insured financial institutions. Conversely, the South Dakota legislature has declared that virtually all fees and charges are deemed "interest."¹³ The Pennsylvania legislature, while continuing to limit sellers and holders of retail installment accounts to an 18% rate ceiling on accounts issued to buyers domiciled in the state, has deregulated rates on such accounts issued to buyers domiciled outside the state.¹⁴

This article will compare the most favored lender and exportation rights of national banks, federally-insured savings institutions, and federally-insured state banks. In the process, this article will examine recent developments regard-

ing the application of the most favored lender doctrine to these institutions and analyze many of the theories offered in support of the exportation of fees and terms other than the interest rate. This article will not attempt to resolve all of the unanswered questions relating to these institutions' interstate lending operations. Rather, it will describe a matrix of issues and considerations that national banks and other federally-insured financial institutions must analyze thoroughly and weigh carefully as a part of any decision to engage in interstate consumer lending.

I. National Banks

A. Section 85 and the Most Favored Lender Doctrine

1. Interpretation of Section 85

The National Bank Act,¹⁵ at 12 U.S.C. section 85 (section 85),¹⁶ establishes the interest rate that a national bank may charge on extensions of credit. The maximum rate chargeable by a national bank is thus a federal question.¹⁷ Section 85 incorporates state law to determine the maximum rate¹⁸ through application of three clauses.

First, a national bank generally may charge interest at the greater of "the rate allowed by the laws of the State . . . where the bank is located," or one percent in excess of the discount rate on ninety-day commercial paper in effect at

the Federal Reserve Bank in the district where the bank is located.¹⁹ In *Tiffany v. National Bank*,²⁰ the United States Supreme Court interpreted the "allowance clause" to refer not to the rate allowed for state banks, but to the rate allowed for "lenders generally,"²¹ even if such rate exceeds the rate permitted to state banks under state law.²² *Tiffany* did not determine whether the term "laws" referred to in the "allowance clause" encompasses a state regulated lender statute which characteristically constitutes an exception to a general state usury law and authorizes such lenders to charge higher rates than those permitted to "lenders generally" under state law.²³ It was left for the Comptroller of the Currency (OCC) to issue an interpretation of section 85 (the OCC Ruling) providing that a national bank may charge the highest rate authorized under state law for any competing state-chartered or licensed lender, without becoming licensed under such state law.²⁴ The OCC Ruling codifies what has come to be known as the "most favored lender" doctrine. The alternative rate of one percent over the discount rate contained in the first clause of section 85, added in 1933,²⁵ represents a federal rate which preempts lower rates provided for

10. An Act Concerning the Activities of Foreign Banking Corporations, 1987 Conn. Pub. Acts No. 87-205, § 5 (effective July 1, 1987). To the extent that this law attempts to regulate the Connecticut activities of out-of-state financial institutions in a way that would infringe on those institutions' rights granted under federal law, it would appear to violate the supremacy clause and the commerce clause. See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); U.S. Const. art. I, § 8, cl. 3; art. VI, cl. 2. But see *Sears, Roebuck & Co. v. Brown*, 806 F.2d 399 (2d Cir. 1986) (Connecticut statute regulating holding companies and their subsidiaries held not to violate commerce clause or supremacy clause).

11. See *Marquette*, 439 U.S. at 313-19 (national banks).

12. See Letter from General Counsel to the Federal Home Loan Bank Board (Aug. 6, 1982), reprinted in [Current] Fed. Banking L. Rep. (CCH) para. 82,022 (federally-insured savings institutions); Letter from Kathy A. Johnson, Attorney to the Federal Deposit Insurance Corporation (FDIC) (Mar. 17, 1981) (unpublished) (federally-insured state banks) [hereinafter cited as Johnson letter]; Letter from Peter M. Kravitz, Senior Attorney to the FDIC (Oct. 20, 1983) (unpublished) (federally-insured state banks) [hereinafter cited as Kravitz letter].

13. An Act to Revise Certain Statutes Pertaining to Interest and Charges Between Debtors and Creditors, 1987 S.D. Sess. Laws ch. 360. Similar legislation is pending in Delaware. O'Connor, *Interstate Credit Cards and Other Products*, in Fischer, Retail Financial Services: Current Developments 182, 271-76 (1987) (outline prepared for distribution at June 11-12, 1987, Practising L. Inst. program, New York, N.Y.). The Delaware legislation also would declare virtually all fees, charges, and other statutory provisions to be "material to the determination of the interest rate." See 12 C.F.R. § 7.7310(a) (1987).

14. 1988 Pa. Laws, Act 15 (effective Feb. 26, 1988). The distinction between rates chargeable to in-state and out-of-state borrowers raises constitutional questions under the commerce clause, equal protection clause, and privileges and immunities clause. U.S. Const. art. I, § 8, cl. 3; art. 4, § 2, cl. 1; amend. XIV, § 1.

15. 12 U.S.C. §§ 21-200 (1982 & Supp. V 1987).

16. *Id.* § 85 (1982). Section 85 provides in pertinent part: Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

Id.

17. *Marquette*, 439 U.S. at 308 (citing *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)).

18. *Evans v. Nat'l Bank*, 251 U.S. 108, 111 (1919). But cf. *City Nat'l Bank v. Edmisten*, 681 F.2d 942 (4th Cir. 1982) (no federal question jurisdiction under section 85 when declaratory judgment sought that annual fee would not violate state usury law if added to interest charged). See *infra* text accompanying notes 48-51, 177-186, & 252-262 for a discussion of the extent to which state law is incorporated in section 85.

19. 12 U.S.C. § 85 (1982) (emphasis added).

20. 85 U.S. (18 Wall.) 409 (1874).

21. *Id.* at 411. The Court also used the term "natural persons" to refer to "lenders generally" because individuals frequently operated as private bankers during that time. See Comment, *Extension of the Most Favored Lender Doctrine Under Federal Usury Law: A Contrary View*, 27 Vill. L. Rev. 1077, 1083 n.34 and authority cited therein (1982) [hereinafter cited as *A Contrary View*].

22. 85 U.S. (18 Wall.) at 411.

23. Such a statute was not at issue. *Id.* at 411. See *A Contrary View*, *supra* note 21, at 1095-96; Burke and Kaplinsky, *supra* note 2, at 1096.

24. 12 C.F.R. § 7.7310(a) (1987). The OCC Ruling provides: A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or Morris plan bank, without being so licensed.

Id. The OCC Ruling was initially issued as an opinion letter in 1936 and was finally promulgated as an interpretive ruling in 1971 and codified in 1972. For the history and development of the OCC Ruling, see *A Contrary View*, *supra* note 21, at 1089-91 & nn.82-89; Burke and Kaplinsky, *supra* note 2, at 1100-01 n.121; Arnold and Rohner, *supra* note 2, at 6-7. For a discussion of the OCC Ruling's validity, scope, and interpretation, see *infra* text accompanying notes 56-226.

25. Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191 (1933) (amending National Bank Act, ch. 106, § 30, 13 Stat. 108 (1864)) (current version at 12 U.S.C. § 85 (1982)). See *A Contrary View*, *supra* note 21, at 1078 n.7, 1081 n.24 for a history of the amendments to section 85.

under state law.²⁶

The second clause is an exception to the first which provides that "[w]here by the laws of any State a different rate is limited for [state banks], the rate so limited shall be allowed for [national banks] organized or existing in any such State."²⁷ The *Tiffany* Court held that the "exception clause" applies only where the rate permitted to state banks is higher than that allowed for lenders in general.²⁸ The combination of the "any State" and "existing" phraseology in the "exception clause" has led national banks to contend that they may "import" the rate allowed by a borrower's home state's laws if it is higher than the rate in the bank's home state.²⁹

Finally, section 85 states that where no rate is fixed by state law, national banks may charge the greater of seven percent or one percent over the discount rate.³⁰ In *Daggs v. Phoenix National Bank*,³¹ the United States Supreme Court held that this clause does not apply if state law allows creditors to contract for any rate under a written agreement.³² Similarly, the Ninth Circuit held in *Hiatt v. San Francisco National Bank*³³ that a national bank was authorized to charge any rate even though California law exempted state and national banks from its usury restrictions, which could have meant that no rate was fixed by state law.³⁴ Consequently, the third

clause of section 85 is essentially meaningless.³⁵

The interpretation of five other terms or phrases in section 85 is important in determining the most favored lender and exportation rights of national banks. A national bank is authorized to "take, receive, reserve, and charge [interest] on any loan or discount made."³⁶ In *Evans v. National Bank*,³⁷ the United States Supreme Court noted that national banks are authorized to discount promissory notes³⁸ and determined that discounting implies reservation of interest in advance.³⁹ The National Bank Act thus may permit the charging of discount interest at the maximum state rate, even though the maximum state rate is established in terms of a simple interest rate and discounting is specifically prohibited.⁴⁰

Moreover, the rate chargeable under section 85 may be imposed on "any loan[,] discount . . . , notes, bills of exchange or other evidences of debt."⁴¹ In construing the term "specified class of loans"⁴² contained in the OCC Ruling, the court in *United Missouri Bank v. Danforth*⁴³ determined that retail credit sales and loans constitute an interchangeable class of debt.⁴⁴ The court based its conclusion on the "other evidences of debt" language in section 85.⁴⁵ To the extent adopted by the courts, a broad classification of transactions will enhance a national bank's flexibility in establish-

ing the terms under which it will operate a particular type of loan program.

Third, section 85 empowers national banks to charge "interest" at the highest rate allowed under the laws of the state where it is located.⁴⁶ The largely unresolved issues regarding the definition of "interest" and whether the definition should be obtained from federal law, the law of the bank's home state, or the law of the borrower's home state, are critical in delineating national banks' rights to export fees and other contract terms in addition to the interest rate.

Fourth, "interest" may be imposed at the "rate allowed by the laws" of the bank's home state.⁴⁷ There have been differing views as to whether the state law incorporated in section 85 encompasses only the numerical rate,⁴⁸ the method of calculating the rate as well,⁴⁹ or even the entire case law interpreting limitations on usury,⁵⁰ including common law conflict of laws rules.⁵¹

Finally, a national bank obtains its maximum rate by reference to "the laws of the State where the bank is located."⁵² In *Marquette National Bank v. First of Omaha Service Corp.*,⁵³ the Supreme Court held that a national bank is located in the state named in its organization certificate.⁵⁴ This decision underlies the establishment in *Marquette* of national banks' authority to "export" interest rates in interstate lending programs.⁵⁵

26. *Marquette*, 439 U.S. at 318 n.31; OCC Interpretive Letter No. 71 from John G. Heimann, Comptroller of the Currency (Dec. 1, 1978), reprinted in [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,146.

27. 12 U.S.C. § 85 (1982) (emphasis added).

28. *Tiffany*, 85 U.S. (18 Wall.) at 411-12. The Court noted that section 85 "speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks." *Id.* at 412. The Court effectively substituted "higher" for "different" in the "exception clause" based on the absence of the "and no more" language found in the "allowance clause." *Id.* See *A Contrary View*, supra note 21, at 1083 & nn. 36-37 and authorities cited therein. The Court emphasized the need to protect national banks against unfriendly state legislation. 85 U.S. (18 Wall.) at 412-13.

29. See *infra* text accompanying notes 236-246 for a discussion of national banks' rights to "import" rates.

30. 12 U.S.C. § 85 (1982). The one percent over the discount rate option was added in 1933. Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191 (1933) (amending National Bank Act, ch. 106, § 30, 13 Stat. 108 (1864)) (current version at 12 U.S.C. § 85 (1982)).

31. 177 U.S. 549 (1900).

32. The Court construed the phrase "no rate is fixed" to refer only to circumstances where no rate is "allowed" by state law, i.e., where state law prohibits the charging of any interest. *Id.* at 555.

33. 361 F.2d 504 (9th Cir.), cert. denied, 385 U.S. 948 (1966), rehearing denied, 385 U.S. 1021 (1967).

34. Under state law there was thus no limit on the rate a state bank could charge. The court interpreted this usury exemption to mean that rates were "fixed" as without limitation except as

agreed to by the parties, and concluded that national banks should be accorded the same treatment. 361 F.2d at 507. See Cal. Const. art. XV, § 1 (West Cum. Supp. 1987).

35. See OCC Interpretive Letter No. 138 from John E. Shockey, Chief Counsel (Feb. 8, 1980), reprinted in [1980-1981 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,219, at 77,328 (citing Shanks, supra note 5, at 488 (suggesting that "for all practical purposes, the 7 percent . . . limit . . . may be ignored.")).

36. 12 U.S.C. § 85 (1982) (emphasis added).

37. 251 U.S. 108.

38. See 12 U.S.C. § 24 (Seventh) (Supp. V 1987) (national banks have the power to discount promissory notes, drafts, bills of exchange, and other evidences of debt).

39. 251 U.S. at 114. The case involved the discounting of short-term single payment commercial paper. See *infra* note 40.

40. See *infra* text accompanying notes 100-104 & 187-206 for a discussion of whether or not national banks may charge discount interest on installment credit.

41. 12 U.S.C. § 85 (1982) (emphasis added).

42. 12 C.F.R. § 7.7310(a) (1987). See supra note 24 for text of the OCC Ruling. See also *infra* text accompanying notes 76-81 & 130-155 for a discussion of this term.

43. 394 F. Supp. 774 (W.D. Mo. 1975).

44. *Id.* at 783. The court held that the bank could charge the Small Loan Act rate on credit sale transactions governed by the Retail Credit Sales Act (RCSA), even though the RCSA exempted licensed small loan companies from its provisions. *Id.* at 784.

45. *Id.* See *infra* text accompanying notes 130-155 for a discussion of the classification of transactions.

46. 12 U.S.C. § 85 (1982) (emphasis added).

47. *Id.*

48. *Evans*, 251 U.S. at 111. See *Nat'l Bank v. Johnson*, 104 U.S. 271, 277-78 (1881); *Dearing*, 91 U.S. at 34.

49. This includes all prohibitions on enlarging the rate, even if the resulting charge is within the legal limit if imposed properly. *Citizens' Nat'l Bank v. Doanell*, 195 U.S. 369, 374 (1904); *Att'y Gen. v. Equitable Trust Co.*, 294 Md. 385, 417, 450 A.2d 1273, 1291-92 (1982).

50. *First Nat'l Bank v. Nowlin*, 590 F.2d 872, 876 (8th Cir. 1975). See *Union Nat'l Bank v. Louisville, N.A. & C. Ry.*, 163 U.S. 325, 331 (1896).

51. OCC Interpretive Letter No. 325 from Peter Lieberman, Assistant Director of the Legal Advisory Services Division (Jan. 22, 1985), reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,495, at 77,754. See Shanks, supra note 5, at 489-91. *But see Morosani v. First Nat'l Bank*, 539 F. Supp. 1171, 1173 (N.D. Ga. 1982), *rev'd on other grounds*, 703 F.2d 1220 (11th Cir. 1983).

52. 12 U.S.C. § 85 (1982) (emphasis added).

53. 439 U.S. 299.

54. *Id.* at 310. The Court engaged in a federal common law choice-of-law analysis concerning Omaha Bank's Bank-American program to confirm that Omaha Bank was "located" in Nebraska. *Id.* at 309-13. See *infra* text accompanying notes 229-235 for further discussion of the "location" question relating to national banks.

55. *Id.* at 313-19.

Unfortunately, for national banks this analysis of section 85 resolves neither the scope of the most favored lender doctrine nor many of the issues which arise in the context of interstate lending operations. A national bank also must explore the validity, scope, and interpretation of the OCC Ruling, which necessarily involves further examination of section 85, in order to determine the bank's authority to export the highest interest rate, or the most advantageous fees and other contract terms, allowed in its home state to borrowers residing in other states.

2. The OCC Ruling

a. Validity and Scope

A federal appellate court first upheld the OCC Ruling⁵⁶ in 1972 in *Northway Lanes v. Hackley Union National Bank & Trust Co.*⁵⁷ Its validity has since been confirmed and its criteria applied implicitly or explicitly by the Courts of Appeals for the Fifth,⁵⁸ Seventh,⁵⁹ and Eighth⁶⁰ Circuits, as well as several other courts.⁶¹ Only two state trial courts have declined to adopt the OCC Ruling.⁶² The Supreme Court cited the OCC Ruling with apparent approval in *Marquette*, at least to the extent of the Ruling's incorporation of the most favored lender doctrine,⁶³ but declined to address its validity. The Court still has not decided this issue, and, based on the scope of the OCC Ruling detailed below, it is unclear whether the Court would uphold it as a

reasonable interpretation of section 85.⁶⁴

Perhaps the most useful basis for examining the validity of the OCC Ruling as an interpretation of section 85 is to determine whether the Ruling is broader or more restrictive than section 85. This determination will be based on an analysis of the following key concepts and terms contained in the OCC Ruling.⁶⁵

(1) The Need for a "Borrowing"

The OCC Ruling clearly is applicable when a national bank is borrowing the rate authority set forth in section 85 from a state-supervised lender. It is therefore important to determine when a national bank is borrowing its rate. A national bank always may contend that it is borrowing its rate, unless the highest rate is applicable only to national banks under a particular state's laws.⁶⁶ National banks may even borrow a usury exemption available to a state-chartered lender. In *Hiatt v. San Francisco National Bank*,⁶⁷ national banks held the same exemption from state usury laws as state banks. The Ninth Circuit applied the allowance and exception clauses of section 85 to allow a national bank to borrow the state bank's rate exemption rather than rule that no rate was "fixed" by state law.⁶⁸

State rate structures generally are established in one of four different ways: (1) by class of loans (i.e., consumer versus commercial, closed-end versus open-end, direct lending versus sales finance, real estate mortgages versus automobile loans versus bank credit cards, etc.); (2) by class of lenders (i.e., banks versus savings and loans versus licensed lenders); (3) in a nondiscriminatory manner (i.e., under an undifferentiated Uniform Consumer Credit Code or usury law); or (4) in some combination of the first three alternatives. Based on *Hiatt*, national banks may borrow a rate established under any of these four schemes.

Several commentators have argued that to the extent that national banks have independent authority under state law to charge the highest state rate, and another class of lender has the same authority, national banks are not borrowing their authority from that class lender. In that case, the commentators assert that the OCC Ruling does not apply.⁶⁹ Under this interpretation, the OCC Ruling is merely a borrowing regulation.⁷⁰ In order to obtain its benefits, a national bank cannot already be the most favored lender in the state. This reading of the OCC Ruling is too rigid and ignores the language of section 85. Section 85 does not require borrowing; rather, it authorizes a national bank to borrow rates in order to become a most favored lender. As *Tiffany* and the OCC Ruling have indicated, section 85 recognizes three classes of lenders: "lenders generally," state banks, and other state-chartered or licensed lenders.⁷¹ National banks may either have parity with one or more classes under state law or be accorded parity pursuant to section 85. Thus, the better view under *Tiffany* and *Hiatt*, as partially codified⁷² in the OCC Ruling, is that a national bank is always deemed to be borrowing its rate from the "highest rate" lender in the state, even if the national bank also is a most favored lender.

(2) "Competing Lender"

Section 85 on its face does not contain a "competing lender" test. The *Tiffany* Court did not require national banks to compete with the highest rate lender in order to charge such a rate.⁷³ Subsequent decisions by courts and state regulators, with few exceptions, and an OCC staff letter have ruled that the OCC Ruling does not require actual competition.⁷⁴ Even if this test merely requires that the most favored lender may engage in the same type of credit transaction as a national bank,⁷⁵ it expands the plain language of section 85. By incorporating

56. See *supra* note 24 for text of the OCC Ruling.
 57. 464 F.2d 855, 864 (6th Cir. 1972). The court determined that it should defer to a reasonable interpretation of the National Bank Act promulgated by the OCC, the agency charged with the Act's administration. *Id.* (citing *Udall v. Tallman*, 380 U.S. 1, 17 (1965); *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Unemployment Compensation Comm'n v. Aragan*, 329 U.S. 143, 153-54 (1946)).
 58. *Partain v. First Nat'l Bank*, 467 F.2d 167, 174 (5th Cir. 1972).
 59. *Fisher v. First Nat'l Bank (Fisher/Chicago)*, 538 F.2d 1284, 1290 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).
 60. *Fisher v. First Nat'l Bank (Fisher/Omaha)*, 548 F.2d 255, 259-60 (8th Cir. 1977). See *Nowlin*, 590 F.2d 872 (never referred to OCC Ruling, although used term "most favored lender").
 61. See, e.g., *Ray v. American Nat'l Bank & Trust Co.*, 443 F. Supp. 883 (E.D. Tenn. 1978); *Danforth*, 394 F. Supp. 774; *Equitable Trust*, 294 Md. 385, 450 A.2d 1273; *Comm'r of Small Loans v. First Nat'l Bank*, 268 Md. 305, 300 A.2d 685 (1973); *First Bank v. Miller*, 131 Mich. App. 764, 347 N.W.2d 715 (Mich. App. 1984) (case involved state banks, but OCC Ruling invoked for comparative purposes).
 62. *Deak Nat'l Bank v. Bond*, 89 Misc. 2d 95, 390 N.Y.S.2d 771 (Sup. Ct. 1976); *Colo. Nat'l Bank v. Coder*, [1969-1973 Transfer Binder] Cons. Cred. Guide (CCH) para. 99,018 (Mont. Dist. Dec. 29, 1972) (still applied "competing lender" test).
 63. 439 U.S. at 314 n.26.

64. See *supra* note 57 and authorities cited therein. See also *infra* text accompanying notes 112-115.
 65. The other important question regarding the scope of the OCC Ruling is whether it should apply to interstate loans or only to intrastate loans. See *infra* text accompanying notes 296-300 for an analysis of this issue.
 66. An analysis of the statutory schemes of all 50 states is beyond the scope of this article. It seems unlikely, however, that any such state statutory scheme exists.
 67. 361 F.2d 504.
 68. *Id.* at 507.

69. See *Burgess, supra* note 2, at 938-39; *A Contrary View, supra* note 21, at 1093.
 70. *Burgess, supra* note 2, at 938.
 71. 85 U.S. (18 Wall.) at 411-12; 12 C.F.R. § 7.7310(a) (1987).
 72. See *infra* text accompanying notes 82-83.
 73. 85 U.S. (18 Wall.) at 411-412.
 74. See *infra* text accompanying notes 116-124 and authorities cited therein for a more thorough analysis of the "competing lender" standard.
 75. *Danforth*, 394 F. Supp. 774, 784.

