

A "Smiley" Conclusion to the Fee Exportation Saga: Certain Implications of *Smiley v. Citibank*

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In the most important interstate lending court decision since *Marquette National Bank v. First of Omaha Service Corp.*¹ in 1978, the United States Supreme Court upheld the authority of national banks to "export" loan fees deemed

by an Interpretive Ruling of the Office of the Comptroller of the Currency (OCC)² to constitute "interest" under section 30 of the National Bank Act (NBA) (12 U.S.C. section 85 or section 85)³ in *Smiley v. Citibank (South Dakota), N.A.*⁴ The Court's decision in *Smiley* culminated nearly a decade⁵ of litigation concerning whether and to what extent national banks and other federally-chartered or federally-insured financial institutions may impose fees allowed by the laws of the state where the institution is "located" as "interest" on loans to borrowers residing in other states.

This article will delineate the issues resolved by the *Smiley* decision and some of the key issues yet to be resolved. Despite the apparent breadth of the Supreme Court's opinion, a number of important interstate lending and bank administra-

tive law issues were either created or left unresolved by the decision. This article will suggest means of resolving certain but not all of these unresolved issues.

L. Issues Resolved by *Smiley*

A. Fees That Constitute "Interest" Under Federal Law May be Exported by National Banks

Smiley conclusively resolves that national banks have the authority to export fees that are deemed "interest"⁶ under OCC Interpretive Rule 7.4001 (the OCC Ruling), including the credit card late fees at issue in the case,⁷ if the law of the state where the bank is located permits its most favored lender to charge the fees.⁸ The

2. 61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(a)).

3. 12 U.S.C. § 85 (1994). 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.

4. 116 S. Ct. 1730 (1996).

5. Iowa ex rel. Miller v. First Nat'l Bank, Civ. No. 88-20 (D. Del., filed Jan. 19, 1988, dismissed Apr. 15, 1988), was the first such suit filed.

6. The OCC Ruling provides in pertinent part:

(a) *Definition.* The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(a)).

7. 116 S. Ct. at 1732.

8. The OCC Ruling further provides:

(b) *Authority.* 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. If state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully

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1. 439 U.S. 299 (1978).

Supreme Court endorsed as "reasonable" the OCC's interpretation of the term "interest" in section 85.⁹ This principle applies to all types of loans, consumer or commercial,¹⁰ closed-end or open-end, secured or unsecured, made by national banks.

A contentious issue throughout the fee exportation litigation was whether the term "interest" in section 85 is defined by federal law or the law of the state where the bank is located. The Supreme Court's deference to the OCC's definition also establishes that federal law controls in this instance. Accordingly, "interest" under section 85 includes "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended," including without limitation "numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees."¹¹ The term, however, "does not ordinarily include appraisal fees, premiums and commissions attrib-

utable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports."¹² The Supreme Court characterized non-"interest" charges as encompassing "reimbursement for the lender's costs in processing the application, insuring the loan, and appraising the collateral."¹³ The Court distinguished non-"interest" charges—"those charges that are specifically assigned to" the lender's expenses listed above—from "interest" charges—"those that are assessed for simply making the loan, or for the borrower's default."¹⁴

Although this federal definition of "interest" is broad, it is not as expansive as the definition propounded by many of the states to which bank credit card operations have migrated since the early 1980s. For instance, in addition to a number of other specifically enumerated fees, the Bank Revolving Credit subchapter of the Delaware Banking Code treats as "interest":

[r]easonable fees for services rendered or for reimbursement of expenses incurred in good faith by the bank or its agents in connection with the plan, or other reasonable fees incident to the application for and the opening, administration and termination of a plan including, without limitation, commitment, application and processing fees, official fees and taxes, costs incurred by reason of examination of title, inspection, appraisal, recording, mortgage satisfaction or other formal acts necessary or appropriate to the security for the plan, and filing fees.¹⁵

Similarly, the Illinois Financial Services Development Act, which governs

"revolving credit plans"¹⁶ by, *inter alia*, in-state banks,¹⁷ authorizes as "interest," among other fees, "fees for services rendered."¹⁸ The Nevada Debt Evidenced by Credit Card statute defines "interest" to include "[a]ny other charge or fee [besides those specifically listed] to which the issuer and cardholder agree."¹⁹ Moreover, the Ohio Banking statute authorizes a "bank"²⁰ to charge, collect, and receive as "interest," in addition to periodic interest, "other fees and charges that are agreed upon by the bank and the borrower."²¹ Finally, the South Dakota Banking statutes permit a "bank"²² to contract for and collect as "interest," in addition to certain enumerated charges, "[o]ther charges made in connection with the revolving loan or charge account arrangement."²³ Thus, national banks located in these and other states having similarly expansive definitions of "interest" seemingly would have preferred a home state definition of "interest" to that provided in the OCC Ruling.

In any event, the OCC Ruling incorporates a national bank's home state's law to determine the rate and amount of "interest" that the bank may impose (and export on its interstate loans). The OCC Ruling provides that (i) "[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"²⁴ and (ii) if the most favored lender in a state where a national bank is located may charge a fee that is "interest" under the OCC Ruling, the bank may charge the fee to its interstate customers whether or not the

8. (Continued from previous page)

charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

- (c) *Effect on state definitions of interest.* The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR §§ 7.4001(b), (c)).

9. 116 S. Ct. at 1735.

10. Subsection (d) of the OCC Ruling provides that "[a] national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by a corporate borrower." 61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(d)).

11. *Id.* (to be codified at 12 CFR § 7.4001(a)).

12. *Id.*

13. 116 S. Ct. at 1734.

14. *Id.*

15. Del. Code Ann. tit. 5, § 945(a)(4), redesignated by 1996 Del. Laws ch. 327, § 26 (effective May 2, 1996).

16. 205 ILCS 675/3(b) (Supp. 1996).

17. *Id.* 675/3(a).

18. *Id.* 675/6 (1993).

19. Nev. Rev. Stat. Ann. § 97A.090(2)(e) (Michie Com. Supp. 1995).

20. Ohio Rev. Code Ann. § 1101.01(B), as amended by 1995 Ohio Am. Sub. H.B. 538, § 1 (effective Jan. 1, 1997).

21. 1995 Ohio Am. Sub. H.B. 538, § 1 (to be codified at Ohio Rev. Code § 1109.20) (effective Jan. 1, 1997).

22. S.D. Codified Laws Ann. § 51A-1-2(1) (Supp. 1996).

23. *Id.* § 51A-12-13 (1990).

24. 61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(b)).

fee is "interest" under state law, because the fee is "interest" under the federal definition.²⁵ Consequently, if the law of the state where a national bank is located permits a fee that is "interest" under the OCC Ruling, the bank may export the fee in an amount permitted under that state's law. While this principle is clear, as discussed in Part II.C of this article, the scope of the incorporation of home state law in section 85 remains unresolved to a significant extent.

B. The Supreme Court Will Defer to the OCC's Interpretations of Ambiguous Provisions of the National Bank Act, If the OCC's Interpretation is Formal, "Reasonable," and Directed to National Banks Generally

In an important reaffirmation of the principle of judicial deference to administrative agency interpretations of statutes that they are charged with administering, the *Smiley* Court deferred to the OCC's interpretation of the meaning of the term "interest" in section 85.²⁶ Following upon the heels of the Supreme Court's decision in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*²⁷ deferring to the Comptroller of the Currency's (Comptroller) determinations that national banks may serve as agents in the sale of annuities and that annuities are properly classified as investments, not "insurance" within the meaning of 12 U.S.C. section 92,²⁸ *Smiley* signifies that the Court will defer to the OCC's or the Comptroller's formal interpretations of the NBA, as long as those interpretations are reasonable.²⁹ Moreover, the Court clarified that a "reasonable" agency in-

terpretation of a statute need not be the best interpretation.³⁰

The Court in *Smiley* nonetheless appears to have limited the types of OCC or Comptroller interpretations to which courts should accord deference. In rejecting the cardholder's argument that the OCC Ruling was inconsistent with past Comptroller positions and therefore not entitled to deference, the Supreme Court characterized as insufficient "to establish a binding agency policy" (i) a 1964 Comptroller letter to the President's Committee on Consumer Interests because it was "too informal" and (ii) a 1988 opinion letter from the Deputy Chief Counsel of the OCC, because it only purported to represent the Deputy Chief Counsel's position "in response to an inquiry concerning particular banks."³¹ As many, if not most, OCC interpretive letters are issued in response to inquiries concerning particular banks, the Court has left in question the extent to which national banks—indeed all federally-regulated financial institutions—may rely upon such narrowly-directed interpretations by their federal supervisory agency. After *Smiley*, in order to ensure deference to their interpretations, the OCC and the other federal bank regulatory agencies may be required to address interpretive letters or any other interpretations in the name of the agency or its chief official and to all institutions that it regulates.

In this regard, before issuing any opinion letter or interpretive rule (such as the OCC Ruling), in response to a request or upon the agency's own motion, that concludes that federal law preempts the application to a national bank of any state law regarding, *inter alia*, consumer protection, the OCC is required to (i) publish in the Federal Register notice of the preemption issue that the OCC is considering (including a description of each state law at issue); (ii) give interested parties not less than 30 days in which to submit written comments; and (iii) in

developing its final opinion letter or interpretive rule, consider any comments received.³² This provision, however, does not apply with respect to any opinion letter or interpretive rule that (i) raises issues of federal preemption that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or (ii) responds to a request that contains no significant legal basis on which to make a preemption determination.³³ The OCC followed neither all of the above requirements before issuing the OCC Ruling³⁴ nor any of these requirements before its Chief Counsel issued an interpretive letter in 1995 regarding the scope of the term "interest" under section 85.³⁵ The basis for this approach in the case of the OCC 1995 interpretive letter was that the question concerned whether the charges at issue constituted "interest" under section 85 and was not a determination that federal law preempts the application of state law to a national bank.³⁶ The foundation for this approach in the case of the OCC Ruling arguably was that, as in the case of the OCC 1995 interpretive letter, only the definition of "interest" and the most favored lender status of national banks under section 85, not preemption of state law, was at issue.

The Supreme Court, in deferring to the OCC Ruling, adopted this distinction between the meaning of the term "interest" under and the preemptive scope of section 85. The cardholder contended that no Comptroller interpretation of section 85 is entitled to deference because section 85 itself preempts state law. The Court disagreed, declaring that under *Marquette*, section 85 clearly preempts

25. *Id.* (to be codified at 12 CFR § 7.4001(c)).

26. 116 S. Ct. at 1733, 1735.

27. 115 S. Ct. 810 (1995).

28. *Id.* at 815-17.

29. See 116 S. Ct. at 1733, 1735.

30. *Id.* at 1735.

31. *Id.* at 1734.

32. 12 U.S.C. § 43(e) (Supp. I 1995), as added by Riegle-Neal Interstate Banking and Branching Act of 1994, Pub. L. No. 103-328, § 114 (1994).

33. *Id.* § 43(e)(1).

34. See OCC Proposed Rule, Interpretive Rulings, 60 Fed. Reg. 11,925, 11,929 (1995).

35. OCC Interpretive Letter No. 670 from Julie L. Williams, Chief Counsel (Feb. 17, 1995), reprinted in [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,618 ("Williams 1995 OCC Letter").

36. *Id.* n.1.

state law, but that only the definition of "interest," which term "does not...deal with pre-emption," was at issue.³⁷ The effect of the Court's distinction is to elevate deference to an agency's interpretation of the substantive meaning of a statute above the "presumption against preemption" announced in *Cipollone v. Liggett Group, Inc.*³⁸ This is the case because in *Smiley*, the preemption clause of section 85, *i.e.*, the phrase "the rate allowed by the laws of the State... where the bank is located," was not at issue, already having been found to preempt state law in *Marquette*.³⁹ Nonetheless, the Court's decision to defer to the OCC Ruling has the effect of significantly expanding the preemptive scope of section 85. Thus, where a federal agency interpretation of ambiguous statutory language not including the preemption clause is reasonable, the Court indicates in *Smiley* that it will defer to the agency's interpretation, even if deference will greatly extend the preemptive reach of the statute.

II. Certain Issues Not Resolved by *Smiley*

A. Scope of Fee Exportation by State-Chartered Banks and Federally and State-Chartered Savings Associations

Given that the *Smiley* decision is based upon the Supreme Court's deference to the OCC's interpretation of section 85, it is not dispositive as to whether federally-insured state-chartered banks and federally-chartered and federally-insured state-chartered savings associations may export late fees and other loan fees. There are nonetheless several grounds for concluding that the fee exportation rights of these institutions should be equivalent to those of national banks. First, one week after its decision

in *Smiley*, the Supreme Court vacated the New Jersey Supreme Court's decision in *Hunter v. Greenwood Trust Co.*⁴⁰ holding that section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA)⁴¹ did not preempt New Jersey's credit card late fee limitations in the case of federally-insured state banks. Upon remand for reconsideration in light of *Smiley*, the New Jersey Supreme Court reinstated the decision of the state's Appellate Division upholding preemption of the New Jersey limitations.⁴² Thus, the only lower court to interpret *Smiley* has concluded that state-chartered banks possess the same fee exportation rights as national banks, at least concerning late fees.

Second, both the Federal Deposit Insurance Corporation (FDIC)⁴³ and the Office of Thrift Supervision (OTS)⁴⁴ have issued interpretations (the more recent OTS interpretation consists of an inter-

pretive ruling on most favored lender usury preemption (the OTS Most Favored Lender Ruling)⁴⁵ providing that federally-insured state banks and federally-insured savings associations, respectively, may export the same fees on credit card loans as national banks. Indeed, the OTS Most Favored Lender Ruling contains a definition of "interest"⁴⁵ under section 4(g) of the Home Owners' Loan Act of 1933⁴⁶ that is iden-

45. The OTS Most Favored Lender Ruling provides:

(a) *Definition.* The term "interest" as used in 12 U.S.C. 1463(g) includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) *Authority.* A savings association 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. If state law permits different interest charges on specified classes of loans, a federal savings association making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a federal savings association may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies. Except as provided in this paragraph, the applicability of state law to Federal savings associations shall be determined in accordance with § 560.2 of this part. State supervisors determine the degree to which state-chartered savings associations must comply with state laws other than those imposing restrictions on interest, as defined in paragraph (a) of this section.

(c) *Effect on state definitions of interest.* The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a savings association is located but state law permits its most favored lender to charge late fees, then a savings association located in that state may charge late fees to its intrastate customers. The savings association may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the savings association is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

61 Fed. Reg. 50,951, 50,981 (1996) (to be codified at 12 CFR § 560.110) (effective Oct. 30, 1996).

46. Pub. L. No. 101-73, § 301 (Aug. 9, 1989) (codified at 12 U.S.C. § 1463(g) (1994)). Section 4(g) of the HOLA provides in pertinent part:

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40. 143 N.J. 97, 668 A.2d 1067 (1995), vacated and remanded, 116 S. Ct. 2493 (1996), rev'd on remand, 146 N.J. 65, 679 A.2d 653 (1996).

41. Pub. L. No. 96-221, § 521 (Mar. 31, 1980) (codified at 12 U.S.C. § 1831d (1994)). Section 521 of the DIDA provides in pertinent part:

In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 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 such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

Id. § 1831d(a).

42. *Hunter v. Greenwood Trust Co.*, 146 N.J. 65, 679 A.2d 653 (1996), reinstating 272 N.J. Super. 526, 640 A.2d 855 (1994).

43. FDIC Letter No. 92-47 from Douglas H. Jones, Dep. Gen. Counsel (July 8, 1992), reprinted in [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 ("Jones 1992 FDIC Letter").

44. OTS Final Rule on Most Favored Lender Usury Preemption, 61 Fed. Reg. 50,951, 50,967-68 & n.63, 50,981 (1996) (to be codified at 12 C.F.R. § 560.110) (effective Oct. 30, 1996); OTS Op. 94/CC-18 from Karen Solomon, Dep. Chief Counsel (Sept. 29, 1994), reprinted in [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 (attaching Federal Home Loan Bank Board (predecessor to OTS) Interpretive Letter from Harry W. Quillian (June 27, 1986)).

37. 116 S. Ct. at 1735.

38. 505 U.S. 504, 518 (1992).

39. 439 U.S. at 313-19.

tical to that in the OCC Ruling and presumably would receive deference from the Supreme Court. Because the FDIC letter is not addressed to all institutions that the agency regulates and is issued neither by the head of the FDIC nor by the FDIC after notice and comment, however, it may not be entitled to deference under *Smiley*.⁴⁷ Conversely, because the FDIC has consistently interpreted section 521 of the DIDA to grant federally-insured state banks most favored lender status⁴⁸—in effect, parity with national banks, deference appears more likely to be accorded than in the case of the OCC 1988 Deputy Chief Counsel opinion denied deference in *Smiley*.⁴⁹

In any event, sections 521 and 4(g) should be interpreted to have the same meaning as section 85 with respect to the term “interest” because the operative language of all three provisions, *i.e.*, the authority to “charge interest at the rate allowed by the laws of the state where the institution is located,” is virtually identical. Indeed, the Court of Appeals for the First Circuit in *Greenwood Trust Co. v. Massachusetts*⁵⁰ determined that “[t]he historical record clearly requires a court to read the parallel provisions of [the DIDA] and [section 85] *in pari*

materia.”⁵¹ After *Smiley*, to heighten the likelihood of judicial deference to its position, the FDIC would be well advised to adopt an interpretive ruling concerning the definition of “interest” and most favored lender status under section 521 that is coextensive with the OCC Ruling. While the FDIC never has adopted such a formal interpretation, as noted above, the OTS has just adopted such an interpretive ruling with respect to usury preemption and most favored lender status.⁵² Since *Smiley* was decided, the OTS has issued a final interpretive rule on Lending and Investment by federal savings associations⁵³ that provides for broader federal preemption of state “loan-related” fee limitations than that established in the OCC Ruling.⁵⁴ This greater preemption, however, is premised on section 5(a)⁵⁵ as well as section 4(g) of the HOLA. Section 5(a) of the HOLA grants the OTS plenary authority to regulate federal savings associations’ lending practices,⁵⁶ an authority that has been interpreted more broadly⁵⁷ than that of the OCC under section 24(Seventh) of the NBA⁵⁸ to regulate national banks’ lending activities.

B. Whether Certain Fees Are “Interest” Under the OCC Ruling

The OCC Ruling indicates that the OCC’s list of fees that constitute “interest” is not intended to be exhaustive.⁵⁹ Accordingly, fees other than those listed may constitute “interest,” as long as they are not among the fees not considered by the OCC to be “interest.”⁶⁰ A number of credit card and other loan fees do not neatly fall into either category. For instance, attorneys’ fees and collection costs are assessed because of “default or breach by a borrower of a condition upon which credit was extended,” but they may not be a “payment compensating a creditor or prospective creditor” (as opposed to a third party) for nonpayment of a loan.⁶¹ Similarly, loan application fees may compensate a creditor or prospective creditor for making a line of credit available, but the *Smiley* Court declared that charges assigned to reimbursement of the lender’s costs in processing the application do not constitute “interest” under the OCC Ruling.⁶² Among the other fees that may not be considered “interest” under section 85 are credit card replacement fees, copy fees, currency conversion fees, line of credit access check stop payment fees, security interest filing and release or termination fees, and other types of secured loan closing and post-closing costs and fees.

Finally, certain fees and charges that banks may have considered “interest” under sections 85, 521, and 4(g) appear not to constitute “interest” under the OCC

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(g) Preemption of State usury laws

(1) Notwithstanding any State law, a savings association may charge interest on any extension of credit at a rate of not more than 1 percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district in which such savings association is located or at the rate allowed by the laws of the State in which such savings association is located, whichever is greater.

Id. § 1463(g)(1).

47. *Supra* note 31.

48. Jones 1992 FDIC Letter, *supra* note 43; FDIC Letter No. 83-16 from Peter M. Kravitz, Senior Att’y, to Peter D. Schellie (Oct. 20, 1983), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,013; FDIC Letter No. 81-7 from Kathy A. Johnson, Att’y, to Harvey Bock (Mar. 17, 1981), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,008.

49. See 116 S. Ct. at 1734-35.

50. 971 F.2d 818 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993).

51. 971 F.2d at 827. Those “parallel provisions” include not only section 521 but also sections 522 (now section 4(g) of the HOLA) and 523 (regarding federally-chartered and federally-insured state-chartered credit unions). See 12 U.S.C. §§ 1463(g), 1785(g), 1831d (1994). See also Part ILD of this article *infra* (regarding applicability of opt-out provision of DIDA).

52. 61 Fed. Reg. 50,951, 50,981 (1996) (to be codified at 12 CFR § 560.110) (effective Oct. 30, 1996).

53. 61 Fed. Reg. 50,951 (1996) (effective Oct. 30, 1996).

54. *Id.* at 50,972 (to be codified at 12 CFR § 560.2(b)) (effective Oct. 30, 1996). The rule also preempts state law limitations or requirements concerning disclosures, disbursements and repayments, and usury and interest rate ceilings to the extent provided in 12 U.S.C. § 1735f-7(a) and 12 CFR Part 590 (regarding first lien real estate loans) and 12 U.S.C. § 1463(g) and newly-promulgated 12 CFR § 560.110 (regarding exportation and most favored lender rights). 61 Fed. Reg. 50,951, 50,972 (to be codified at 12 CFR § 560.2(b)) (effective Oct. 30, 1996).

55. 12 U.S.C. § 1464(a) (1994).

56. *Id.*; see Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141 (1982).

57. See *id.*; OTS Final Rule, 61 Fed. Reg. 50,951, 50,965-67 (1996).

58. 12 U.S.C. § 24(Seventh) (1994).

59. The OCC Ruling provides that “interest” under section 85 includes, “among other things,” certain enumerated fees. 61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(a)). The OTS Most Favored Lender Ruling contains identical language. See *supra* note 45.

60. *Supra* text accompanying note 12. Since the *Smiley* decision, the OCC has opined in an interpretive letter that prepayment fees or penalties levied by a national bank on home equity loans constitute “interest” under 12 U.S.C. § 85 because, *inter alia*, the fees represent “compensation to the bank, in the form of an alternative to higher finance charges, for the risk that an extension of credit will be repaid prior to the maturity date on which the interest rate was predicated.” OCC Interpretive Letter from Julie L. Williams, Chief Counsel (Aug. 21, 1996).

61. See OCC Ruling, 61 Fed. Reg. 4849, 4869 (1996) (to be codified at 12 CFR § 7.4001(a)).

62. 116 S. Ct. at 1734.

