

Location and Exportation Authority

Summary Conclusion: A federal savings association may use and export the interest rate on loans permitted by the state in which its home office is located, and the performance of certain non-ministerial functions in another state in which the association has branch offices does not require that the association use the interest rate permitted by the branch state.

Date: September 17, 2004

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2004-8



Office of Thrift Supervision
Department of the Treasury

John E. Bowman, Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6372

September 17, 2004

[]
[]
[]
[]

Re: Location and Exportation Authority

Dear []:

This responds to your inquiry submitted on behalf of [] (“Association”), a federal savings association. You ask whether the Association may use and export on loans it makes the interest rate permitted by the state in which the Association’s home office is located, even though the Association’s officers and employees perform certain non-ministerial functions, but not loan approvals, in another state in which the Association has branches.

In brief, we conclude that in the circumstances you describe, the Association may use and export the interest rate on loans permitted by the state in which its home office is located, and the performance of the specified non-ministerial functions in another state or states in which the Association has branch offices does not require that the Association use the interest rate permitted by the branch state.

Background

The Association’s home office currently is located in [] (“State A”) and the largest single concentration of the Association’s branch offices is in State A.¹ The Association also has branch offices in several other states. The Association is considering relocating its home office to another state (“State B”).² The Association anticipates that even if it moves its home office from State A to State B, a majority of the Association’s branch offices will still be in State A.

¹ You indicate that more than 40% of the Association’s branches currently are located in State A.

² Although the Association has not yet designated the particular state in which the new home office will be located, for purposes of this letter we will refer to the state in which the Association’s new home office will be located as “State B.”

You indicate that the Association's officers and employees perform, or would perform, many non-ministerial functions with respect to home equity loans and credit card loans, other than approving the loans, in the Association's branch offices in various states. For instance, most of the face-to-face communications (if any) with regard to a home equity loan application, including communication of the loan approval, occur on the premises of a branch, which the Association records as the branch of the loan account. The branch often is located in the state where the borrower resides. If the borrower has a deposit account, then the loan proceeds may be deposited into that account at the branch. If loan proceeds are in the form of a check, then an Association employee may hand the check to the borrower on the premises of the branch. You indicate that with respect to credit card loans the Association may offer, the same functions, including communication of the approval of the credit card application, would likely occur in a branch in a state where the borrower resides. You represent that the actual approval of a home equity loan or credit card loan, as opposed to the communication of the approval, would never occur in a branch.³

You seek confirmation that the Association may be considered "located," for purposes of section 4(g) of the Home Owners' Loan Act ("HOLA")⁴ and OTS's implementing regulation,⁵ in the state in which the Association's new home office is located (State B), even though the Association has branch offices in other states and the majority of its branches will still be in State A. You also seek confirmation that interest rates on the Association's home equity loans and credit card loans will not be subject to limitation or regulation under the laws of any state other than State B, the state in which the Association's new home office is located. Finally, you ask whether the performance of non-ministerial functions, but not loan approvals, in branch offices in states other than State B, including in states where borrowers may reside, would require that the Association be deemed "located" in those branch states for purposes of HOLA § 4(g).

Statute and Regulations

Section 4(g) of the HOLA, commonly referred to as the "Most Favored Lender Provision," authorizes a savings association, notwithstanding any contrary state law, to

³ You indicate that currently, with respect to home equity loans, and in the future with respect to any credit card loans the Association may make, most loans would be approved or denied automatically, according to criteria established by a group of the Association's officers and employees in various administrative offices and programmed into a computerized loan underwriting system. You note that some loan applications may be submitted for a second review by an individual officer, employee, or agent of the Association, who may be located in one of several administrative offices of the Association throughout the United States.

⁴ 12 U.S.C.A. § 1463(g) (West 2001).

⁵ 12 C.F.R. § 560.110 (2004), entitled "Most favored lender usury preemption."

⁶ See 12 C.F.R. § 560.110(a) for the definition of "interest" for purposes of HOLA § 4(g) and this letter.

charge interest on loans and other extensions of credit at a rate of not more than (1) the maximum rate authorized for any class of lender under the laws of the state where the association is located or (2) one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district where the savings association is located, whichever is greater.⁷ The provision thereby preempts any other states' laws that might attempt to regulate the interest rates the savings association may charge on loans.

OTS's regulation implementing § 4(g) of the HOLA, § 560.110, entitled "Most favored lender usury preemption," provides, in part, that 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.⁸ The regulation goes on to state that if state law permits different interest charges on specified 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. The regulation thus permits a savings association to charge interest on loans at the rate permitted by the state where the association is located.

OTS regulations also permit a federal savings association to change the location of its home office and other offices, or redesignate a home or branch office, and sets forth the procedures an association must follow to accomplish such change or redesignation.⁹

Discussion

The Most Favored Lender provision of the HOLA enables a savings association located in one state to use or "export" the interest rate permitted by that state, even when making loans to borrowers who reside in another state. The doctrine of "exportation" has been recognized by the Supreme Court and other federal courts.¹⁰ A federal savings

⁷ Section 4(g) of the HOLA, 12 U.S.C. § 1463(g) (West 2001), provides, in pertinent part:

(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.

⁸ 12 C.F.R. § 560.110 (2004). The regulation also defines the term "interest" as used in HOLA §4(g).

⁹ 12 C.F.R. § 545.95 (2004), entitled "Change of office location and redesignation of offices."

¹⁰ See *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (construing the most favored lender provision applicable to national banks in the National Bank Act, 12 U.S.C. § 85); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519 (5th Cir. 1988) (construing the most favored lender provision applicable to federally-insured savings associations); and *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).

association may have its home office and branch offices in one state, and may also have branch offices in another state or states. For purposes of the Most Favored Lender Doctrine and HOLA § 4(g), when an association has branch offices in a state or states other than its home state, the association is deemed “located” in both its home office state and in any state in which it has a branch office.¹¹ Thus, a savings association may be located in more than one state for purposes of HOLA § 4(g).

OTS has previously concluded that an association may always export the most favored lender interest rate of its home office, even when making loans to borrowers residing in a branch state and even if the loans are booked out of offices located in that branch state.¹² The fact that an association is located in a state because it has a branch office in that state does not preclude the association from using the most favored lender rate of its home office state.¹³ In addition, even when loans are booked in offices in a branch state, an association may choose to export the most favored lender rate of the association’s home office state without demonstrating any special nexus between the loans and the association’s home state.¹⁴ Finally, an association having branches in a state other than its home state also has the option of electing to use the most favored lender rate of a branch state when a loan is booked in that branch state, regardless of whether the borrower resides in the branch state or a state in which the association is not located.¹⁵ To summarize, an association may use and export, at its option, the most favored lender interest rate of (i) the state in which its home office is located or (ii) any state in which a branch office is located and in which a loan is booked.

Your inquiry arises because of interpretations issued by other federal financial institution regulators regarding exportation of interest rates. Specifically, in 1998, the Office of the Comptroller of the Currency (“OCC”) issued an interpretive letter

¹¹ OTS Op. Chief Counsel (December 24, 1992).

¹² OTS Op. Chief Counsel, (December 24, 1992). The opinion also states, at note 19, that a loan will be deemed to be “booked” out of a branch office when the loan is underwritten, approved, processed, and disbursed from that office, but also indicated that it may not be necessary that each of the four elements always be present. *See also* OTS Op. Chief Counsel (April 2, 1992) (federal savings associations with a home office in Maryland and branches in Maryland, the District of Columbia, and Virginia may make credit card loans in Illinois and use the most favored lender rate of Maryland, or, if loans are booked out of a branch in Washington, D.C. or Virginia, the association has the option of using the most favored lender rate of the jurisdiction where the loan was booked).

¹³ OTS Op. Chief Counsel (December 24, 1992).

¹⁴ *Id.* The opinion indicated that the fact that the lending institution’s home office is located in the state from which interest rates are being exported provides a sufficient nexus.

¹⁵ *Id.* The opinion expressly did not address whether an association may use the most favored lender rate of a branch state for loans booked in the branch state and made to a borrower who resides in the association’s home state or another branch state.

construing the most favored lender provision of the National Bank Act.¹⁶ The OCC addressed the issue of which state's usury laws govern interest that may be charged by a national bank when the bank's main office is located in one state, the home state, and a branch office or offices of the bank are located in another state, the "host," state, and the bank is therefore located in more than one state. The OCC concluded that an interstate national bank may charge interest permitted by the laws of the state in which its home or "main" office is located unless three non-ministerial functions – loan approval, the extension of credit (communication of loan approval), and disbursement of loan proceeds – all occur in a branch or branches in the same state, in which case the bank is required to use the interest rates permitted by the law of that branch or "host" state.¹⁷ The Federal Deposit Insurance Corporation ("FDIC") adopted substantially the same position with respect to interstate state banks.¹⁸ You therefore ask whether OTS's previously stated positions regarding use and exportation of the most favored lender interest rate have changed such that the Association would not be able to use the most favored lender interest rate of its new home office state (State B), or whether the fact that there may be some nexus or connection between a loan and a branch state would hinder exportation of the interest rate permitted by the Association's home office state.

We note that the OCC interpretation was issued in response to federal legislation enacted in 1994, which permitted for the first time widespread interstate branching by national banks and state banks in some circumstances.¹⁹ The OCC reviewed and relied on the Riegle-Neal Act and the specific legislative history of that Act in reaching its conclusions regarding the use and exportation of interest rates by interstate national banks, and in deciding which state's usury laws govern interest that a bank located in more than one state may charge. The FDIC interpretation also followed Riegle-Neal's enactment and looked to its legislative history. In contrast, federal savings associations derive their interstate branching authority from the HOLA and had engaged in interstate branching for many years before passage of the Riegle-Neal Act. The branching authority of state savings associations similarly was not affected by the Riegle-Neal Act. In our view, the fact that the OCC has subsequently adopted a position, based on another statute, is not controlling. Each agency may interpret its respective governing statute

¹⁶ 12 U.S.C.A. § 85.

¹⁷ OCC Interpretive Letter No. 822 (February 17, 1998). The OCC also concluded that if the three identified non-ministerial functions are performed in the main office or in branches in different states, or in offices or in non-branch states, the national bank may apply the interest rate permitted by its home state. Finally, if fewer than all three functions are performed in branches in a host state, then the national bank may apply the rates of the host state if there is a clear nexus between the host state and the loan state. *See also*, OCC Interpretive Letters No. 968 (February 12, 2003) and No. 954 (December 16, 2002).

¹⁸ FDIC General Counsel's Opinion No. 11, 63 Fed. Reg. 27282-01 (May 18, 1998).

¹⁹ Riegle-Neal Interstate Banking and Branching Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) ("Riegle-Neal Act").

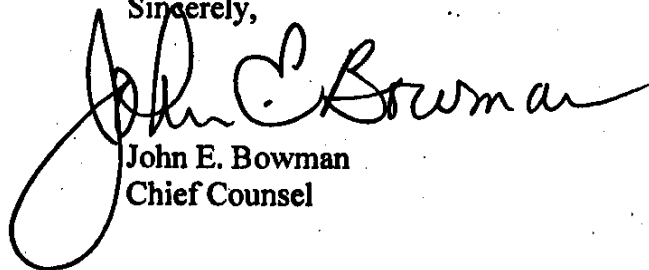
which, although similar with respect to most favored lender and permitted interest rates, are not identical.²⁰ Each agency has the authority to interpret its own regulations.

We continue to be of the view that the fact that the Association's home office is located in the state from which interest rates will be exported provides, by itself, a sufficient nexus between the loan and the home office state, regardless of any activities that may occur in a branch state. Thus, a savings association may always export the most favored lender rates of its home office state, and also has the option to use the most favored lender rate of any branch state for loans booked in that branch state.

In reaching the foregoing conclusions, we have relied on the facts and representations made in the material you submitted to us. Any material difference in facts or circumstances from those described herein could result in different conclusions.

If you have further questions regarding this matter, please contact Vicki Hawkins-Jones, Special Counsel (Banking and Finance), at (202) 906-7034.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Bowman". The signature is fluid and cursive, with a large loop at the end of the last name.

John E. Bowman
Chief Counsel

cc: OTS Regional Directors
OTS Regional Counsel

²⁰ Even where multiple agencies are construing the same statute, if they have mutually exclusive jurisdiction over separate sets of regulated entities, each agency's interpretation is entitled to deference. See e.g., *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246 (D.C. Cir. 2003).