



Interpretive Letter #1171
August 2020

June 1, 2020

Subject: Response to Request Regarding Non-Ministerial Functions in Context of Credit Card Loans Under 12 U.S.C. § 85

Dear []:

This is in response to your letter dated May 27, 2020, requesting confirmation from the Office of the Comptroller of the Currency (OCC) that [] (Bank) may charge interest on credit cards consistent with **[State X]** law.

For the reasons discussed below, the OCC concludes that the Bank may charge interest on credit cards consistent with **[State X]** law because (1) the non-ministerial function of loan approval for credit cards occurs in **[State X]** and (2) the Bank's credit card lending has a clear nexus with **[State X]**. The OCC does not reach a conclusion as to whether the non-ministerial functions of extension of credit or disbursal of loan proceeds occur in **[State X]**.

I. Background

The Bank is an interstate national bank that has its main office in **[State Y]** and that operates branches in [**several**] states, including **[State X]**.¹ The Bank issues credit cards to borrowers across the country. This credit card business was previously conducted by its affiliate [] (**Bank2**), which had its main office in [**State X**] and which had no branches. [**Bank2**] was merged with and into the Bank in May 2019. Prior to the merger, [**Bank2**] charged credit card borrowers in all states interest consistent with the laws of **[State X]**. Although the credit card business is now conducted by the Bank, the core of the credit card business continues to be conducted out of a Bank branch in **[State X]**. The activities related to the credit card business that occur in **[State X]** include development and approval of the Bank's credit risk policy, decisions about the content of communications reflecting approval

¹ The state where a national bank's main office is located is referred to as the bank's home state. States in which a bank has branches are referred to as host states. See 12 U.S.C. § 1831u(g)(4)(A)(i), (g)(5).

of a credit card application, and establishment and approval of credit risk rules that govern the review of individual transactions.²

The Bank seeks OCC confirmation that, under 12 U.S.C. § 85, it may continue to charge credit card borrowers interest consistent with the laws of [State X] notwithstanding the merger, given the credit card business's ongoing connection to [State X].³

II. Section 85 precedent

Pursuant to section 85, a national bank may charge interest on any loan at the rate permitted by the laws of the state where the bank is “located.” In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,⁴ the Supreme Court concluded that, for purposes of section 85, a national bank is located in the state named in its organization certificate pursuant to 12 U.S.C. § 22 (*i.e.*, its home state).⁵ The *Marquette* Court then held that a national bank could charge interest consistent with the laws of its home state, regardless of the location of the borrower and even if the bank had specifically targeted borrowers in another state.⁶

In 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal),⁷ which permitted extensive interstate branching by national banks for the first time. Because the OCC concluded that an interstate national bank is located both in its home state and in any host state,⁸ this statutory change raised new questions about how section 85

² Your letter also notes that the Bank's credit card application and issuance process is highly automated, and many related functions occur at locations throughout the country, which reduces costs, increases efficiency, and supports business resiliency.

³ Note that if the Bank could not charge interest consistent with [State X] law, it would likely charge interest consistent with the laws of [State Y], its home state. *See infra* Section II. Your letter states that the Bank has been advised by separate counsel that [State Y] law would authorize the Bank to charge the same or substantially the same interest, fees, and other charges as [State X] law. Therefore, while a confirmation from the OCC that the Bank may continue to charge interest consistent with [State X] law would not materially alter the interest the Bank may charge under section 85, your letter explains that the Bank nevertheless prefers to charge interest on credit cards consistent with [State X] law for other reasons, including legal certainty and other operational and risk management considerations. The OCC also understands that [State X] law otherwise governs the Bank's credit card contracts.

⁴ 439 U.S. 299 (1978).

⁵ *Id.* at 310.

⁶ *Id.* at 310-13.

⁷ Pub. L. No. 103-328, 108 Stat. 2338 (1994).

⁸ *See* OCC Interpretive Letters 686 (Sept. 11, 1995) and 822 (Feb. 17, 1998). The OCC based this conclusion on cases that have construed similar location-based language in 12 U.S.C. §§ 36 (interstate branching) and 94 (venue) to include both a national bank's home state and any state in which it operates branches, as well as language in *Marquette* recognizing this precedent. *See, e.g., Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 38-45 (1977) (interpreting the term “located” in section 94 as it then existed); *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309, 315-17 (5th Cir. 1997) (interpreting the term “situated” in section 36); *Seattle Trust & Sav. Bank v. Bank of California, N.A.*, 492 F.2d 48, 50-52 (9th Cir. 1974) (same); *see also Marquette*, 439 U.S. at 309 n.21 (recognizing

would apply to an interstate national bank.⁹ Although Riegle-Neal includes two statutory provisions relevant to evaluating these questions—one that sets forth which host state laws apply to a branch of an out-of-state national bank¹⁰ and one that preserves national banks’ ability to charge interest under section 85¹¹—these do not clearly establish when an interstate national bank *must charge* interest consistent with the laws of its home state or of a particular host state, nor do they clearly establish when, if ever, an interstate national bank *may elect to charge* interest consistent with the laws of one of these states.

Interpreting section 85 in light of Riegle-Neal and its legislative history, the OCC adopted a framework to evaluate which state’s laws govern the interest an interstate national bank must or may elect to charge based on where a loan is “made.”¹² Under this framework, a loan is made where the three non-ministerial functions associated with making a loan occur; the non-ministerial functions are (1) approving the loan; (2) extending the credit; and (3) disbursing the loan proceeds.¹³ Based on this analysis, an interstate national bank may charge interest in accordance with the laws of its home state *unless* all three non-ministerial functions occur at one

that a national bank is located where it has branches for purposes of section 94). At least one court has suggested that section 85’s location language should be read consistently with section 36 and other provisions of the National Bank Act that refer to where a national bank is located or situated. *Seattle Trust*, 492 F.2d at 51; *see also MorEquity, Inc. v. Naeem*, 118 F.Supp.2d 885, 897 (N.D. Ill. 2000).

⁹ *Marquette*, for example, specifically noted that the national bank in that case did not operate any branches in the state where the out-of-state borrowers resided. *Marquette*, 439 U.S. at 309.

¹⁰ Section 102(b)(1), codified at 12 U.S.C. § 36(f)(1)(A), provides that “[t]he laws of the host State regarding . . . consumer protection . . . apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except- (i) when Federal law preempts the application of such State laws to a national bank”

¹¹ Section 111, codified at 12 U.S.C. § 1811 note, provides that “[n]o provision of [Title I of Riegle-Neal] and no amendment made by this title to any other provision of law shall be construed as affecting in any way . . . the applicability of [section 85].”

¹² OCC Interpretive Letter 822. *See* H.R. Rep. No. 103-651, at 63 (1994) (Conf. Rep.) (explaining that section 111 makes clear that Riegle-Neal “[does] not affect existing authorities with respect to any charges under . . . [section 85] . . . imposed by national . . . banks for loans or other extensions of credit made to borrowers outside the state *where the bank or branch making the loan or other extension of credit is located*”) (emphasis added); 140 Cong. Rec. 24,487 (1994) (“[I]n the context of nationwide interstate branching, it is *the office of the bank or branch making the loan* that determines which State law applies.”) (emphasis added).

¹³ *See* 140 Cong. Rec. 24,488 (1994) (“[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”) (emphasis added); OCC Interpretive Letter 822 at 8-9; *see also MorEquity, Inc.*, 118 F.Supp.2d at 897-98 (applying FDIC’s General Counsel Opinion No. 11, which “essentially adopts” OCC Interpretive Letter 822, to evaluate where the non-ministerial functions occurred and, therefore, where the loan was made).

or more of the bank's branches in a single host state.¹⁴ If all three non-ministerial functions occur within a branch or branches in a single host state, the bank *must* use that host state's rates.¹⁵ If some, but not all, of the non-ministerial functions occur in a host state, the bank may elect to use the host state's rates, provided that there is a clear nexus between the loan and the host state based on an assessment of all the facts and circumstances.¹⁶ In this case, the bank may also elect to use the home state's rates.¹⁷ If the non-ministerial functions occur in different states (*e.g.*, both home state and host state(s)) and there are not sufficient contacts to establish a clear nexus between the loan and any host state, the bank must use the home state's rates.¹⁸

Therefore, pursuant to this framework, the Bank may charge interest on its credit cards consistent with **[State X]** law if (1) all three non-ministerial functions occur in one or more **[State X]** branches or (2) at least one non-ministerial function occurs in **[State X]** and the Bank's credit card lending has a clear nexus to **[State X]**.

III. Analysis

A. Approval

According to OCC Interpretive Letter 822, if bank personnel apply subjective underwriting criteria and exercise discretion in reviewing loan applications, loan approval occurs where the person making the decision is located.¹⁹ In contrast, if the determination to approve or deny a loan is based on non-discretionary criteria that will be applied mechanically, loan approval occurs where the decision establishing those non-discretionary criteria is made. However, if bank personnel have discretion to review and approve loans rejected by non-discretionary criteria, approval of these loans occurs where that discretion is exercised.

As you have explained, the Bank's credit decisions on credit card applications are uniformly made in accordance with non-discretionary underwriting criteria established by the Bank's credit

¹⁴ OCC Interpretive Letter 822 at 9-10 (“[W]here a loan cannot be said to be ‘made’ in a host state under the approach laid out in the Riegle-Neal legislative history, the loan must be considered to be a bank loan and the home state's rates may always be applied.”).

¹⁵ See *MorEquity, Inc.*, 118 F.Supp.2d at 897-98 (N.D. Ill. 2000); *supra* notes 12-13; see also OCC Interpretive Letter 822 at 9 (relying on sections 102(b)(1) and 111 of Riegle-Neal and related legislative history to conclude that “if a branch or branches in a particular *host* state approves the loan, extends the credit, and disburses the proceeds to a customer, Congress contemplated application of the usury laws of that state regardless of the state of residence of the borrower”) (emphasis added).

¹⁶ See OCC Interpretive Letter 822 at 9, 11 (interpreting the statutory silence regarding which state's laws apply when the loan cannot be considered “made” in the main office or in the bank's branch(es) in one host state).

¹⁷ See *id.* at 11.

¹⁸ See *id.* at 9-11. The principles established by the framework adopted in OCC Interpretive Letter 822 do not change based on the state in which the borrower resides or the mere presence of branches in other states. See *id.*

¹⁹ *Id.* at 12-13.

risk policy, which is written by a team based in [State X] and approved, at meetings held in [State X], by senior credit card risk executives, the majority of whom work primarily in [State X]. Substantially all of these credit decisions are made automatically through the Bank's electronic systems. A *de minimis* number of applications cannot be processed automatically and are reviewed by Bank analysts located in [State X] and several other states.²⁰ This manual review is also governed by the Bank's credit risk policy; the reviewing bank analyst mechanically applies the non-discretionary underwriting criteria established therein and does not exercise independent credit or underwriting judgment that could alter outcome of the credit decision.²¹

Applying the framework in OCC Interpretive Letter 822, the OCC concludes that loan approval for all credit cards occurs in [State X], where Bank executives and employees exercise skill and judgment to establish the non-discretionary underwriting criteria in the credit risk policy. Once the Bank's credit risk policy is established, all credit decisions are made based on the mechanistic application of these non-discretionary criteria, even when applications are reviewed manually by Bank analysts. Therefore, the non-ministerial function of loan approval for credit cards occurs in [State X].

B. Nexus

As noted above, if a bank can establish that it performs some, but not all, non-ministerial functions in a host state, it can rely on the host state's interest rates if it can establish a clear nexus between the loan and the host state. The OCC has previously concluded that a bank can establish a clear nexus between a host state and its credit card operations when related key strategic planning and development and other functions occur in the host state.²² These include developing credit and other policies regarding pricing and terms, receiving and reviewing applications, receiving customer inquiries and handling billing errors, reviewing delinquent accounts, and receiving reports of lost or stolen credit cards.²³

In addition to the facts related to approval described above, your letter highlights several other credit card lending activities that occur in [State X]. These include (1) determining the content of communications to borrowers regarding loan approval; (2) developing algorithms that facilitate these communications; (3) establishing and approving credit risk rules (*e.g.*, spending limits) to automatically review individual credit card transactions; (4) developing policies regarding pricing and terms, marketing plans and strategies, product plans, and communications

²⁰ In addition, less than 15 percent of credit card applications are referred to fraud verification analysts that identify potential fraud or clear red flags generated by the Bank's automated systems. The analysts gather information and do not exercise credit judgment independent of the Bank's credit risk policy.

²¹ Analysts' decisions are also governed by policies and guidelines written and approved by Bank employees in [State X], and analysts are reviewed by a team based in [State X] for compliance with the Bank's credit risk policy.

²² OCC Interpretive Letter 782, at 4-5 (May 21, 1997).

²³ *Id.* at 2-3.

to implement these plans and strategies; (5) managing the systems into which credit card applications are entered and from which the majority of loan approvals occur; and (6) writing, approval, and coding²⁴ of credit application rules. In addition, a significant number of employees focused on card services are located in [State X]. Moreover, [State X] is the state whose interest was used before the merger, borrowers know and will continue to be informed that interest is governed by Federal and [State X] law, and [State X] law governs other aspects of the Bank's credit card contracts.

The OCC concludes that these activities, taken together, establish a clear nexus between the Bank's credit card operations and [State X].

IV. Conclusion

Based on the foregoing analysis, the OCC concludes that loan approval for the Bank's credit cards occurs in [State X] and that the Bank's credit card lending has a clear nexus with [State X]. Therefore, consistent with the framework established in OCC Interpretive Letter 822, the Bank is clearly authorized to charge interest on credit cards consistent with [State X] law. The OCC does not reach a conclusion as to whether extension of credit or disbursal occur in [State X]. This conclusion is based on the facts and circumstances as represented in your letter. Different facts and circumstances or different applicable laws and regulations could result in a different conclusion.

Please feel free to contact me if you have any questions.

Sincerely,

/s/

Jonathan V. Gould
Senior Deputy Comptroller & Chief Counsel

²⁴ Your letter notes that a *de minimis* team in [outside of State X] supports the [State X] coding team.