Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 7 and Part 160

[Docket ID OCC–2019–0027]

RIN 1557–AE73

Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: Federal law establishes that national banks and savings associations (banks) may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. Federal law also provides national banks and Federal savings associations with the authority to enter into and assign contracts. Well-established authority also authorizes banks to sell, assign, or otherwise transfer loans. Despite these clear authorities, recent developments have created uncertainty about the ongoing validity of the interest term after a bank sells, assigns, or otherwise transfers a loan. This rule would clarify that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer.

DATES: Comments must be received by January 21, 2020.

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title ''Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

• *Federal eRulemaking Portal—Regulations.gov Classic or Regulations.gov Beta.*

Regulations.gov Classic: Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0027'' in the Search Box and click ''Search.'' Click on ''Comment Now'' to submit public comments. For help with submitting effective comments please click on ''View Commenter's Checklist.'' Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov,* including instructions for submitting public comments.

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• *Email: regs.comments@occ.treas.gov.*

• *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2019–0027'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

• *Viewing Comments Electronically—Regulations.gov Classic or Regulations.gov Beta.*

Regulations.gov Classic: Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0027'' in the Search box and click ''Search.'' Click on ''Open Docket Folder'' on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on ''View all documents and comments in this docket'' and then using the filtering tools on the left side of the screen. Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov.* The docket may be viewed after the close of the comment period in the same manner as during the comment period.

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• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Andra Shuster, Senior Counsel, Karen

McSweeney, Special Counsel, or Priscilla Benner, Attorney, Chief Counsel's Office, (202) 649–5490, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Background

Federal law authorizes national banks and savings associations (banks) to charge interest at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. Pursuant to Federal law, national banks and Federal savings associations may also enter into contracts. Inherent in this authority is the authority to assign such contracts. In addition, well-established authority authorizes banks to sell, assign, or otherwise transfer their loans.

Despite these clear authorities, recent developments have created uncertainty about the ongoing validity of the interest term after a bank sells, assigns, or otherwise transfers a loan. After considering the principles discussed below, the OCC has concluded that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. This proposed rule would codify this conclusion.

II. Analysis

Various provisions of Federal banking law, taken together, show that Congress created an integrated Federal scheme that permits national banks and Federal savings associations to operate across state lines without being hindered by differing state laws. *See, e.g.,* 12 U.S.C. 24, 85, 86, 371, and 1461 *et seq.* The National Bank Act (NBA) provides for a system of national banks to serve as "instrumentalities of the federal government," [1] which are "designed to be used to aid the government in the administration of an important branch of the public service." [2] The NBA contemplates that national banks will operate nationwide, and accordingly, it provides national banks "protection from 'possible unfriendly State legislation.' " [3] Similarly, through the Home Owners' Loan Act (HOLA), "Congress delegated to the [Federal Home Loan Bank Board (FHLBB)] broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now,' and to 'establish them with the force of the government behind them, with a national charter.' " [4]

To carry out Congress's purposes, the NBA vests in national banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24(Seventh). HOLA provides Federal savings associations with broad authority to engage in banking activities. 12 U.S.C. 1464. These statutes grant national banks and Federal savings associations the power to make contracts, 12 U.S.C. 24(Third) and 1464,[5] and the power to lend money. 12 U.S.C. 24(Seventh) and 1464.

While not expressly stated in these statutes, among the essential rights normally associated with the power to contract is the ability to subsequently assign some or all of the benefits of a contract to a third party.[6] Restatement (Second) of Contracts § 317 (1981). Generally, all contract rights may be assigned in the absence of clear language expressly prohibiting the assignment or if the assignment would "[(1)] materially change the duty of the obligor or [(2)] materially increase the obligor's burden or risk under the contract or [(3)] the contract involves obligations of a personal nature." 29 Williston on Contracts § 74:10 (4th ed.) (citations omitted). *But see* 29 Williston on Contracts § 74:23 (stating that certain assignments may be specifically forbidden by statute or may otherwise be void as against public policy). All ordinary business contracts are assignable, and a contract for money to become due in the future is among the types of contracts that normally may be assigned.[7] Upon assignment, the third-party assignee steps into the shoes of the bank; the assignee acquires and may enforce the rights the bank assigned to it under the contract.[8]

In the banking context, the authority of banks to sell, assign, or otherwise transfer (assign) a loan is a well-established element of the authority to make loans. Since at least 1848, the Supreme Court has recognized that a bank's authority to assign a loan is a power incident to the authority to make one, even if assignment is not expressly mentioned in the statute.[9] Thus, the Federal statutes that provide national banks and Federal savings associations the authority to make loans also confer upon them the power to assign loans. 12 U.S.C. 24(Seventh), 371, and 1464(c); *see also* 12 CFR 7.4008(a), 34.3, and 160.30.

As part of the authority to lend granted to national banks, Federal law establishes a clear and comprehensive scheme governing the interest that a bank may charge. Twelve U.S.C. 85 provides that a national bank may "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located." [10] Similarly, 12 U.S.C. 1463(g), which is modeled on and interpreted *in pari materia* with section 85,[11] provides that savings associations may "[n]otwithstanding any State law . . . charge interest . . . at the rate allowed by the laws of the State in which such savings association is located." [12]

The intent of Congress when it originally enacted section 85 in 1864 was to ensure parity between national and state banks in order to allow the new Federal charter to flourish and to establish a uniform national currency.[13] When Congress enacted section 1463(g), it intended to place savings associations on equal footing with their national bank competitors. *See supra* note 11.

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[1] *Davis* v. *Elmira Sav. Bank,* 161 U.S. 275, 283 (1896).

[2] *Farmers' & Mechanics' Nat'l Bank* v. *Dearing,* 91 U.S. 29, 33 (1875).

[3] *Beneficial Nat'l Bank* v. *Anderson,* 539 U.S. 1, 10 (2003) (quoting *Tiffany* v. *Nat'l Bank of Mo.,* 85 U.S. 409, 412 (1873)).

[4] *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 166 (1982) (citations and footnote omitted).

[5] Office of Thrift Supervision (OTS) letter from Carolyn J. Buck, November 22, 1995, 1995 WL 790839.

[6] Rights authorized by a statute need not always be express—they are often implicit in the other rights given by the statute. *See, e.g., Franklin Nat'l Bank* v. *New York,* 347 U.S. 373, 377–78 (1954) (concluding that the right to accept savings deposits implicitly included the right to advertise).

[7] *See Bank of America, N.A.* v. *Rice,* 780 SE2d 873 (N.C. Ct. App. 2015).

[8] *Dean Witter Reynolds Inc.* v. *Var. Annuity Life Ins. Co.,* 373 F.3d 1100, 1110 (10th Cir. 2004) (stating that it was long-established that "an assignee stands in the shoes of the assignor").

[9] *See Planters' Bank of Miss.* v. *Sharp,* 47 U.S. 301, 322–23 (1848); *see also supra* note 6.

[10] Alternatively, section 85 allows a national bank to charge "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." 12 U.S.C. 85. Through interpretive letters, the OCC has addressed where a national bank is located for purposes of section 85. *See, e.g.,* OCC Interpretive Letter 822 (Feb. 17, 1998).

[11] *See Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n,* 845 F.2d 519, 521 (5th Cir. 1988) ("Given the similarity of language, the conclusion is virtually compelled that Congress sought to provide federally insured credit institutions with the same 'most-favored lender' status enjoyed by national banks."); 61 FR 50951, 50968 (Sept. 30, 1996) ("OTS and its predecessor, the FHLBB, have long looked to the OCC regulation and other precedent interpreting the national bank most favored lender provision for guidance in interpreting [12 U.S.C. 1463(g)] and OTS's implementing regulation."); OTS letter from Harris Weinstein, December 24, 1992, 1992 WL 12005275.

[12] Section 1463(g) also allows savings associations to charge an alternate rate that is based on the relevant Federal Reserve discount rate for 90-day commercial paper. *See supra* note 10.

[13] Cong. Globe, 38th Cong., 1st Sess., 2123–27 (1864). *See Roper* v. *Consurve, Inc.,* 578 F.2d 1106 (5th Cir. 1978), *affirmed* 445 U.S. 326 (1980).

Sections 85 and 1463(g) have been interpreted to permit a bank to charge interest at the highest rate allowed to competing lenders by the state where the bank is located (known as the ''most favored lender'' doctrine) and to export this rate to borrowers in other states, regardless of any other state law purporting to limit the interest permitted on bank loans.[14]

Federal law thus establishes that a bank may enter into a loan contract, charge interest at the maximum rate permitted in the state where it is located, and subsequently assign the loan. These authorities, in turn, provide the fundamental transactional building blocks that are used to construct important portions of the nation's banking system. For example, the ability to originate loans and subsequently securitize them on the secondary market depends upon the ability of banks to assign all or part of their ownership interest in a loan.

Despite the fact that these well-established and heretofore well-understood authorities previously had not been seriously called into question, a recent decision from the United States Court of Appeals for the Second Circuit has created uncertainty regarding the ongoing validity of the interest term determined under section 85 after a national bank assigns a loan.[15] Through this rulemaking, the OCC seeks to end this uncertainty by clarifying that when a bank assigns a loan, interest permissible prior to the assignment will continue to be permissible following the assignment.

Multiple legal principles support the OCC's interpretation. First, well before the passage of the NBA or the HOLA, the Supreme Court recognized the longstanding common law principle of valid-when-made and described it as a ''cardinal rule[ ] in the doctrine of usury.''[16] The valid-when-made principle provides that if a loan is non-usurious at origination, the loan does not subsequently become usurious when assigned.[17] This longstanding rule relating to usury certainly applies here; a loan by a bank that complies with section 85 or 1463(g) is by definition not usurious when it is originated, and a subsequent assignment of the loan does not render the loan usurious.

Apart from being the natural result if one applies the valid-when-made principle, this conclusion is also supported by banks' ability to assign contracts. As noted above, national banks and Federal savings associations may assign their loan contracts to third parties. Because the assignee steps into the bank's shoes upon assignment, the third party receives the benefit of and may enforce the permissible interest term. Again, the loan does not become usurious after the assignment simply because the third party is enforcing the contractually agreed upon interest term.[18] An assignment does not normally change the borrower's obligation to repay in any material way. *See* 29 Williston on Contracts § 74:10.

Finally, a bank's well-established authority to assign a loan may be unduly curtailed if the bank cannot be certain that interest permissible prior to the assignment will remain permissible afterwards. Congress would not have intended to limit banks' authority in this manner.[19] Even in the mid-nineteenth century, banks' ability to assign their loans was recognized as an important tool to manage liquidity and enhance safety and soundness. As the Supreme Court stated, ''[banks] must be able to assign or sell [their] notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house.''[20] The Court further observed that while a bank may have other tools to respond to these circumstances, assigning loans may be the ''wiser and safer'' course of action.[21] Although the banking system has evolved significantly in the 150 years since *Planters' Bank,* banks of all sizes continue to routinely rely on loan assignments and securitization to access alternative funding sources, manage concentrations, improve financial performance ratios, and more efficiently meet customer needs. This risk management tool would be significantly weakened if the permissible interest on assigned loans were uncertain or if assignment of the permissible interest were limited only to third parties that would be subject to the same or higher usury caps.

The conclusion that interest permissible prior to the assignment of a loan continues to be permissible following the assignment is also consistent with the purpose of sections 85 and 1463(g)—to facilitate banks' ability to operate across state lines by eliminating the burden of complying with each state's interest laws. This ability to operate on an interstate basis under a uniform set of standards, including with respect to interest, is fundamental to the character of national banks and has been since their inception.[22] Recognizing the value of this uniformity in applicable interest law, Congress extended the principles of section 85 to savings associations, state-chartered insured depository institutions, and insured credit unions in 1980. *See* 12 U.S.C. 1463(g), 1785, and 1831d. Then, in 2010, while carefully examining the application of state law to Federally-chartered banks, Congress expressly preserved national banks' authority under section 85 and thereby reaffirmed the importance of section 85 and similar statutes to the banking system.[23] Reading sections 85 and 1463(g) as applying only to loans that a bank holds on its books would thwart this statutory scheme and would be inconsistent with the valid-when-made and assignability principles discussed above.

Based on the foregoing, the OCC concludes that, as a matter of Federal law, banks may assign their loans without impacting the validity or enforceability of the interest.

III. Summary of the Proposal

The OCC would amend 12 CFR 7.4001 and 12 CFR 160.110 by adding a new paragraph, which would provide that interest on a loan that is permissible under sections 85 and 1463(g)(1), respectively, shall not be affected by the sale, assignment, or other transfer of the loan.[24] This rule would

[14] *See Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.,* 439 U.S. 299, 310–14 (1978) (''[The bank] cannot be deprived of [its] location merely because it is extending credit to residents of a foreign State.'').

[15] *See Madden* v. *Midland Funding, LLC,* 786 F.3d 246 (2nd Cir. 2015).

[16] *See Nichols* v. *Fearson,* 32 U.S. (7 Pet.) 103, 109 (1833).

[17] *See id.* (''[A] contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.''); *Gaither* v. *Farmers & Mechs. Bank of Georgetown,* 26 U.S. (1 Pet.) 37, 43 (1828).

[18] *See Olvera* v. *Blitt & Gaines, P.C.,* 431 F.3d 285, 286, 289 (7th Cir. 2005) (''[T]he assignee of a debt . . . is free to charge the same interest rate that the assignor . . . charged the debtor . . . even if the assignee does not have a license that expressly permits the charging of a higher rate.'').

[19] *See Franklin,* 347 U.S. at 377–78.

[20] *Planters' Bank of Miss.,* 47 U.S. at 323.

[21] *Id.*

[22] ''National banks have been National favorites . . . It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States . . . .'' *Tiffany,* 85 U.S. at 413. The NBA ''has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.'' *Easton* v. *Iowa,* 188 U.S. 220, 229 (1903).

[23] Section 1044(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[24] The Federal Deposit Insurance Corporation (FDIC) is also proposing a similar rule based on 12 U.S.C. 1831d. The FDIC has interpreted this provision to be consistent with section 85

Continued

expressly codify what the OCC and the banking industry have always believed and address recent confusion about the impact of an assignment on the permissible interest. This rule would not address which entity is the true lender when a bank makes a loan and assigns it to a third party. The true lender issue, which has been considered by courts recently, is outside the scope of this rulemaking.

IV. Solicitation of Comments

The OCC invites comment on all aspects of this proposal.

V. Regulatory Analyses

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC has reviewed the notice of proposed rulemaking and determined that it would not introduce any new or revise any existing collection of information pursuant to the PRA. Therefore, no submission will be made to OMB for review.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million of less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 755 small entities.[25] The ability to sell, assign, or otherwise transfer a loan is important to all banks, so the OCC expects that all of these small entities would be impacted by the rule. However, the rule does not contain any new recordkeeping, reporting, or significant compliance requirements. Therefore, the OCC anticipates that costs, if any, will be *de minimis* and certifies that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires the OCC to consider whether the proposed rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted for inflation). The proposed rule does not impose new mandates. Therefore, the OCC concludes that implementation of the proposed rule would not result in an expenditure of $100 million (adjusted for inflation) or more annually by state, local, and tribal governments, or by the private sector.

Riegle Community Development and Regulatory Improvement Act

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. The OCC invites comments that will inform its consideration of RCDRIA.

List of Subjects

12 CFR Part 7

National banks, Interest, Usury.

12 CFR Part 160

Savings associations, Interest, Usury.

Office of the Comptroller of the Currency

For the reasons set out in the preamble, the OCC proposes to amend 12 CFR part 7 and part 160 as follows.

PART 7—ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1463, 1464, 1465, 1818, 1828(m) and 5412(b)(2)(B).

Subpart D—Preemption

■ 2. Section 7.4001 is amended by adding paragraph (e) to read as follows:

§ 7.4001 Charging interest by national banks at rates permitted competing institutions; charging interest to corporate borrowers.

* * * * *

(e) *Transferred loans.* Interest on a loan that is permissible under 12 U.S.C. 85 shall not be affected by the sale, assignment, or other transfer of the loan.

PART 160—LENDING AND INVESTMENT

■ 3. The authority citation for part 160 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1701j–3, 1828, 3803, 3806, 5412(b)(2)(B); 42 U.S.C. 4106.

■ 4. Section 160.110 is amended by adding paragraph (d) to read as follows:

§ 160.110 Most favored lender usury preemption for all savings associations.

* * * * *

(d) *Transferred loans.* Interest on a loan that is permissible under 12 U.S.C. 1463(g)(1) shall not be affected by the sale, assignment, or other transfer of the loan.

Dated: November 18, 2019.

Morris R. Morgan,

First Deputy Comptroller, Comptroller of the Currency.

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(including OCC precedent). *See, e.g.,* FDIC General Counsel's Opinion No. 11, Interest Charges by Interstate State Banks, 63 FR 27282 (May 18, 1998).

[25] The OCC bases its estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if the OCC should classify an OCC-supervised institution as a small entity. The OCC uses December 31, 2018, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the SBA's *Table of Size Standards*