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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Parts 7 and 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:** Final rule.

**SUMMARY:** Federal law establishes that national banks and savings associations (banks) may charge interest on loans at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. In addition, banks are generally authorized to sell, assign, or otherwise transfer (transfer) loans and to enter into and assign loan contracts. Despite these authorities, recent developments have created legal uncertainty about the ongoing permissibility of the interest term after a bank transfers a loan. This rule clarifies that when a bank transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer.

**DATE:** The final rule is effective on [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

On November 21, 2019, the OCC published a notice of proposed rulemaking (proposal or NPR) to codify its conclusion that when a national bank or savings association (bank) sells, assigns, or otherwise transfers (transfers) a loan, interest permissible before the transfer continues to be permissible after the transfer.[1]

As the proposal explained, a bank may charge interest on a loan at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. In addition, banks are generally authorized to transfer their loans and to enter into and assign loan contracts. Despite these authorities, recent developments have created legal uncertainty about the ongoing permissibility of the interest term after a bank transfers a loan.

Consistent with the proposal, this regulation addresses that legal uncertainty by clarifying and reaffirming the longstanding understanding that a bank may transfer a loan without affecting the permissible interest term. Based on its supervisory experience, the OCC believes that unresolved legal uncertainty about this issue may disrupt banks' ability to serve consumers, businesses, and the broader economy efficiently and effectively, particularly in times of economic stress. The OCC also believes that enhanced legal

[1] Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 84 FR 64229 (Nov. 21, 2019).

certainty may facilitate responsible lending by banks, including in circumstances when access to credit is especially critical.

## II. Overview of Comments

The OCC received over sixty comments on its NPR, including comments from industry trade associations, nonbank lenders, community groups, academics, state government representatives, and members of the public. Many commenters expressed support for the rule. Some stated that the legal uncertainty discussed in the proposal has had negative effects on the primary and secondary markets for bank loans. They argued that legal certainty regarding a bank's ability to transfer non-usurious loans without affecting the interest term would benefit banks and markets, including for liquidity and diversification purposes. Many supporting commenters also agreed that the OCC has the authority to address this issue by regulation and that the proposal reflected a permissible interpretation of relevant Federal banking law.

The OCC also received comments opposed to the rule, which raised both legal and policy concerns. Many commenters argued that the OCC does not have the authority to issue this regulation. Several also argued that the OCC's proposal was subject to, but did not comply with, the substantive and procedural provisions in 12 U.S.C. 25b. Opposing commenters also questioned the need for the rule, stating there is no evidence that legal uncertainty has had negative effects on banks or markets. Relying on these and other arguments, some commenters also argued that the OCC's proposal did not comply with the Administrative Procedure Act (APA).[2] Finally, certain commenters stated that the

[2] 5 U.S.C. 551 *et seq.*

NPR would facilitate predatory lending by promoting rent-a-charter relationships and allowing nonbanks to evade otherwise applicable state law.

Two commenters provided empirical studies analyzing the effects of the *Madden v. Midland Funding, LLC*[3] decision (*Madden*), including evidence that *Madden* restricted access to credit for higher-risk borrowers in states within the Second Circuit and that it caused a rise in personal bankruptcies due to a decline in marketplace lending, especially for low-income households.

**III. Analysis**

As noted in the proposal, the OCC is undertaking this rulemaking to clarify that a bank may transfer a loan without impacting the permissibility or enforceability of the interest term in the loan contract, thereby resolving the legal uncertainty created by the *Madden* decision. To support this conclusion, the proposal discussed a bank's authority to lend money, to make contracts, to charge interest consistent with the laws of the state in which it is located, and to subsequently transfer that loan and assign the loan contract. It also discussed the principles of "valid-when-made" and the assignability of contracts, which, if applied to the transfer of a loan, would generally produce an outcome consistent with the OCC's conclusion.

[3] 786 F.3d 246 (2d Cir. 2015). In this case, the U.S. Court of Appeals for the Second Circuit held that a purchaser of a loan originated by a national bank could not charge interest at the rate permissible for the bank if that rate would be impermissible under the lower usury cap applicable to the purchaser.

*Authority*

As noted above, although many supporting commenters expressly agreed that the OCC may promulgate this rule, many opposing commenters questioned the OCC's authority, relying on several principal arguments:

- Certain Federal statutes (12 U.S.C. 85 and 1463(g)) are unambiguous and only address the interest a *bank* may charge. Because these statutes are unambiguous, the OCC cannot invoke *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[4] (*Brand X*) to overturn the result in *Madden*.
- Valid-when-made is not a historical usury principle that supports the OCC's proposal.
- There is no basis to conclude that Federal law should preempt state usury laws based on a bank's power to assign contracts.
- There is no basis to conclude that Federal law should preempt state usury laws based on a bank's authority to transfer loans.

The OCC has carefully considered these comments and believes there is ample authority to issue this regulation. Federal law grants national banks broad authority to engage in the business of banking.[5] Specifically relevant here, the National Bank Act (NBA) provides national banks with enumerated powers, including the ability to lend money, and "all such incidental powers as shall be necessary to carry on the business of banking."[6] By statute, national banks also have the authority to transfer their loans.[7]

[4] 545 U.S. 967 (2005).

[5] The OCC will discuss the authority to issue this rule for national banks before discussing the authority to issue this rule for savings associations.

[6] 12 U.S.C. 24(Seventh) and 371.

Furthermore, the NBA expressly authorizes national banks to make contracts.[8] Among the essential rights associated with this power is the right to assign some or all of the benefits of a contract to a third party.[9] Generally, all contractual rights may be assigned "in the absence of clear language expressly prohibiting the assignment and unless the assignment would materially change the duty of the obligor or materially increase the obligor's burden or risk under contract or the contract involves obligations of a personal nature."[10] In addition, contractual rights generally may not be assigned if the assignment is "specifically forbidden by statute or . . . void as against public policy."[11] All ordinary business contracts are assignable, and a contract for money due in the future is among the types of contracts that normally may be assigned.[12] Therefore, a national bank's authority to enter into loan contracts pursuant to 12 U.S.C. 24(Third) necessarily includes the authority to assign such loan contracts.[13]

When a national bank exercises its authority to lend money and enters into a loan contract, the NBA authorizes the bank to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located."[14] Section 85 is the sole provision that governs the interest permissible on a loan made by a national bank, and it

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[7] 12 U.S.C. 24(Seventh) and 371; 12 CFR 7.4008 and 34.3; *see also Planters' Bank of Miss. v. Sharp*, 47 U.S. 301, 322 (1848) (concluding that the authority to transfer a loan is a "necessarily implied" corollary to the authority to make a loan). It should be noted that rights authorized by a statute need not 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 includes the right to advertise).

[8] 12 U.S.C. 24(Third).

[9] Restatement (Second) of Contracts section 317 (Am. Law Inst. 1981).

[10] 29 Williston on Contracts section 74:10 (4th ed.) (footnote omitted).

[11] *Id.* at section 74:23.

[12] *See Bank of Am., N.A. v. Rice*, 780 S.E.2d 873 (N.C. Ct. App. 2015).

[13] *See also Franklin Nat'l Bank*, 347 U.S. at 377-78.

[14] 12 U.S.C. 85. Section 85 also 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." *Id.*

operates primarily by incorporating the usury laws of the state in which the bank is located. Section 85 and 12 U.S.C. 86, which establishes the remedy for a violation of section 85, constitute the comprehensive statutory scheme governing the interest permitted on national bank loans.[15]

The NBA thus clearly establishes that a national bank may (1) lend money, pursuant to a loan contract, with an interest term that is consistent with the laws of the state in which the bank is located and (2) subsequently transfer that loan and assign the loan contract. However, the comprehensive statutory scheme regarding interest permitted on national bank loans does not expressly address how the exercise of a national bank's authority to transfer a loan and assign the loan contract affects the interest term. When Congress enacted the NBA, it understood that loan transfers were a fundamental aspect of the business of banking and that such transfers would play an important role in the national banking system.[16] Therefore, section 85's silence in this regard is "conspicuous[],"[17] and the OCC may interpret section 85 to resolve this silence.[18]

The OCC is not persuaded by commenters who argued that 12 U.S.C. 1735f-7a forecloses an argument that section 85's silence is ambiguous as to its application to loan transfers. These commenters argued that section 1735f-7a preempts state usury laws and expressly applies to originations and sales of certain loans, and therefore, Congress must

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[15] *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

[16] *See Planters' Bank*, 47 U.S. at 323 ("[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.").

[17] *Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019).

[18] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the *broader context of the statute as a whole*.") (emphasis added); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) (*Smiley*) (deferring to the OCC's reasonable interpretation of section 85's ambiguity with respect to meaning of "interest").

be presumed to have intentionally omitted similar language in section 85, thereby precluding the application of section 85 to loan transfers. These commenters argued that this presumption is particularly strong, because several statutory parallels to section 85 were enacted at the same time as section 1735f-7a. At least one commenter also cited 12 U.S.C. 3803 to make a similar argument.[19] The OCC disagrees. First, while the OCC agrees that section 1735f-7a applies to certain loans that have been transferred,[20] this is not by virtue of express statutory language addressing loan transfers. Rather, section 1735f-7a implicitly applies to transferred loans, notwithstanding its silence on this issue, for reasons similar to why the OCC concludes that section 85 applies to transferred loans. Moreover, even if section 1735f-7a expressly applied to loan transfers, it would further highlight the ambiguity created by the silence in section 85.[21] As courts have stated, affirmative language in one provision (section 1735f-7a) and statutory silence in another (section 85) can indicate that Congress intended to provide the administering agency (the OCC) with discretion to interpret the latter statute.[22]

[19] This statute authorizes housing creditors to make, purchase, and enforce alternative mortgage transactions and expressly preempts certain state laws.

[20] *See* S. REP. NO. 96-368, at 19 (1979) ("In connection with the provisions in this section, it is the Committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section.").

[21] This same conclusion applies to the extent that section 3803 expressly addresses transferred loans.

[22] *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) ("Silence . . . may signal permission rather than proscription."); *Cheney R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) ("[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the 'direct[]' congressional answer required by *Chevron*."); *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990) ("[W]here an agency is empowered to administer the statute, Congress may have meant that in the second context the choice should be up to the agency.").

After careful consideration, the OCC continues to conclude that it is appropriate to resolve the silence in section 85 by providing that when a bank transfers a loan, interest permissible before the transfer continues to be permissible after the transfer.

Well before the passage of the NBA, the Supreme Court recognized one of the "cardinal rules in the doctrine of usury" and described it as follows: "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."[23] Courts have also held the inverse—a loan that is usurious at its inception remains usurious until purged by a new contract.[24] Notwithstanding comments to the contrary, the OCC continues to read the cases cited in the proposal, particularly when considered in light of the court decisions establishing the inverse, to support a broad proposition: the usurious or non-usurious character of a contract endures through assignment.[25]

The OCC's interpretation is also supported by national banks' ability to assign contracts, as discussed above. Commenters argued that the interest term on a loan should be treated differently from other loan terms, including because it derives from a national bank's status under Federal law. For reasons stated in the proposal and herein, the OCC does not agree that the interest term of the contract should be treated differently, nor does it believe that the enforceability of an assigned interest term should depend on the

[23] *See Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833); *see also Gaither v. Farmers' & Mechs.' Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828).

[24] *See, e.g.*, *Auctus Fund, LLC v. Sunstock, Inc.*, 405 F. Supp. 3d 218 (D. Mass. 2019); *Heide v. Hunter Hamilton Ltd. P'ship*, 826 F. Supp. 224 (E.D. Mich. 1993); *Matthews v. Tripp*, 285 Mich. 705 (1938); *Westman v. Dye*, 214 Cal. 28 (1931); *Tribble v. Anderson*, 63 Ga. 31 (1879).

[25] This reading has been endorsed by the Solicitor General of the United States. *See Brief for the United States as Amicus Curiae*, *Midland Funding, LLC v. Madden*, No. 15-610 (May 24, 2016). Many commenters also support this reading.

licensing status of the assignor or assignee.[26] Upon assignment, the third-party assignee steps into the shoes of the national bank and may enforce the rights the bank assigned to it under the contract.[27] To effectively assign a loan contract and allow the assignee to step into the shoes of the national bank assignor, a permissible interest term must remain permissible and enforceable notwithstanding the assignment.[28] The loan should not be considered usurious after the assignment simply because a third party is enforcing the contractually agreed-upon interest term.[29] Furthermore, an assignment should not change the borrower's obligation to repay in any material way.[30]

Several commenters argued that, as common law, valid-when-made and the assignability of contracts do not provide the OCC with authority for this regulation. However, the OCC is not citing these tenets as independent authority for this rulemaking but rather as tenets of common law that inform its reasonable interpretation of section 85. Because Congress is presumed to legislate with knowledge of, and incorporate, common law, it is reasonable to interpret section 85 in light of these tenets.[31]

The OCC's interpretation is also consistent with the purpose of section 85. This statute facilitates national banks' ability to operate lending programs on a nationwide basis, a characteristic fundamental to national banks since their inception.[32] Recognizing

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[26] *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."). As at least one commenter noted, this case interprets Illinois state law and, therefore, does not directly address the issues raised by this rulemaking. However, the OCC finds the holding and reasoning instructive to its analysis.

[27] *Dean Witter Reynolds Inc. v. Variable 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").

[28] *See Olvera*, 413 F.3d at 288-89.

[29] *See id.* at 286, 289.

[30] *See* 29 Williston on Contracts section 74:10.

[31] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

[32] *See Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315-18 (1978) (concluding that Congress was aware of, and intended to facilitate, interstate lending when it enacted

the value of uniformity in applicable interest law, Congress extended the principles of section 85 to savings associations, state-chartered insured depository institutions, and insured credit unions.[33] Then, in 2010, while carefully examining the application of state law to national banks, Congress expressly preserved the authority conferred by section 85, thereby reaffirming its importance.[34] Reading section 85 as applying only to loans that a national bank holds to maturity would undermine this statutory scheme.[35]

The OCC's interpretation also promotes safe and sound operations, a core component of the OCC's mission as the prudential regulator of national banks. Even in the mid-nineteenth century, the ability to transfer loans was recognized as an important tool to manage liquidity and enhance safety and soundness.[36] 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."[37] Although the banking system has evolved significantly in the 150 years since *Planters' Bank*, national banks of all sizes continue to routinely rely on loan transfers to access alternative funding sources, manage concentrations, improve financial performance ratios, and more efficiently meet customer needs.[38] While the *Madden* decision's effect on a particular national bank

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section 85); *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) ("[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."); *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873) ("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 . . . .").

[33] *See* 12 U.S.C. 1463(g), 1785, and 1831d.

[34] 12 U.S.C. 25b(f).

[35] *See Marquette*, 439 U.S. at 312 (declining to interpret section 85 in a manner that would "throw into confusion the complex system of modern interstate banking").

[36] *Planters' Bank*, 47 U.S. 301.

[37] *Id.* at 323.

[38] *Comptroller's Handbook, Safety and Soundness,* "Liquidity," at 5, June 2012.

necessarily varies depending on the bank's business model, the resulting legal uncertainty impairs many national banks' ability to rely on this risk management tool, which is particularly worrisome in times of economic stress when funding and liquidity challenges may be acute.[39] The OCC, therefore, concludes that its interpretation promotes safety and soundness.

The OCC also received comments arguing that the OCC's rulemaking is foreclosed by *Madden*. The OCC disagrees; the Second Circuit made no finding that section 85's language unambiguously forecloses the OCC's interpretation, nor did it rely on section 85 in arriving at its holding.[40] Therefore, the *Madden* decision does not limit the OCC's ability to issue this rulemaking.

With respect to the comments arguing that neither section 24(Third) nor section 24(Seventh) provides the OCC with authority to preempt state usury law, the OCC does not cite these statutes for this purpose. As this authority section makes clear, these statutes describe the scope of national bank authorities, highlight the silence in section 85, and inform the OCC's efforts to resolve this silence.[41]

[39] *See Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (Cal. Ct. App. 1979) (concluding that the assignee of a bank note could continue to receive the rate the assigning bank could, because to conclude otherwise would "prohibit-make uneconomic-the assignment or sale by banks of their commercial property to a secondary market[, which] would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance"); *see also LFG Nat'l Capital, LLC v. Gary, Williams, Finney, Lewis, Watson & Sperando P.L.*, 874 F. Supp. 2d 108, 125 (N.D.N.Y. 2012) (stating the same).

[40] *See Brand X*, 545 U.S. at 982-83 (requiring that "judicial precedent *hold*[] that the statute *unambiguously forecloses* the agency's interpretation" (emphasis added)); *see also Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618-19 (2d Cir. 2016) (applying *Brand X* to adopt a more recent agency interpretation rather than two prior Second Circuit interpretations where the court "did not hold that the statute was unambiguous").

[41] *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Although the foregoing discussion specifically addresses national banks, it applies equally to savings associations. In 12 U.S.C. 1463(g), Congress provided savings associations with authority similar to section 85 to charge interest as permitted by the laws of the state in which the savings association is located. Congress modeled section 1463(g) on section 85 to place savings associations on equal footing with their national bank competitors, and thus, these provisions are interpreted *in pari materia*.[42] Therefore, the OCC concludes that section 1463(g) should be interpreted coextensively with section 85 in this regard, which will help ensure that savings associations and national banks have equal authority to transfer their loans without affecting the permissibility of the interest term.

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

*12 U.S.C. 25b*

Several commenters argued that the OCC's rule is subject to the substantive and procedural requirements set forth in section 25b and that the OCC has not complied with these requirements. The OCC disagrees and continues to conclude that the requirements of section 25b are inapplicable to this rulemaking.

Section 25b applies when the Comptroller determines, on a case-by-case basis, that a state consumer financial law is preempted pursuant to the standard for conflict

[42] *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.

preemption established by the Supreme Court in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner*,[43] *i.e.*, when the Comptroller makes a "preemption determination."[44] Interpretations about the substantive scope of section 85 are not preemption determinations. For example, the two most recent substantive Supreme Court opinions on section 85 primarily analyze what the statute authorizes as a matter of Federal law, rather than focus on preemption.[45] In fact, the Court specifically recognized this difference in *Smiley*, noting that "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" is distinct from "the question of *whether* a statute is pre-emptive."[46] This rulemaking addresses the former question, *i.e.*, the meaning of section 85. The proposal simply articulated the OCC's view about the substantive scope of authority granted to banks. The final rule adopts the same approach and thus is not a preemption determination under section 25b.[47]

The OCC also concludes that this rulemaking is outside the scope of section 25b because of section 25b(f), which provides that "[n]o provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85." Section 25b is in title 62 of the Revised Statutes, and therefore, its requirements also do not alter or affect the authority conferred under section 85, including as interpreted in this rulemaking.[48] For these reasons, the OCC disagrees with the

[43] 517 U.S. 25 (1996).

[44] *See* 12 U.S.C. 25b(b)(1)(B).

[45] *See Smiley*, 517 U.S. 735; *Marquette*, 439 U.S. 299.

[46] *Smiley*, 517 U.S. at 744 (emphasis in original).

[47] For these same reasons, the OCC is not persuaded by commenters who argued that sections 25b(b)(2), (e), and (h)(2) preclude the agency from issuing this rule.

[48] Section 25b(f) also supports the OCC conclusion that sections 25b(b)(2), (e), and (h)(2) do not preclude the agency from issuing this rule.

commenters who argued that section 25b(f) does not exempt rules interpreting section 85.[49]

The OCC thus concludes that this rulemaking is not subject to the requirements of section 25b.[50] Because the OCC concludes that these requirements are inapplicable, the OCC declines to address comments regarding how to comply with these requirements.

*Administrative Procedure Act*

Several commenters argued that the OCC's actions violate the APA. First, commenters argued that the OCC is acting "in excess of statutory jurisdiction, authority, or limitations,"[51] because it lacks authority to issue the rule. As described in detail above, the OCC disagrees and concludes that it has the authority to issue this rule under sections 85 and 1463(g).

Second, several commenters argued that the OCC is acting "without observance of procedure required by law"[52] in violation of the APA because it did not comply with the procedural requirements in section 25b. As explained above, the OCC concludes that these provisions do not apply.

Finally, commenters argued that the OCC's proposal is arbitrary and capricious, including because it did not provide evidence of the problem it seeks to remedy. The

[49] This conclusion is supported by consideration of the parallel authority conferred under 12 U.S.C. 1831d, which is construed *in pari materia* with section 85. *See, e.g.*, *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992); FDIC General Counsel's Opinion No. 11, Interest Charges by Interstate State Banks, 63 FR 27282 (May 18, 1998). Congress did not subject Federal Deposit Insurance Corporation (FDIC) interpretations of section 1831d to section 25b or equivalent requirements. Given that sections 1831d and 85 are construed *in pari materia*, it would be incongruous to conclude that an OCC rule interpreting section 85 would be subject to the requirements of section 25b while a substantively identical FDIC rule issued pursuant to parallel statutory authority would not. The same argument can be made regarding section 1463(g).

[50] Some commenters also argued that section 25b applies to this rulemaking because the OCC cited sections 24(Third) and 24(Seventh) in its proposal. As explained above, the OCC does not cite these statutes as direct authority for this rule or for their preemptive effect.

[51] 5 U.S.C. 706(2)(C).

[52] *Id.* at 706(2)(D).

OCC disagrees. The APA's arbitrary and capricious standard requires an agency to make rational and informed decisions based on the information before it.[53] The primary problem the OCC seeks to address is the legal uncertainty resulting from the *Madden* decision, and the OCC has observed considerable evidence of this uncertainty.[54] The OCC understands that its rule may not resolve all legal uncertainty for every loan transfer, as at least one opposing commenter noted. However, resolving every potential uncertainty is not a prerequisite for the OCC to take this narrowly tailored action to address a discrete source of uncertainty.[55]

Relying on this clear evidence of current legal uncertainty, the OCC has made a rational and informed decision to issue this rule.

Furthermore, the OCC is not required to develop or adduce empirical or other data to support its conclusions about the importance of issuing this rule, nor must the OCC wait for the additional problems to materialize before taking action.[56] Instead, the OCC may rely on its supervisory expertise to anticipate and address the problems that may arise

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[53] *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) ("The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962))).

[54] For example, there are ongoing cases challenging the interest charged on securitized credit card receivables, with competing arguments regarding whether *Madden* applies in that circumstance. Similarly, the application of *Madden* to inter-bank loan transfers remains unresolved. Comments on the NPR from industry representatives also evidence the existence of legal uncertainty post-*Madden*.

[55] *See Taylor v. Fed. Aviation Admin.*, 895 F.3d 56, 68 (2018); *cf. Smiley*, 517 U.S. at 743 (stating "that there was good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion").

[56] *Stilwell v. Office of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009) ("The APA imposes no general obligation on agencies to produce empirical evidence. . . . Moreover, agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. . . . OTS based its proposed rule on its long experience of supervising mutual savings associations; its view found support in various comments submitted in response to the proposed rule."); *Chamber of Commerce of U.S. v. SEC,* 412 F.3d 133, 142 (D.C. Cir. 2005) (holding that the SEC did not have to conduct an empirical study in support of its rulemaking where it based its decision on "its own and its staff's experience, the many comments received, and other evidence, in addition to the limited and conflicting empirical evidence").

from *Madden* and the legal uncertainty it has created.[57] As described above, the OCC believes that its interpretation promotes safety and soundness and may facilitate responsible lending and efficient and effective bank operations.

Commenters also argued that the rule is arbitrary and capricious because it failed to consider the potential negative consequences that would, they argued, result from the rule, including the facilitation of predatory lending through "rent-a-charter relationships." The OCC disagrees. The agency takes the risks created by predatory lending, including through third-party relationships, very seriously but, for the reasons discussed below, does not believe that that this rule will facilitate predatory lending through these relationships.

*Predatory lending*

Some commenters argued that the proposal would facilitate predatory lending by promoting rent-a-charter relationships that allow nonbanks to evade state law and that it would reverse the OCC's historical opposition to these relationships. These commenters asserted that the proposal would undermine or eliminate state interest caps, a vital tool that states use to protect residents against predatory lending.

The OCC disagrees with these commenters' criticisms of this rulemaking. As made clear above, the OCC is issuing the rule to clarify its position with regard to the proper interpretation of sections 85 and 1463(g)(1), which relates to a core element of banks' ability to engage in safe and sound banking: the ability to transfer loans. However, the OCC also notes, as many commenters did, that the agency has consistently opposed

[57] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-96 (1981) (granting deference to the agency's "forecast of the direction in which future public interest lies"); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 732 (D.C. Cir. 2016) ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable." (emphasis in original) (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)).

predatory lending, including through relationships between banks and third parties. Nothing in this rulemaking in any way alters the OCC's strong position on this issue, nor does it rescind or amend any related OCC issuances.

The OCC also understands that appropriate third-party relationships play an important role in banks' operations and the economy, and the OCC has issued guidance on how banks can appropriately manage the risks associated with these relationships.[58]

Because commenters are concerned that the rule would undermine state interest caps, it is also important to emphasize that sections 85 and 1463(g) incorporate, rather than eliminate, these state caps. As noted above, these statutes require that a bank refer to, and comply with, the interest cap established by the laws of the state where the bank is located. Thus, disparities between the interest caps applicable to particular bank loans result primarily from differences in the state laws that impose these caps. This rule does not change that.

**IV. Regulatory Text**

The OCC proposed to 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. As the proposal explained, this rule would expressly codify what the OCC and the banking industry have always believed and address the legal confusion about the impact of a transfer on the permissible interest. The proposal also noted that this rule

[58] *See* OCC Bulletin 2014-37, *Consumer Debt Sales: Risk Management Guidance* (Aug. 4, 2014); OCC Bulletin 2013-29, *Third-Party Relationships: Risk Management Guidance* (Oct. 30, 2013); OCC Bulletin 2020-10, *Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29* (Mar. 5, 2020).

would not address which entity is the true lender when a bank transfers a loan to a third party.

The OCC received several comments on its proposed regulatory text. Commenters requested several clarifying changes, including recommendations to (1) specifically reference non-bank third parties in the regulatory text; (2) ensure that the rule applies to transfers of partial interests in loans; and (3) clarify that the rule does not affect the applicability of other state law requirements, including licensing requirements. The OCC does not believe any changes to the regulatory text are necessary to address these recommendations because the OCC reads the regulatory text to be consistent with these recommendations.

In addition, a commenter requested that the OCC clarify that the rule applies to all price terms of a loan. The OCC's rule applies to "interest," as that term is defined in 12 CFR 7.4001(a) and 12 CFR 160.110(a).

Several commenters also requested that the OCC address who is the true lender in its regulatory text. One commenter requested that the OCC specifically include regulatory text providing that the rule does not affect the determination of which entity is the true lender. The OCC reiterates that this rule does not address which entity is the true lender but does not believe it is necessary to specifically include a statement to this effect in the regulatory text. Another commenter requested that the OCC include a *proviso* providing that the rule only applies when the bank is the true lender, as determined by the law of the state where the borrower resides. Because the rule only applies to bank loans that are permissible under section 85 or 1463(g), the OCC does not believe that adding this *proviso* is necessary. Other commenters requested that the OCC establish a test for determining when the bank is the true lender. This would raise issues distinct from, and outside the scope of, this narrowly tailored rulemaking.

Finally, several commenters argued that the OCC and the FDIC should coordinate and harmonize their respective regulatory texts, which will help minimize any differences in court decisions.[59] The OCC's proposed regulatory text was narrowly tailored to address the specific legal uncertainty created by *Madden*, and the OCC believes this regulatory text best implements its interpretation of the statutory language in sections 85 and 1463(g)(1). Accordingly, the OCC adopts the rule as proposed. However, the OCC notes that it intends that its rule will function in the same way as the FDIC's proposed regulatory text would, which is consistent with interpreting sections 85 and 1831d *in pari materia*.[60]

## 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 final rule and determined that it would not introduce any new or revise any existing collection of information pursuant to the PRA. Therefore, no PRA submission will be made to OMB.

[59] On December 6, 2019, the FDIC proposed a similar rule based on section 1831d. Federal Interest Rate Authority, 84 FR 66845.

[60] This discussion refers specifically to 12 CFR 331.4(e) of the FDIC's proposed rule, which would address the impact a loan transfer has on permissible interest. The FDIC's proposed regulatory text also would address additional subsequent events, including changes in state law and changes in the relevant commercial paper rate. Although the OCC's rule does not address these circumstances, the OCC believes that the result would generally be the same for loans made by OCC-regulated banks.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires an agency, in connection with a final rule, to prepare a Final 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 or less) or to certify that the final rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities.[61] The ability to transfer a loan is important to all banks, so the OCC expects that all of these small entities would be impacted by this 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 will not have a significant economic impact on a substantial number of small entities. Accordingly, a Final Regulatory Flexibility Analysis is not required.

*Unfunded Mandates Reform Act*

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, the OCC considers whether a final 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 final rule does not impose new mandates. Therefore, the OCC concludes that implementation of the

[61] 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, 2019, 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*.

final 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. This rule imposes no additional reporting, disclosure, or other requirements on insured depository institutions, and therefore, neither section 302(a) or 302(b) is applicable to this rule.

*Congressional Review Act*

For purposes of Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, the Office of Information and Regulatory Affairs (OIRA) of the OMB determines whether a final rule is a "major rule," as that term is defined at 5 U.S.C. 804(2). OIRA has determined that this rule is not a "major rule."

As required by the CRA, the OCC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

*Administrative Procedure Act*

The APA, 5 U.S.C. 551 *et seq.*, generally requires that a final rule be published in the *Federal Register* not less than 30 days before its effective date. This final rule will be effective 60 days after publication in the *Federal Register*, which meets the APA's effective date requirement.

**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 amends 12 CFR parts 7 and 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.

**Brian P. Brooks**
*Acting Comptroller of the Currency.*
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