Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 12, 2003

Interpretive Letter #968
July 2003
12 U.S.C. 85

Dear **[ ]**:

This is in response to your inquiry on behalf of **[ ]** (Bank) and **[ ]** ("*Co.*"). In that letter, you request confirmation that after **[*Co.*]**, currently a holding company affiliate of the Bank, becomes an operating subsidiary of the Bank, it may rely on 12 U.S.C. § 85 to impose and export interest charges permitted by North Carolina law on consumer loans that it makes in North Carolina and throughout the United States. For the reasons described below, after it becomes a national bank operating subsidiary, **[*Co.*]** may impose and export North Carolina interest charges under the same terms and conditions applicable to the Bank.[1]

Both the Bank and **[*Co.*]** are headquartered in North Carolina. **[*Co.*]** makes consumer loans secured by first or subordinate liens on one to four family residential real estate.[2] The Bank, through **[*Co.*]**, seeks to establish nationwide lending programs with uniform national pricing policies based on the laws of its home state, North Carolina. **[*Co.*]** would include in its loan documents a governing law clause disclosing to borrowers that interest, including loan fees considered to be interest under Federal law, would be governed by Federal and North Carolina law. **[*Co.*]** also would comply with all requirements and limitations imposed by section 85 and OCC regulations and interpretations regarding section 85.

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[1] Our review of the preemption issues involved in the Bank's inquiry is not subject to the notice-and-comment procedures required under certain circumstances by 12 U.S.C. § 43. That provision requires the OCC to publish in the *Federal Register* notice of any preemption inquiry concerning a state law in the areas of community reinvestment, consumer protection, fair lending, and the establishment of interstate branches. However, notice is not required for requests that raise issues of federal preemption that are essentially identical to those on which we have previously issued an opinion letter or interpretive rule. *Id*. § 43(c)(1)(A). As explained in this letter, the request involves two issues that are resolved by OCC regulations: (1) the ability of a national bank to export interest rates (*see* 12 C.F.R. § 7.4001(c)), and (2) the extent to which state law applies to an operating subsidiary of a national bank (*see id.* §§ 5.34(e)(3) and 7.4006). This letter simply outlines the relationship between these two well-settled principles of federal banking law.

2 **[*Co.*]** plans to sell the majority of the first lien secured loans to secondary market investors, such as Fannie Mae. The subordinate lien secured loans likely would be transferred to the Bank, securitized, or sold to private investors.

Because **[*Co.*]** will be a subsidiary of the Bank within the meaning of 12 C.F.R. § 5.34(e)(2), and will engage solely in activities that are permissible for the Bank to engage in directly, **[*Co.*]** will qualify as an operating subsidiary of the Bank under 12 C.F.R. § 5.34. As such, it will be subject to the same terms and conditions that apply to the Bank. As stated in the relevant OCC regulations --

> *Examination and supervision*. An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.[3]

Elsewhere, our regulations specify that "[s]tate laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[4] Recent legislation also has recognized the permissibility of national banks engaging in activities through operating subsidiaries. In Section 121 of the Gramm-Leach-Bliley Act, Congress expressly acknowledged that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[5] Operating subsidiaries are often described as equivalent to a department or division of their parent bank, and our regulations ensure that operating subsidiaries will be subject to the same Federal laws and standards that govern their parent bank, including any state laws and standards that are made applicable to the parent bank by Federal law.[6]

One such law is section 85 governing the interest a national bank may charge. Under section 85, a national bank is authorized to establish interest based on the laws of the State in which the bank is located.[7] OCC regulations provide that:

> A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state.[8]

This "most favored lender" lender status permits a national bank to contract with borrowers in any state for interest at the maximum rate permitted by the law of the state in which the national bank is located. Generally, that is the state in which the main office of the national bank is

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[3] 12 C.F.R. § 5.34(e)(3).

[4] 12 C.F.R. § 7.4006.

[5] Pub. L. No. 106-102, § 121, 113 Stat. at 1378, *codified at* 12 U.S.C. § 24a(g)(3).

[6] Letter from Charles F. Byrd, Assistant Director, Legal Advisory Services Division (October 30, 1977), *reprinted in* [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,051 (national bank operating subsidiaries are in effect incorporated departments of the bank).

[7] 12 U.S.C. § 85.

[8] 12 C.F.R. § 7.4001(b).

located.[9] Under certain circumstances, national banks with branches in more than one state may be required to impose interest rates permitted by the law of a state in which they have a branch. That would happen in circumstances where three functions -- loan approval, communication of loan approval, and disbursal of loan proceeds -- all occur in a branch or branches in the same branch state.[10] Absent this set of circumstances, a national bank may impose rates permitted by the state where its main office is located.

Accordingly, pursuant to 12 C.F.R. §§ 5.34(e)(3) and 7.4006, the amount of interest **[*Co.*]** may charge is governed by section 85 to the same extent as section 85 is applicable to its parent bank.[11]

I hope the foregoing is helpful in your analysis of your client's lending programs. Please do not hesitate to contact my office at (202) 874-5200; MaryAnn Nash, Counsel, in our Law Department, at (202) 874-5090; or Jerome L. Edelstein, Senior Counsel, in our Law Department at (202) 874-5300, if you have any questions or if you need any additional information.

Sincerely,

/s/ *Julie L. Williams*

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

[9] *Marquette National Bank of Minneapolis v. First of Omaha Service Corp,* 439 U.S. 299 (1978).

[10] OCC Interpretive Letter No. 822 (Feb. 17, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265.

[11] *See Moss v. Southtrust Mobile Services, Inc*., No. CV-95-P-1647-W, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. Sept. 22, 1995). In this case, the court concluded, without analysis, that section 85 applied to the operating subsidiary in question pursuant to 12 C.F.R. § 5.34 because it was an operating subsidiary of a national bank.