Bonhomme

Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

September 29, 1994

Dear

This responds to your inquiry submitted on behalf of (the "Association"), raising several questions about § 4(g) of the Home Owners' Loan Act ("HOLA"), which is commonly referred to as the savings association Most Favored Lender Provision. In general, HOLA § 4(g) authorizes savings associations to charge interest on loans at the maximum rate authorized for any class of lender under the laws of the state where the association is located, thereby preempting any state law that might attempt to limit savings associations to lower interest rates. Under HOLA § 4(g), savings associations are permitted to use the most favored lender rate of their location state for any loan made or "booked" in that state, even if the borrower resides in another state.[1] This is commonly referred to as "exporting."

You have asked two questions. First, you ask whether, under HOLA § 4(g), a savings association may charge (and export) the same credit card fees as are authorized by state law for the most favored lender in whose shoes the association seeks to stand.[2] This question was addressed in an opinion issued by the former Federal Home Loan Bank Board ("FHLBB"). FHLBB Op. by Quillian, June 27, 1986 (copy attached). The FHLBB held that loan fees are covered by the savings association Most Favored Lender Provision and, therefore, may be exported in the same manner as interest rates.

Opinions of the former FHLBB constitute valid and binding precedent for savings associations unless or until modified or revoked by the Office of Thrift Supervision. Therefore, the Association may continue to rely on the June 27, 1986 FHLBB

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1 <u>E.g.</u>, OTS Op. Chief Counsel, Dec. 24, 1992.

2 The fees you have asked about are annual fees, late fees, return check fees, cash advance fees, and overlimit fees.

opinion.[3] We note that the conclusion reached in the FHLBB opinion was recently confirmed in Ament v. PNC National Bank et al., No. 92-244 (W.D. Pa., April 8, 1994). To our knowledge, this is the only judicial decision to ever address exportation of loan fees by savings associations. The conclusion reached in the FHLBB opinion is also consistent with substantial case law developed in connection with the virtually identical national bank and state bank Most Favored Lender Provisions.[4]

Your second question concerns what state consumer protection laws will apply when a savings association exports under the Most Favored Lender Provision. This question has also been addressed in a prior interpretive opinion. OTS Op. Chief Counsel, April 2, 1992 (copy attached). There we concluded that, when originating a loan under the Most Favored Lender Provision, a savings association is required to follow the state consumer protection laws that are applicable to the most favored lender in whose shoes the association seeks to stand, rather than the consumer protection laws of the state of the borrower's residence.

If you have further questions, please feel free to contact Evelyne Bonhomme, Counsel (Banking and Finance), at (202) 906-7052.

Very truly yours,

Karen Solomon
Deputy Chief Counsel

cc: Regional Director
Regional Counsel
Central Region

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3 At the time the FHLBB opinion was issued, the savings association Most Favored Lender Provision was codified as § 414 of the National Housing Act. 12 U.S.C. § 1730g (1982). The Most Favored Lender Provision was subsequently moved to HOLA § 4(g) by § 408 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, without substantive change. See e.g., S. Rep. No. 19, 101st Cong., 1st Sess., 332 (1989). Thus, FHLBB interpretations of § 414 of the National Housing Act continue to apply to HOLA § 4(g).

4 E.g., Greenwood Trust Company v. Commonwealth of Massachusetts, 971 F.2d 818 (1st Cir. 1992), cert. den., 113 S. Ct. 974 (1993); Fisher v. First National Bank of Omaha, 548 F.2d 255, 257-261 (8th Cir. 1977); and Northway Lanes v. Hackley Union Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972).

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Federal Home Loan Bank Board

1700 G Street N.W.
Washington, D.C. 20552
Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

June 27, 1986

This is in response to your letter dated April 17, 1986, requesting the opinion of the Office of General Counsel as to whether section 522 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), 12 U.S.C. § 1730g, and the Board's implementing regulation, 12 C.F.R. § 570.11, allow an insured institution to "export" (1) the interest rates of the state where it is located to borrowers in states that have overridden or "opted out" of section 522, and (2) the integral non-interest-rate features of its loan programs to borrowers in states that restrict or prohibit such features, whether or not such states have opted out of section 522. You note that the loans of the programs about which you inquire will be "booked" or "made" (that is, underwritten, approved, processed, and disbursed) in offices of the institution in the state in which it is located. For the reasons explained below, I have concluded that an insured institution is authorized to export both the interest rate and integral noninterest-rate features of its loan programs to borrowers in other states, regardless of whether such states restrict such features or have opted out of section 522.

Pursuant to section 522, an insured institution may charge an interest rate equal to the greater of one percentage point above the discount rate on ninety-day commercial paper in the institution's Federal Reserve district or "the rate allowed by the laws of the State" where it is located if either such rate is greater than that otherwise permitted to the institution. 12 U.S.C. § 1730g(a). In section 570.11(a), the Board interpreted "the rate allowed by the laws of the State" to be the amount which the most favored lender in the state may charge on a particular class of loans. To use the status of a most favored lender, the insured institution must make the same type of loan as the most favored lender and satisfy certain "substantive" state-law requirements pertaining to the type of loan being made. 12 C.F.R. § 570.11(b). Under section 525 of the DIDMCA, 12 U.S.C. § 1730g note, a state may override the applicability of section 522 to loans made in that state. This Office has previously concluded, in an opinion letter dated December 11, 1984, that section 522 "empowers the

main office or any branch office of an insured institution to use and export the most-favored-lender rates of the state where such office is located on any loan or other extension of credit booked at that office." That conclusion was based in part upon the fact that section 522 was enacted to provide insured institutions with competitive equality with commercial banks.

The first question you pose is whether an insured institutio may export the interest rates of the state where it is located to borrowers in states that have opted out of section 522. As noted above, under section 525 a state may opt out of section 522 only with respect to loans "made" in such state. Thus, the fact that state has opted out of section 522 should not affect the ability of an insured institution not located in that state to export most-favored-lender rates to that state, so long as the loans are made in the state where the institution is located rather than in the state that has opted out of section 522. The legal staff of the Federal Deposit Insurance Corporation ("FDIC"), in an opinion construing section 521 of the DIDMCA, 12 U.S.C. § 1831d (the comparable provision conferring "most favored lender" status on stat chartered, FDIC-insured banks), explicitly concluded that if the state where a bank is located has not opted out under section 525 the bank may charge its home-state rate to residents of any other state, even if the latter state has opted out of section 521. Letter from Peter M. Kravitz, FDIC Senior Attorney, to Peter D. Schellie (Oct. 20, 1983).

For these reasons, this Office concludes that an insured institution, pursuant to section 522, may offer loans to out-of-state customers at interest rates authorized in the state where the institution is located, even if the state where the borrower lives (or where the collateral lies or the loan proceeds are spent) has exercised its "opt out" authority under section 525, long as the loan is made in the state where the institution is located.

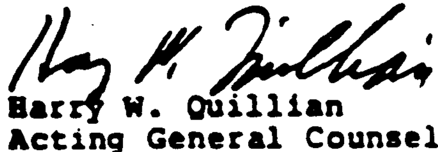
The second question you pose is whether an insured institution may export the integral noninterest-rate features of its loan programs to borrowers in states that restrict or prohibit such features, whether or not such states have opted out of section 522. Both the Comptroller of the Currency ("OCC") and the Board require lenders using most-favored-lender status to comply with certain state-law provisions that relate to their loans.

Under 12 C.F.R. § 7.7310, the OCC requires national banks using most-favored-lender rates to comply only with state-law provisions that are "material to the determination of the intere rate" for a specified class of loans. The OCC has interpreted provisions to be "material" if they either set forth the characteristics of a category of loans or establish how the most-favored-lender numerical rate of interest is determined. Moreover "material" state-law provisions may be exported, regardless of whether such provisions are permissive or restrictive. Letter from Roberta W. Boylan, Director, OCC Legal Advisory Services

Division (Nov. 18, 1985). See also Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972) (holding that a national bank in Michigan could collect closing costs in addition to interest because Michigan law permitted the most favored lender to do so). In section 570.11(b), the Board ruled that to use the status of a most favored lender an insured institution must comply with "substantive" state-law requirements --including those related to loan term amount, use of proceeds, identity of borrower, and mandatory consumer protections--that pertain to the type of loan being made.

In view of the ability of a national bank to export the permissive features of a loan program that are material to the determination of the most-favored-lender rate, insured institutions should be permitted to do the same because such features are "substantive." Integral noninterest-rate features such as late charges, annual fees, change-in-terms authorization, and variable interest rates are substantive because they directly affect the determination of the maximum interest rate and yield allowed by a state. Therefore, this Office is of the opinion that when an insured institution exports its home-state interest rate it necessarily exports such substantive features of the loan program, regardless of whether they are restrictive or permissive. Pursuant to our answer to your first question, it follows that this is so regardless of whether the state to which the most-favored-lender interest rate and integral noninterest-rate features of a loan program are exported has opted out of section 522.

Sincerely,



Harry W. Quillian
Acting General Counsel