COMMENT LETTER

National Banks and Federal Savings Associations as Lenders

September 3, 2020
|
Download PDF

September 3rd, 2020

Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2020-0026

Re: National Banks and Federal Savings Associations as Lenders.

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")[1] appreciates the opportunity to comment on the Notice of proposed rulemaking issued by the Office of the Comptroller of the Currency (the "OCC") titled "National Banks and Federal Savings Associations as Lenders" (Docket ID OCC-2020-0026).[2] CSBS opposes the proposed test to determine when a national bank is a true lender ("true lender test") for the reasons set out below. We urge the OCC to rescind the proposed rule.

The stated purpose of the proposed rule is to eliminate the purported uncertainty about the legal framework that applies to loans made as part of lending relationships between banks and nonbank third parties. This alleged legal uncertainty is said to be a product of the state law true lender doctrine traditionally applied by courts to determine, based on the substance of the lending relationship, which entity has the predominant economic interest in the loan and is therefore the true lender. Because the true lender doctrine involves substantive, fact-intensive balancing tests, the OCC asserts that nonbanks face the legal risk that a court may determine that it, rather than its bank partner, has made the loan which may render the loan usurious and/or the product of unlicensed activity.

The notice expresses concern that this legal uncertainty and risk "may restrict access to affordable credit" and so sets out a facile test to dictate when a national bank is the true lender of a loan made through a lending partnership with a nonbank third-party. Under the proposed true lender test, the national bank will be the true lender, not if it has a predominant economic interest in the loan in question, but rather if it, as of the date of the origination, is the named lender or funds the loan.

CSBS opposes this proposed test for policy and legal reasons.

- As a policy matter, due to the highly facile nature of the proposed test, nonbanks would purportedly be allowed to charge otherwise usurious interest rates and seek to avoid state licensing and oversight in making loans in which they have the predominant economic interest. Additionally, the proposal fails to take account of the various competing policy priorities by attempting to insulate nonbanks from legal risk through such a formalistic test.
- In addition to these fatal substantive policy flaws, as a legal matter, the OCC has exceeded its rulemaking authority in issuing the proposed rule in two significant ways. First, the OCC has failed to comply with the requirements applicable to preemption determinations under the National Bank Act (NBA). Second, the proposed test itself does not comport with the relevant statutes and contradicts legal precedent.

I. The proposed true lender test is so formalistic that it will permit nonbanks to effectively lend at otherwise usurious interest rates.

CSBS opposes the proposed true lender test because it is so formalistic and bright-line that it appears to allow nonbanks to charge otherwise impermissible interest rates even when the nonbank bears the entire economic interest in the loan ostensibly made by its national bank partner. Although the proposal is alleged to eliminate the legal risk faced by nonbanks partnering with national banks to make loans, the proposal does not even identify the scenarios in which this risk manifests itself.[3]

To be clear, the legal risk arises when a nonbank seeks to charge an interest rate higher than that permitted under the usury law of the state in which the borrower resides on the grounds that its bank partner could charge such an interest rate if it had the predominant economic interest in the loan made through the lending partnership. This legal risk is most acute when lending arrangements are structured so as to minimize the bank partner's economic interest in the loan, for instance, by the nonbank advancing the money used to fund the loans or indemnifying the bank for any credit losses arising from the loans.

While the proposal states that the legal uncertainty with which it is concerned has resulted from the lack of a "uniform and predictable standard", the proposal does not incorporate any of the various substantive factors that courts have considered in determining whether a bank partner has the predominant economic interest in the loan. Nor are the supervisory expectations described in the proposal incorporated into the proposed test itself. Rather, OCC has proposed a non-substantive, formalistic test to deem a national bank the true lender even if it has no actual economic interest in the loan in question.

Therefore, CSBS is opposed to the proposed test because its non-substantive nature would seemingly allow nonbanks to charge otherwise usurious interest rates based on its bank partners ability to export interest rates even when the bank partner has no real economic interest in the loans made through the lending partnership.

II. The proposed rule fails to weigh the competing policy priorities and stakeholder interests implicated by establishing a federal true lender test.

In addition to opposing the proposed test itself, CSBS also opposes the proposed rule because it fails to address the various policy tradeoffs between providing, through federal law, greater uniformity for nonbanks and preserving traditional consumer rights and remedies under state law. In particular, the proposal fails to explain why it is appropriate for the OCC to be the sole arbiter of credit affordability and deny citizens any role, through their elected state representatives or directly via referendum, in controlling the availability and affordability of credit within the states in which they reside. Additionally, the proposal fails to even acknowledge its apparent intended preemptive effect and the likely impact this will have on state licensing and other state consumer protection laws, including the roles of state officials and courts in administering these laws.

A. The proposed rule fails to weigh the interests of other stakeholders in striking the balance between credit affordability and access.

In purporting to provide greater uniformity and certainty for lending partnerships, the proposal fails to weigh the relative importance of consumers being able to enact laws governing the terms and conditions at which credit is offered in their state. The proposal explains that there should be no concern that the proposed test will enable nonbanks to charge otherwise usurious rates on loans in which they have the predominant economic interest because if the national bank is deemed the lender, then the bank will be supervised by the OCC for compliance with "the panoply of applicable Federal laws and regulations", including ensuring that the credit that is offered to borrowers through these lending partnerships is affordable.

But these assurances fail to inspire a great deal of confidence particularly given that in describing the animating purpose of the proposal—to eliminate legal risk that "may restrict access to affordable credit"—the OCC indicates that it views credit offered at otherwise usurious rates to be affordable. Even if the OCC were to apply the most heightened supervisory scrutiny imaginable to the bank partner, the OCC fails to address the supervision and oversight of the non-bank. It would seem to be appropriate for the proposal to at least consider how and by whom the balance between credit access and affordability should be struck.

Historically, this balance has been struck by consumers as citizens at the state level through the enactment of consumer protection laws (including usury laws), through the medium of state officials enforcing these laws, and through courts interpreting and applying these laws. Yet, the proposal upends this historical application and simply concludes, without explanation, that the OCC is better positioned to strike this balance than citizens themselves. This is a particularly glaring omission given that, the OCC proposes to make decisions regarding credit affordability for consumers to which it is connected by, at most, a highly attenuated chain of accountability. Therefore, CSBS opposes the proposed rule because it fails to consider the relative importance of consumers, as citizens, having a say in how the balance between credit affordability and access is struck in their state.

B. The proposal fails to acknowledge its intended preemptive effect and the impact this will have on state licensing and consumer protection laws.

Although, as alleged, "a key objective of this proposal is to provide regulatory clarity and certainty", the proposal nowhere addresses how the proposal would deliver this certainty. Clearly, the desired certainty is obtained by seeking to extend NBA preemption of state licensing and usury laws as well as other consumer protection laws to nonbanks partnering with national banks to make loans. This is made clear by the proposal's repeated assertions that a determination that a national bank is the true lender under federal law by virtue of the proposed test forecloses any determination, under state law, that its nonbank partner is the true lender. Indeed, if the proposal did not have any intended preemptive effect then it would not provide the presumed pantheon of certainty.

However, the proposal does not even reference preemption. This omission reflects a failure to consider, let alone weigh, the tradeoffs inherent in providing the certainty desired by the proposal. For instance, no consideration is given to the impact on state licensing laws, in particular, whether this proposal will enable nonbanks to operate free of those laws. The OCC cannot simply dictate that a regulatory scheme it does not administer—namely, state licensing laws and regulations—does not apply to entities outside of the OCC's jurisdiction—namely, nonbank financial institutions. CSBS requests that the OCC clarify whether this proposal is intended to or will in effect preempt the application of state licensing laws to the nonbank partners of national banks.

Additionally, in seeking to prevent courts from applying the substance-over-form approach inherent in the true

lender doctrine, it is incumbent on the OCC to explain why bank supervision is an appropriate substitute for the traditional fact-finding function of the courts. But, again, no explanation is provided as to why the OCC's fairly limited supervisory role in reviewing third party lending arrangements on an ex ante basis should completely displace the role of courts and state officials in relying on the true lender doctrine to remediate harm on an ex post basis. This failure is all the more glaring given that it is unlikely these agreements will be frequently or meaningfully reviewed as many, if not most, of these loans will not be held by the bank for a significant period of time and, thus, will have a de minimis impact on the bank's balance sheet.

CSBS simply cannot agree with the conclusion that the ability of citizens to control, through state law, the terms and conditions at which credit is offered in their state and to empower state officials and courts to look to the substance of lending arrangements in applying these laws is simply "unnecessarily complex and unpredictable". As we have said previously, issues of credit affordability and access are inherently matters of local concern as to which consumers should have a voice through the enactment of law. Of course, it is equally important that state officials and courts have the ability to look through the inevitable contrivances and formalities to ensure that these laws are not avoided through routine evasion. Given the proposal's failure to accommodate, let alone acknowledge, these important policy interests, CSBS is compelled to oppose the proposed true lender test and urges the OCC to rescind the proposed rule.

C. Thoughtful policy solutions are lacking in the proposed rule.

Although CSBS opposes the proposal, in part, because it fails to consider the significant policy questions at issue and fails to acknowledge its apparent preemptive effect, this is not to say that these policy issues are necessarily or inherently intractable. Perhaps after thoughtful consideration and deliberation, an appropriate balance can be struck which will accommodate the need to preserve the consumer rights and remedies afforded under state law while providing greater certainty to participants in lending partnerships.

Indeed, it is worth noting that the state of Colorado has recently endeavored to strike such a balance after thoughtful and serious consideration of policy tradeoffs implicated by lending partnerships.[4] The resolution in that case followed an extensive process involving state officials and two state banks that are engaged in a broad range of partnerships with non-bank lenders. CSBS believes that the detailed and substantive "safe harbor" approach resulting from this case represents the type of thoughtful and considerate balancing of competing policy priorities which is utterly lacking in the OCC's proposal.

Additionally, CSBS's opposition to the proposed rule should not be taken as an indication that we oppose the OCC supervising national banks involved in these lending partnerships for compliance with applicable laws and regulations. To the contrary, we highly encourage the OCC to take an active supervisory and enforcement role with respect to national banks involved in lending partnerships with nonbanks. It is highly appropriate for the OCC to provide certainty to these national banks regarding OCC's supervisory expectations. However, it is entirely inappropriate for the OCC to exceed its supervisory purview by seeking to declare state licensing and consumer protection laws are thereby inapplicable to the nonbanks involved in these lending partnerships.

Just as the proposed test eschews any of the substantive factors considered in the state law true lender doctrine, it likewise does not impose a single substantive regulatory requirement or standard on the national bank or their lending partners. States and consumers are being told, in effect, to trust the OCC to protect consumers through supervisory actions that will occur with little to no public awareness or knowledge of the relevant facts or actions taken or not taken. While certainty and reliability are not unimportant, CSBS believes that regulators in seeking to address this uncertainty should not only take account of the tradeoffs faced in providing greater certainty but also should be realistic as to what level of certainty is obtainable and desirable. Indeed, the absolute certainty that the proposed rule myopically pursues at any cost is not only unattainable, it is entirely inconsistent with the

existing degree of certainty afforded national banks which themselves seek to export interest rates.[5]

III. The proposed rule exceeds the OCC's authority and fails to comport with the NBA.

Even if the proposal weighed the relevant policy tradeoffs in a meaningful manner and proposed a true lender test which accommodates the interests of relevant stakeholders, CSBS is opposed to the proposed test because the OCC lacks the statutory authority necessary to establish the test.

- First, the proposed rule seemingly interprets the NBA to preempt state licensing and consumer protection laws without complying with the requirements applicable to preemption determinations under the NBA.
- Second, even if it complied with these requirements, the proposed test contradicts the language and intent of the NBA and relevant judicial and administrative precedent.

A. The proposed rule fails to comply with the limits and requirements on establishing preemption under the NBA.

Despite the proposed rule's intention to eliminate the legal risk associated with national bank lending partnerships by preempting state usury, licensing and other consumer protection laws, it will not have its intended preemptive effect, in part, because it fails to comply with the requirements applicable to preemption determinations under the NBA. The ways in which the proposal fails to comply with the limitations on NBA preemption determinations are nearly precisely the same as was seen with the OCC's recent rulemaking to codify the "valid-when-made" principle which itself is currently subject to legal challenge over this very question.[6]

CSBS will briefly reiterate the arguments put forth in its letter on the OCC's valid-when-made rulemaking in the context of the current proposal.[7]

- First, the proposed rule is a preemption determination subject to Section 25b because it is intended to preempt the application of state consumer financial laws to nonbanks partnering with national bank to make loans, and thereby render lawful pursuant to the NBA transactions that would otherwise be unlawful under state law.
- Second, the proposed rule is not exempt from Section 25b because the legal basis for the proposed rule is not the limitation placed on interest rates by Section 85, but rather the power of national banks to make and assign loans under Section 24.
- Third, the proposed rule fails to comply with the limits and requirements of Section 25b because it fails to apply the Barnett Bank prevent or significantly interfere preemption standard on a case-by-case basis and does not provide substantial evidence to support the determination.

In finalizing its valid-when-made rule, the OCC responded to these arguments by asserting that the rule was not subject to the NBA limitations on preemption determinations for several reasons.[8] As this assertion conveyed several misconceptions regarding the operation and scope of the limitations on NBA preemption, CSBS believes it appropriate that these misconceptions be corrected so that the OCC does not continue to adopt the same erroneous assumptions with respect to the proposed rulemaking.

First, in its final rulemaking, the OCC states that "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 preemption established by the Supreme Court in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, i.e., when the Comptroller makes a 'preemption determination.'" This interpretation of the scope of Section 25b is plainly incorrect insofar as it suggests that Section 25b does not apply when the OCC

asserts or implies, in a categorical manner, that state law is preempted.

Section 25b provides, in relevant part, that state consumer financial laws are preempted by the NBA only if the OCC or a court determines, on a case-by-case basis, that the law in question prevents or significantly interferes with national bank powers under the Barnett Bank standard. Thus, far from excluding categorical assertions of preemption from its scope, Section 25b denies the OCC the authority to make any such categorical determinations either expressly or by implication by denying such determinations any legal effect.

Second, in the final valid-when-made rule, the OCC reasoned that the rulemaking merely interpreted the substantive scope of Section 85, not its preemptive scope, and asserted that the former type of interpretations are not preemption determinations. The distinction between the preemptive scope and substantive scope of a federal statute has no bearing on the scope of Section 25b, but instead, is only relevant to the type of deference analysis a court will apply absent some congressional directive as to deference.

Congress did not exempt interpretations regarding the substantive scope of the NBA from the strictures of Section 25b; to the contrary, it expressly stated that the substantive meaning of national bank powers could only be interpreted to conflict with and override state law pursuant to Section 25b. The OCC cannot circumvent the statutory mandates in Section 25b by simply issuing a proposal the animating purpose of which is to conflict with and preempt state consumer financial laws but simply infer rather than expressly state its preemptive effect and thereby avoid the limitations on OCC preemption determinations.

The distinction between the substantive and preemptive scope of the NBA is even less relevant in this case given that the proposed regulatory text expressly states that it is implementing Sections 24 and 371c which grants lending powers to national banks. For the same reason, OCC's argument that Section 25b(f) exempts the proposed rule from the requirements of Section 25b is even less tenable than it was in the case of the valid-when-made rule. No cogent argument can be made that OCC is not relying on national bank powers provision, which are clearly not exempted from Section 25b, to provide the rule with its preemptive effect.

In sum, for all the reasons stated herein, the OCC has exceeded its rulemaking authority in issuing the proposed rule because it failed to comply with the substantive and procedural requirements applicable to determinations that the NBA preempts state law.

B. The OCC lacks the requisite authority to establish a bright-line, formalistic true lender test.

Even if the proposed rule complied with the requirements of Section 25b, the proposed test is legally invalid because it contradicts the language and intent of the NBA usury provisions and relevant judicial and administrative precedent. The proposed rule states that part of the reason for the uncertainty it seeks to address is the fact that the OCC has not taken regulatory action to identify whether a bank in a lending relationship is the true lender which leaves this determination to be made by the courts. This is incorrect.

The judicial determination as to the identity of the true lender of a loan is very much a feature, not a bug, of usury law. Indeed, it is a bedrock principle of usury law that in determining whether or not a contract or transaction is usurious, a court will disregard its form and look to the substance. The principle that the law looks to substance and not form is a maxim of the common law[9] rooted in the capability of courts to engage in thorough fact-finding and apply the law to the facts to achieve an equitable and just result.

The substance-over-form maxim has particular importance in usury law because of "the thousand devices resorted to, for evasion of the usury laws".[10] Through the historical experience of combating these many contrivances devised as covers for usury, legislatures learned that "legislating in detail against the various forms,

which [usury] from time to time assumed" was generally ineffective.[11] Eventually, they decided to simply prohibit taking exorbitant interest directly or indirectly and "throw[] upon the ministers of the law, the duty of detecting and defeating every attempted evasion of it" because of the "ample powers" given to courts to pursue usury in all its changing forms.[12]

Cognizant of this historical experience while drafting the NBA, Congress, of course, did not establish a formalistic test to specify whether a national bank is the true lender of a loan ostensibly made thereunder as such an approach would merely invite evasion and arbitrage. Rather, Congress intended that this question would be resolved by the courts under the laws of the state in which the loan is made, including the common law, just as national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws."[13]

Accordingly, as a part of the common law, the state law true lender doctrine is a part of the "laws" incorporated by Section 85.[14] As the Supreme Court has stated:

"It may be said that the rights of a national bank as to interest are given by the Federal statute; that the reference to the state law is only for a measure of those rights; that a misconstruction of the state law really works a denial of the rights given by the Federal statute, and thus creates a Federal question. . . . A sufficient answer is that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks."[15]

Because Section 85 incorporates state jurisprudence, many cases over the past century have held that Section 85 itself "has regard to substance, not merely to form"[16], including in identifying the true lender of a loan ostensibly covered by Section 85.[17] Therefore, there is no gap for the OCC to fill or ambiguity for the OCC to interpret, Congress has left it to the judicial branch to apply the law as written as a part of its traditional equitable and fact-finding role. At the very least, any argument that the OCC is authorized to intrude on this role and create a regulatory structure that authorizes, if not encourages, subterfuge, is against the weight of authority here.

C. The proposed true lender test contradicts the language of the NBA usury provisions and relevant judicial and administrative precedent.

Even if the OCC did have the requisite authority to adopt a federal true lender test, the test put forth in the proposed rule contradicts judicial and administrative precedent interpreting Sections 85 and 86. As an initial matter, there are many cases which have held that the relevant provisions of the NBA governing what interest rate may be charged on national bank loans (Section 85) and providing the remedy for loans made in excess of this rate (Section 86) simply do not apply to non-national bank entities.[18] In fact, in one case, the OCC itself submitted an amicus making just this point.[19]

1. Solely being named the lender is not sufficient to establish a national bank is the true lender.

The reasoning advanced in support of the two prongs of the proposed true lender test directly contradicts (sometimes word for word) judicial precedent. For instance, the proposal states that "if a bank is named in the loan agreement as the lender as of the date of origination, the OCC views this imprimatur as conclusive evidence that the bank is exercising its authority to make loans pursuant to the statutes." But at least one court held exactly the opposite in finding that the "imprimatur of a national bank on the loan documents" does not "automatically trigger[] preemption" and "foreclos[e] inquiry into the real nature of the loan, or whether the debtor may invoke

the protection of state consumer laws if she proves that the actual lender in substance is not a national bank".[20] Several other cases have similarly held that simply being named the lender in the loan agreement does not trigger NBA preemption.[21]

2. Solely funding a loan is not sufficient to establish a national bank is the true lender.

With respect to the loan funding prong of the proposed test, the proposal states that "if a bank funds a loan as of the date of origination, the OCC concludes that it has a predominant economic interest in the loan and, therefore, has made the loan—regardless of whether it is the named lender in the loan agreement as of the date of origination." The proposal cites to an OCC interpretive letter regarding table funding arrangements in support of this prong of the test.[22]

But that interpretive letter directly contradicts what is asserted in the proposal because it concluded that where a third-party nonbank either "establishes the terms of credit *or* provides the funding for the mortgage loan", the national bank is not making the loan.[23] While it recognized an exception to this general rule in finding that the national bank is the lender when it both funds the loan and immediately takes assignment of the loan (i.e. a table funding arrangement), that exception has no application here where the lending relationships at issue would involve a bank funding the loan and the nonbank third party immediately taking assignment of the loan.

Additionally, in most of the lending arrangements targeted by the proposal, the bank funds the loan by drawing on money maintained by the nonbank on deposit with the bank to cover loan funding. While, under this arrangement, a national bank would, presumably, be considered to have funded the loan, the national bank would likely not thereby be engaged in "loan disbursal" for purposes of the non-ministerial functions test[24] nor would "money" be "lent" by a national bank under the definition of "branch" because the funds disbursed would not be "bank funds"[25]. In fact, the nonbank, rather than the national bank, could engage in all three of the non-ministerial functions (loan disbursal, loan approval, extension of credit) and yet, under the proposed test, the national bank could still be deemed the true lender.

3. Determining the identity of the true lender solely on the date of origination contradicts principles of usury law incorporated by the NBA.

Finally, by tying the determination as to the identity of the true lender to the date of origination, the proposed test conflicts with the text and structure of the NBA. Although the usurious nature of a loan is generally determined at the inception of the contract, usury laws (including Sections 85 and 86) will treat a facially non-usurious contract as usurious where it is shown that the interest paid and accepted under the contract, as implemented and consummated by the parties, became usurious.[26] This is because the intent as it existed at the time the agreement is executed controls and this intent may reveal a subterfuge to evade usury laws which only becomes evident through the performance of the contract, for instance, with respect to loans intended for assignment at inception.[27] The relevance of post-origination conduct is also reflected in Section 86 which, in setting out the remedies for violations of the state usury law incorporated by Section 85, focuses on the post-origination conduct such as the actual payment of usurious interest rather than solely agreeing to pay usurious interest.[28]

In sum, even if the OCC complied with the requirements to issue a preemption determination, the OCC lacks the authority to codify a federal true lender test, as proposed, because it conflicts with the text and intent of the relevant statutes as well as judicial and OCC precedent construing these statutes. There is no ambiguity here: (1) the NBA usury provisions incorporate the state law true lender doctrine and, thus, embrace substance over form; (2) Congress intended that courts would determine, based on the substance of the transaction, the relevant facts, including the identity of the true lender; and (3) the relevant statutes do not apply to non-national bank entities. Since the OCC lacks the authority to establish the proposed true lender test, we urge OCC to rescind the

proposed rule.

IV. Conclusion

CSBS appreciates the opportunity to comment on the proposed rule. As explained above, CSBS is opposed to the proposed true lender test and urges the OCC to rescind the proposal. We believe that the test is so formalistic that it would, if valid, enable nonbanks to charge otherwise impermissible interest rates even when the nonbank bears the entire or predominant economic interest and that the OCC lacks the legal authority to establish such a bright-line test for numerous reasons.

We do not oppose the OCC clarifying supervisory or enforcement expectations with respect to national banks engaged in lending partnerships with nonbanks. But we believe it is not appropriate for the OCC to attempt to insulate entities it does not regulate from otherwise applicable state laws. While encouraging innovation is an important policy priority, we believe a reasonable solution would balance these priorities with the significant policy interests and roles of other relevant stakeholders. Since the proposed rule does not even attempt to strike this balance, we are opposed to it.

Sincerely,

John W. Ryan
President & CEO

Footnotes

1 CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.
2 For the sake of brevity, this letter refers to national banks and federal savings associations, collectively, as national banks.
3 It is particularly noteworthy that the OCC does not identify any such scenarios in which a national bank faces legal risk in the absence of this rule. This is because national banks do not face any meaningful legal risks as a result of these relationships.
4 See Colorado Attorney General's Office settles lawsuit against lenders for exceeding state interest rate limits on consumer loans (August 18, 2020).
5 In fact, the proposed true lender test is made so formalistic and bright-line that it will actually provide greater certainty as to whether a national bank makes a loan for purposes of interest rate exportation than the existing test for determining what state's usury law applies and may be exported. Under the latter—the so-called non-ministerial functions test—the OCC requires that the chosen state's law have a "clear nexus" to the transaction which is a determination which must be made on a case-by-case basis in reviewing the entire facts and circumstances of the transaction. *See* OCC Interpretive Letter No. 822, at 11, 14 (March 1998).
It is, at best, logically inconsistent that such a fact-intensive review should be eschewed in determining whether a bank or its nonbank partner has made a loan to enable the latter to benefit from interest rate exportation when this tenant is so central to determining which of a bank's offices has made a loan and thus whether interest rates may be exported in the first place.
6 *See* Fintech in Brief: State Attorneys General File Lawsuit Challenging OCC's 'Valid When Made' Rule (July

31, 2020).
7 *See* CSBS Comment Letter: Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred (January 21, 2020).
8 *See* 88 Fed. Reg. 33530, 33533 (June 2, 2020).
9 *See U.S. v. New York, N.H. & H.R. Co.*, 355 U.S. 253 (1957)
10 *Whitworth & Yancey v. Adams*, 26 Va. 333, 336 (1827)
11 *Id.*
12 *Id.*
13 *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)
14 *See First Nat'l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) ("We think that determination of the "rate allowed by the laws of the State" can only be accomplished with reference to state court interpretations of the state's own constitution and statutes. The primary principle of construction of 12 U.S.C. § 85, . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state. *Citizens' National Bank v. Donnell*, 195 U.S. 369, 374, 49 L. Ed. 238, 25 S. Ct. 49 (1904); *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555, 44 L. Ed. 882, 20 S. Ct. 732 (1900)."); 1985 OCC QJ LEXIS 723, *10 ("The "laws" of the jurisdiction where the bank is located include not only statutory laws governing usury, but also 'common law, conflict of law rules as to which usury statute applies.'").
15 *Union Nat'l Bank v. Louisville, N. A. & C. R. Co.*, 163 U.S. 325, 331 (1896). If the federal courts are without authority under section 85 to vary from state common law doctrines related to usury, it is hard to see how the OCC, an executive branch agency, could possess such an authority to invade the unquestioned province of the courts for hundreds of years.
16 See *Evans v. National Bank*, 251 U.S. 108, 118 (1919). *See also Sterling Prop. Mgmt. v. Tex. Commerce Bank, Nat'l Ass'n*, 32 F.3d 964, 968 (5th Cir. 1994); *Am. Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 789 (9th Cir. 1982); *Calcasieu-Marine Nat'l Bank of Lake Charles v. American Employers' Ins. Co.*, 533 F.2d 290, 297 (5th Cir. 1976); *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 877 (8th Cir. 1975); *Anderson v. Hershey*, 127 F.2d 884, 886 (6th Cir. 1942); *Vose v. U. S. Cities Corp.*, 1931 OK 610, P24 (Okla. October 13, 1931).
17 *See Dandy v. Wilmington Fin., Inc.*, 2010 U.S. Dist. LEXIS 151430, *25 (D.N.M. May 3, 2010) ("Other federal courts in this Circuit, addressing the propriety of removal where the claim of federal preemption centers on determining the identity of the lender, have found that the determination should be made in state court and that remand is appropriate.")
18 See *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016); *Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191 (N.D. Okla. 2004); Colo. ex rel. Salazar v. Ace Cash Express, Inc., 188 F. Supp. 2d. 1282 (D. Colo. 2002); *Simmons v. Central Charge Service, Inc.*, 269 A.2d 850 (D.C. 1970).
19 *See Colorado ex rel. Salazar v. Ace Cash Express, Inc.*, No. 01-D-1576 (D. Colo. 2001) (Mot. for Leave to File Amicus Brief) ("The standard for finding complete preemption is not met in this case. While the Defendants Notice of Removal repeatedly refers to Goleta National Bank using Ace Cash Express, Inc. ("ACE") as its agent to solicit loans ... , ACE is the only defendant in this action, and ACE is not a national bank. Nor do the [attorney general's] claims against ACE arise under the National Bank Act, or other federal law. Although Defendant [ACE] apparently attempts to appropriate attributes of the legal status of a national bank for its own operations as a defense to certain of [the attorney general's] claims, such a hypothetical conflict between federal and state law does not give this court federal question jurisdiction under the doctrine of complete preemption.").
20 *See Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1194-95 (N.D. Cal. 2012).
21 *See City Nat'l Bank v. Brown*, 251 Ark. 33 (1971) (State and not federal law applied where a usurious installment contract, on a form supplied by a national bank, between plaintiff and car dealer, was assigned to defendant with recourse at a discount of five per cent less than the face value of the contract, because the initial transaction was between plaintiff and the car dealer.). See also Citibank (SD) N.A. v. Hansen, 2010 NY Slip Op

20144, ¶ 2, 28 Misc. 3d 195, 196, 902 N.Y.S.2d 299, 301 (Dist. Ct.) (“a national bank's right to exceed this state's usury limits is not established simply by alleging its status as a ‘national bank.’”).
22 *See* OCC Interpretive Letter 1002 (May 13, 2004).
23 *Id.* (emphasis added).
24 *See* OCC Interpretive Letter No. 822, at 13 (March 1998) (characterizing “delivering previously disbursed funds to a customer” as ministerial).
25 *See* 12 CFR 7.1003.
26 *See Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir. 1933).
27 See *Strike v. Trans-West Discount Corp*., 92 Cal. App. 3d 735, 745 (Cal. Ct. App. 1979). *See also RepublicBank Dall., N.A. v. Shook*, 653 S.W.2d 278, 281 (Tex. 1983).
28 Notably, the OCC has not—either in the proposed rule or in the valid-when-made rule—addressed how Section 86 would apply to a loan that is usurious when made under the applicable state law but is immediately or subsequently sold to a nonbank third-party. Presumably, because under these new rules the loan would be made under Section 85, the applicable remedy would be the remedy set out in Section 86, rather than the otherwise applicable state law remedy. But this conclusion is in conflict with the plain language of Section 86 which only provides a remedy against the “association taking or receiving” the excessive interest, that is, the national bank. The difficulty in reconciling these new rules with the plain language of the relevant statute again underscores that the OCC is manufacturing ambiguities in these statutes where none actually exist.

Related Topics
Federal Preemption

Related Posts