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E-Mail (comments@FDIC.gov)

Robert F. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW.
Washington, DC 20429

Re: Proposed Rule: Interstate Banking; Federal Interest Rate Authority
RIN 3064-AC95

As the recipient of OCC Interpretive Letter 822, 1998 OCC Ltr. LEXIS 14 (Feb. 17, 1998) (the "OCC Letter"), I am writing to address proposed 12 C.F.R. § 331.4 ("Section 331.4"). I am concerned that the proposed rule does not accurately reflect the rules laid out in the OCC Letter and, accordingly, may create confusion and/or unintended variances in the rules that apply to state banks and national banks, respectively. Additionally, I believe the adoption of the final rules under Section 27 would be a good occasion to recognize a self-evident fact: When a bank performs one of the three non-ministerial loan functions in a particular host state, that host state necessarily has a sufficient nexus to the loan to justify incorporation of the relevant usury laws of that state – that is, the laws applicable to that state's most favored lender – into Section 27.

My concerns with the existing language of proposed Section 331.4 are as follows:

1. I do not believe that proposed Section 331.4 contains an adequate definition of the three non-ministerial loan functions identified in the OCC Letter. Most importantly, it does not articulate where loan approval occurs if a bank applies non-discretionary underwriting standards to a loan.

2. As currently drafted, proposed Section 331.4 would not allow a state bank to apply its home state interest charges if all three non-ministerial functions occur in a single host state but one or more of these functions occurs outside host state branches – for example, at a back office or the borrower's home. This is not consistent either with the rule in the OCC Letter or the FDIC's description of the rule. In the preamble, the FDIC addresses the situation "where the three non-ministerial functions occur in different states or where some of the non-ministerial

functions occur in an office that is not considered to be the home office or a branch of the bank.” 70 Fed. Reg. at 60028-29. It goes on to state that, “[I]n these instances, . . . home state rates may be used.” It is correct in saying that the application of home state rates is consistent with GC-11 but incorrect in saying that the application of home state rates is consistent with the current language in proposed Section 331.4(c)(3). 70 Fed. Reg. at 60029.

3. Proposed Section 331.4(c) does not make it sufficiently clear that a bank may have options of whether to use home state or host state rates in many of the cases it describes. This is because the use of the phrase “[m]ay be determined” in subsections (c)(2) and (3) could be read as meaning “might (or might not) be determined.”

4. Finally, proposed Section 331.4(c)(3) could be read to imply that performance of a non-ministerial function in a particular host state is insufficient to establish a “clear nexus” to that state. I suggest a formulation that allows a state bank to apply a host state’s rates if the bank performs a non-ministerial function in the home state *or* there exists a clear nexus to the state. If the FDIC believes it necessary to retain the reference to performance of a non-ministerial function *and* a clear nexus, I believe it would be appropriate to state in the regulation (or perhaps the preamble) that the FDIC and OCC have not prejudged the issue whether performance of a non-ministerial function in a particular host state is sufficient by itself to establish a clear nexus to that host state, and that the rule should *not* be read to the contrary

Based on the foregoing concerns, I would suggest revising Section 331.4 as follows:

§ 331.4 Location and interest rate for interstate state bank.

(a) Definitions. For purposes this section, the following terms have the following meanings:

(1) Home state means the state that chartered a state bank.

(2) Host state means a state, other than the home state of a state bank, in which the bank maintains a branch.

(3) Non-ministerial functions are factors to be considered in determining where a loan is made by an interstate state bank. The non-ministerial functions are:

(i) Approval. The decision to extend credit. Approval occurs where the person is located who is charged with making applies discretion to make the final judgment determination of approval or denial of credit. If, however, a loan is subject to non-discretionary criteria that are applied mechanically, the loan is approved where the decision to apply those criteria to the loan is made.

(ii) Disbursal. ~~The location where the actual physical disbursement of the disbursal of loan proceeds of the loan occurs, as opposed to the delivery of previously disbursed funds. Disbursal occurs where a bank gives the proceeds of a loan in-person to a customer or credits the borrower's account at a branch. Disbursal does not occur when an escrow agent delivers funds, previously received from a bank, to the borrower. In cases not addressed by this section, identifying where disbursal occurs will require an analysis of the relevant facts and circumstances.~~

(iii) Extension of credit. ~~The site from which the first communication of final approval of the loan occurs.~~

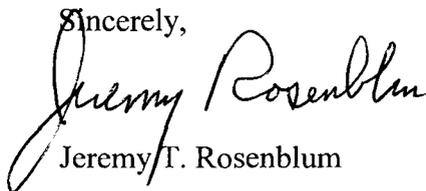
(b) Location. An interstate state bank is located, for purposes of applying 12 U.S.C. 1831d, in the home state of the state bank and in each host state where the state bank maintains a branch.

(c) Location in more than one state. If a state bank is located in more than one state, the appropriate interest rate will be determined as follows:

(1) ~~Will be determined by reference to the laws of the state where~~ If all three of the non-ministerial functions occur in one or more branches in a single host state, the relevant usury laws of that state will apply;

(2) ~~May be determined by reference to the laws of the home state of the state bank, where~~ If all three of the non-ministerial functions do not occur in branches located in different host states or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch; or (3) ~~May be determined by reference to the laws of a host state where~~ one or more branches in a single host state, the bank may always elect to lend on the basis of the relevant usury laws of its home state. Additionally, the bank may elect to lend on the basis of the relevant usury laws of any host state where any non-ministerial function occurs or any host state where, if, based on an assessment of all of the relevant facts and circumstances, the loan has a clear nexus to that host state.

Thank you for your consideration of my views.

Sincerely,

Jeremy T. Rosenblum