

1 Plaintiff, the People of the State of California (“California”), has filed an administrative motion
2 to consider whether the Court should relate *People of the State of California, et al. v. Federal Deposit*
3 *Insurance Corporation*, (“*California v. FDIC*”), Case No. 3:20-cv-05860-CRB, an action brought
4 against the FDIC, to this case, an action against the Office of the Comptroller of the Currency (“OCC”
5 or “Agency”) and Brian P. Brooks, acting in his official capacity as Acting Comptroller of the Currency
6 (collectively, “OCC Defendants”). *See* Civil L.R. 3-12(a). The OCC Defendants take no position on
7 California’s motion, but file this response to advise the Court of several substantive factual and legal
8 differences between the two actions.

9 *First*, the two actions involve different defendants that each hold primary regulatory
10 responsibility over different types of financial institutions.¹ The OCC is an independent bureau of the
11 U.S. Department of the Treasury that supervises national banks under the National Bank of 1864,
12 codified at 12 U.S.C. § 1 *et seq.*, as amended, and federal savings associations under the Home Owners’
13 Loan Act of 1933, codified at 12 U.S.C. § 1461 *et seq.*, as amended. Absent several exceptions not
14 relevant here, Congress vested the Comptroller of the Currency with authority “to prescribe rules and
15 regulations” governing these entities’ business operations. *See* 12 U.S.C. § 93a. Meanwhile, the FDIC
16 acts as the primary federal regulator for certain state-chartered banks and insured branches of foreign
17 banks. 12 U.S.C. §§ 1817(a), 1819, 1820(b). In that capacity, the FDIC prescribes standards to promote
18 these institutions’ safety and soundness, doing so by “regulation or guideline.” *Id.* § 1831p-1(d)(1).

19 Reflecting the agencies’ distinct jurisdictions, the rulemaking challenged in this action applies
20 solely to loans issued by national banks and federal savings associations. *See* Permissible Interest on
21 Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be
22 codified at 12 C.F.R. pts. 7, 160) (“OCC Final Rule”). In contrast, the rulemaking challenged in
23 *California v. FDIC* applies solely to loans issued by state-charted banks and insured branches of foreign
24 banks subject to the FDIC’s supervision. *See* Federal Interest Rate Authority, 85 Fed. Reg. 44,146 (July
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26 ¹ The actions also involve different plaintiffs. Plaintiffs in *California v. FDIC* consist of eight Attorneys
27 General from California, Illinois, Massachusetts, Minnesota, New Jersey, New York, North Carolina,
28 and the District of Columbia. Plaintiffs in the instant action consist of Attorneys General from
California, Illinois, and New York.

1 8, 2020) (to be codified at 12 C.F.R. pt. 331) (“FDIC Final Rule”).

2 *Second*, the two actions involve challenges to rulemakings issued pursuant to two separate
3 statutes. Plaintiffs in this action challenge the OCC’s interpretation of the National Bank Act;
4 specifically, 12 U.S.C. § 85, which, in tandem with 12 U.S.C. § 86, establishes a comprehensive
5 statutory scheme governing the interest permitted on national bank loans. *See Beneficial Nat’l Bank v.*
6 *Anderson*, 539 U.S. 1, 11 (2003). Plaintiffs in *California v. FDIC* challenge the FDIC’s statutory
7 authority under the Federal Deposit Insurance Act to issue a separate regulation governing the interest
8 terms of loans issued by state-chartered banks and insured branches of foreign banks. *See* 12 U.S.C.
9 § 1831d.

10 *Third*, the two actions involve two distinct rulemakings based on two separate administrative
11 records. To address legal developments² calling into question whether a national bank loan’s interest
12 term remains permissible once transferred to a third party, the OCC issued a final rule, effective on
13 August 3, 2020, reaffirming that “interest on a loan that is permissible under sections 85 and 1463(g)(1)
14 . . . shall not be affected by the sale, assignment, or other transfer of the loan.” OCC Final Rule, 85 Fed.
15 Reg. at 33,534-35. Shortly thereafter, the FDIC issued its own final rule, effective on August 21, 2020,
16 “intend[ing] to address uncertainty regarding the applicability of State law interest rate restrictions to
17 State banks and other market participants.” FDIC Final Rule, 85 Fed. Reg. at 44,155. To that end, the
18 FDIC, pursuant to § 27(a) of the Federal Deposit Insurance Act, amended its regulations to “clarif[y]
19 that the determination of whether interest on a loan is permissible . . . is made at the time the loan is
20 made.” *Id.*

21 Although each rulemaking addresses similar underlying legal and market uncertainty—and
22 although the OCC and FDIC both acknowledge that courts have read § 85 of the National Bank Act
23 *in pari materia* with § 27(a) of the Federal Deposit Insurance Act, *see* OCC Final Rule, 85 Fed. Reg. at
24 33,533 n.49; FDIC Final Rule, 85 Fed. Reg. at 44,147—each agency undertook its own independent
25 evaluation of their respective statutory authority to issue the challenged regulations. The OCC and the
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27 ² *See Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).

1 FDIC issued separate Notices of Proposed Rulemaking and Final Rules, and each agency compiled and
2 relied on separate administrative records in promulgating the challenged final rules. Plaintiffs in both
3 actions challenge the OCC's and FDIC's respective compilation and review of these records under the
4 Administrative Procedure Act. But these factual differences necessarily mean that procedural
5 challenges brought against one agency's rulemaking will not inform—or even apply to—procedural
6 challenges brought against the other. And the analyses and rationales included in the agencies' separate
7 final rules are distinct and must be reviewed independently.

8 Accordingly, the OCC Defendants take no position on California's motion, but file this response
9 to advise the Court of several important factual and legal differences between the two actions.

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11 Dated: September 4, 2020

Respectfully submitted,

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13 /s/ Juan Pablo Perez-Sangimino

JONATHAN V. GOULD (DC Bar No. 477569)

Senior Deputy Comptroller and Chief Counsel

BAO NGUYEN (NC Bar No. 39946)

Principal Deputy Chief Counsel

GREGORY F. TAYLOR (DC Bar No. 4170976)

Director of Litigation

PETER C. KOCH (IL Bar No. 6225347)

Assistant Director of Litigation

GABRIEL A. HINDIN (NY Bar No. 495785)

Counsel

MICHAEL K. MORELLI (MA Bar No. 696214)

Attorney

JUAN PABLO PEREZ-SANGIMINO (DC Bar No. 1617262)

Attorney

MARSHA STELSON EDNEY (DC Bar No. 414271)

Counsel

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22 Attorneys for the Defendants
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