STRUCTURED FINANCE ASSOCIATION

bpi
BANK POLICY INSTITUTE

February 4, 2020

Federal Deposit Insurance Corporation
Attn: Robert E. Feldman
Executive Secretary
Attention: Comments
550 17th Street, NW
Washington, DC 20429

Re: RIN 3064-AF21: Federal Interest Rate Authority (84 Fed. Reg. 66845 - December 6, 2019)

Dear Ladies and Gentlemen:

Executive Summary

The Structured Finance Association ("SFA")[1] and the Bank Policy Institute ("BPI")[2] appreciate the opportunity to comment on the notice of proposed rulemaking ("Proposed Rule") by the Federal Deposit Insurance Corporation ("FDIC") implementing Sections 24(j) and 27 of the Federal Deposit Insurance Act ("Section 24(j)" [3] and "Section 27", respectively).[4] The Proposed Rule adds 12 C.F.R. Part 331 to addresses the erroneous ruling by the U.S. Court of Appeals for the Second Circuit in *Madden v. Midland Funding*, LLC, 786 F.3d 246 (2nd Cir. 2015), which held that a loan that is validly originated by a bank may, at a subsequent time, become usurious if that bank sells or assigns the loan to any person or entity that is not a bank. In particular, Section 331.3(e) of the Proposed Rule clarifies that the permissibility of the interest rate on a loan made

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[1] SFA is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA provides an inclusive network for securitization professionals to collaborate and, as industry leaders, drive necessary changes, be advocates for the securitization community, share best practices and innovative ideas, and educate industry members through conferences and other programs. Members of SFA represent all sectors of the securitization market including issuers, investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. Further information can be found at www.structuredfinance.org.

[2] BPI is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States. Collectively, BPI members employ nearly two million Americans, make 72% of all loans, including nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

[3] 12 U.S.C. § 1831a(j) (establishes parity between state banks and national banks regarding the application of state law to interstate branches).

[4] 12 U.S.C. § 1831d.

pursuant to Section 27 is not affected by any subsequent events or the sale, assignment, or transfer of the loan.

SFA, BPI, and their members have a substantial interest in the Proposed Rule. BPI's primary goal is to help its member banks function in a safe and sound manner, which includes enabling them to originate and sell or assign loans or participation interests in loans in an efficient and timely manner and serve their customers and communities. As of September 2019, insured depository institutions held over $10 trillion in outstanding loans. *See* FDIC, Statistics at a Glance (September 30, 2019).[5] SFA's core mission is to support a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. As of the end of 2018, securitization transactions were the source of more than $11.3 trillion in funding for the U.S. economy.[6] This amount represented more than 50% of aggregate outstanding U.S. household debt—including 69% of residential mortgage debt, 17% of automobile debt, 12% of student loan debt, and 14% of credit card debt.

Without the Proposed Rule, *Madden*, and the more recent complaints filed in the federal district courts in the Eastern and Western Districts of New York[7] against the credit card securitization programs of two large national banks, threaten to disrupt substantially the multi-trillion dollar U.S. origination, securitization, and secondary markets for loans.[8] These recent cases do not target payday or similar short-term high interest loans but rather credit cards, the most widely used form of U.S consumer credit. Specifically, these cases throw into doubt the enforceability of the interest rate terms of loan agreements following an insured depository institution's assignment of a loan to a non-bank and have overturned long-established legal principles. Government officials, Congress and industry groups have recognized the threat presented by *Madden* and have asked the Office of the Comptroller of the Currency ("OCC") and FDIC to help address this issue.[9] Accordingly, SFA and BPI strongly support the Proposed Rule.[10]

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5 https://www.fdic.gov/bank/statistical/stats/2019sep/industry.pdf

6 *See* Sec. Indus. & Fin. Mkts. Ass'n, *US ABS Issuance and Outstanding* (July 1, 2019), https://www.sifma.org/resources/research/us-abs-issuance-and-outstanding/; Sec. Indus. & Fin. Mkts. Ass'n, *US Mortgage-Related Issuance and Outstanding* (July 1, 2019), https://www.sifma.org/resources/research/us-mortgage-related-issuance-and-outstanding/.

7 *See Petersen, et al.* v. *Chase Card Funding, LLC*, et al., No. 1:19-cv-00741-LJV (W.D.N.Y. June 6, 2019); *Cohen, et al.* v. *Capital One Funding, LLC et al*., No. 19-03479 (E.D.N.Y. June 12, 2019).

8 *See* Claire Boston, "Usury Lawsuits Put Future of a $563 Billion Bond Market at Risk" (Bloomberg Sept. 17, 2019) (pair of lawsuits could threaten the future of the $563 billion market for debt backed by consumer obligations).

9 For example, the Secretary of the U.S. Department of the Treasury recommended, in a July 2018 report to the President, that the Federal banking regulators should "use their available authorities to address challenges posed by *Madden*." *See* "A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation," July 31, 2018, at p. 93; *see also* Letter to Joseph Otting, Comptroller of the Currency from Members of Congress dated September 19, 2019 (requesting that the OCC take action to mitigate the consequences of the *Madden* decision).

10 *See* SFA, BPI Letter to the OCC on Permissible Interest on Loans that are Sold, Assigned or Otherwise Transferred (Jan. 21, 2020) (discussing why the *Madden* decision was fundamentally incorrect and that the OCC's proposal, like that of the FDIC's, would reestablish the correct legal interpretation regarding the authority of national banks and federal savings associations to sell, assign, and securitize validly originated loans).

First, the Proposed Rule would fix the plainly erroneous ruling in *Madden* and its potential application to loans made pursuant to Section 27, which allows FDIC-insured state-chartered banks, insured branches of foreign banks and other insured depository institutions (collectively, "state banks") not only to make loans, but, as an essential part of making loans, to sell, assign, or securitize those loans or participation interests in those loans without state law intervention to change the interest rate. This is especially true because, as explained below, Section 27 was enacted in the context of the already long-established, "cardinal rule" that a loan that is "valid-when-made" cannot subsequently become usurious simply because the loan is sold or assigned to another party.

Second, by restoring centuries-old fundamental market expectations, the Proposed Rule would enable state banks to support their customers and communities by extending credit to consumers and small businesses, without fear that these lenders will not be able to sell, assign, or securitize the loans or participation interests in those loans due to the concern that potential purchasers or assignees of the loans will have about the application of state interest rate restrictions to the loans post-purchase. The clarity of authority will be of particular benefit for loans to borrowers with lower credit because a state bank will be more reluctant to make loans with higher credit risk if they must be held to maturity or are less salable. Allowing state banks to sell, assign, or securitize loans or participation interests in loans will also provide them with the additional capital flexibility they need to continue lending into the market.

Third, the Proposed Rule would increase the safety and soundness of the financial system by allowing state banks the opportunity to sell loans and increase liquidity in times of stress, such as an economic downturn, unusually high deposit withdrawal demands, or for unexpected liabilities. For state banks, the uncertainty regarding the enforceability of interest rate terms hinders and frustrates risk management activities such as securitization, loan sales, and sales of participation interests in loans, which are crucial to the safety and soundness of these institutions' operations. In normal times, securitization, loan sales, and the sale of participation interests in loans also enable state banks to meet increasing credit demand from borrowers. Without the ability to sell, assign, or securitize loans or participation interests in loans, a state bank's lending would be constrained by the size of its balance sheet. State banks may also need to sell loans to avoid excessive concentrations in particular asset classes. Additionally, state banks may need to seek to sell non-performing loans in circumstances to improve overall asset quality or where it would be unduly costly to pursue collection strategies.

Finally, SFA and BPI have some comments to help strengthen the Proposed Rule.

I. The Proposed Rule would reestablish the correct legal interpretation—well understood for over 150 years—that a loan validly originated does not become usurious if the originator subsequently sells, assigns, or securitizes the loan.

Section 27 provides state banks with the authority to charge interest at the rate allowed by the law of the state where the bank is located, or one percent more than the rate on ninety-day commercial paper, whichever is greater. Exportation of interest rates under Section 27 allows state banks to operate uniform nationwide lending programs without regard to multiple and variable state limits on interest rates in the same manner as national banks. Investors and secondary market purchasers of state bank loans also need to know that the terms of the loans, including the interest rate, will remain permissible after the sale, assignment or transfer of the loan by the state bank.[11] The Proposed Rule is consistent with the underlying purposes of Sections 24(j) and 27 and reduces uncertainty in the marketplace by providing that interest on a loan that is permissible under Section 27 is unaffected by the sale, assignment, or other transfer of the loan by the institution.[12]

The authority of state banks to sell, assign, and securitize those validly originated loans is clear for several reasons.

First, the Proposed Rule is not a departure from, but rather is consistent with and codifies, common law. Well before the enactment of Section 27, the U.S. Supreme Court recognized the longstanding common law principle that a loan that is valid-when-made at origination cannot become usurious because it is sold or assigned to another party.[13] Indeed, the Supreme Court called this principle the "cardinal rule[ ] in the doctrine of usury."[14] Numerous state courts—some pre-dating the Supreme Court's decision—had also recognized the valid-when-made doctrine when considering whether a loan is usurious.[15] This longstanding doctrine certainly applies to loans made by a state bank.[16] Congress is presumed to have understood this long-standing doctrine and incorporated it into Section 27.[17] Accordingly, a loan by a state bank made in compliance with Section 27 is not rendered usurious in the hands of the subsequent holder of the loan.

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[11] In this context, the term "investor" refers to investors in a securitization or similar investment vehicle, rather than an entity coming into a loan or credit facility at the time of origination.

[12] Under the FDIA, the FDIC has the authority to "prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency)." 12 U.S.C. § 1819(a)(Tenth). In addition, 12 U.S.C. § 1820(g), provides the FDIC with the authority to prescribe regulations carrying out the FDIA, and to define terms as necessary to carry out the FDI Act, except to the extent such authority is conferred on another Federal banking agency. No other agency has been granted the authority to issue rules to restate, implement, clarify, or otherwise carry out, either Section 24(j) or Section 27.

[13] *Nichols v. Fearson*, 32 U.S. (7 Pet. 103, 109 (1833).

[14] *Id.*

[15] *See, e.g., Munn v. Comm'n Co*., 15 Johns. 44, 55 (N.Y. Sup. Ct. 1818) ("[A]s the bill was free from usury, between the immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it."); *Tuttle v. Clark*, 4 Conn. 153, 157 (1822) (holding that "this note, free from the taint of usury, in its origin," did not become usurious by a subsequent sale); *Knights v. Putnam*, 20 Mass. (3 Pick.) 184, 185 (1825) ("It is a well established principle, that if a note or security is valid when made, no usurious transaction afterwards between the parties or privies will affect its validity.").

[16] SFA and BPI understand that some commentators have erroneously contended that valid-when-made only applies to situations in which the originator of the loan sells the loan at a discount such that the new owner of the loan is effectively receiving a much higher rate of interest on the loan than the originator. Not only do such contentions fly in the face of the clear language and logic of the valid when made doctrine, but we are unaware of those commentators identifying a single case prior to *Madden* where a loan became usurious simply because it was sold or assigned.

[17] *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, * * * the courts may take it as given that Congress has legislated with an expectation that the principle will apply 'except when a statutory purpose to the contrary is evident.'" (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)) (internal quotation marks and citations omitted)); see also *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (citing *Astoria*, 501 U.S. at 108).

Second, the Proposed Rule is consistent with the Riegle-Neal Amendments Act of 1997, which provided state banks parity with interstate national banks by enacting Section 24(j).[18] Under Section 24(j), the laws of a host state apply to branches of interstate state banks to the same extent such state laws apply to a branch of an interstate national bank. Section 331.3 of the Proposed Rule furthers this intent to create parity by providing that the laws of a host state apply to a branch of an out-of-state state bank only to the extent such laws apply to a branch of an out-of-state national bank in the host state. Thus, to the extent that host state law is preempted for out-of-state national banks, it is also preempted with respect to out-of-state state banks.

Third, the Proposed Rule aligns with the original purpose of Section 27. To promote competitive equality in the nation's banking system and reaffirm the principle that institutions offering similar products should be subject to similar rules, Congress incorporated language from 12 U.S.C. § 85 into the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). This granted all federally-insured financial institutions—state banks, savings associations, and credit unions—similar interest rate authority to that provided to national banks.[19] This allowed state banks to engage in multi-state lending programs and operate in the same manner as national banks.

Fourth, the Proposed Rule is supported by the inherent power of a state bank to originate, sell, or assign contracts. A state bank's power to make loans implicitly carries with it the power to assign loans.[20] This is consistent with state banking laws, which typically grant state banks the power to sell or transfer loans, and more generally, to engage in banking activities similar to those listed in the National Bank Act and activities that are "incidental to banking."[21] The National Bank Act specifically authorizes national banks to sell or transfer loan contracts.[22] Thus, a state bank's statutory authority under Section 27 to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee the right to enforce a loan's terms effectively would prohibit assignment and severely limit the power to make the loan at the rate provided by the statute.

As the Second Circuit conceded, under the *Madden* rule "it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states."[23] Actually, the application of *Madden* constitutes a direct infringement of the rights of a state bank

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[18] Public Law 105–24, 111 Stat. 238 (July 3, 1997).

[19] Public Law 96–221, 94 Stat. 132, 164–168 (1980).

[20] *See Planters' Bank of Miss. v. Sharp*, 47 U.S. 301, 322–23 (1848).

[21] States' "wild card" or parity statutes typically grant state banks competitive equality with national banks under applicable federal statutory or regulatory authority. Such authority is provided either: (1) through state legislation or regulation; or (2) by authorization of the state banking supervisor. *See, e.g.*, N.Y Banking Law § 96 (granting New York-chartered banks the power to "discount, purchase and negotiate promissory notes, drafts, bills of exchange, other evidences of debt. . . .").

[22] *See* 12 U.S.C. 24(Seventh) (expressly authorizing national banks to carry on the business of banking by "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt"); 12 C.F.R. § 7.4008 (national bank may make, sell, purchase, participate in, or otherwise deal in loans subject to terms, conditions, and limitations prescribed by the OCC and any applicable federal law). *See also* SFA, BPI Comment Letter to the OCC, *supra* note 10.

[23] *Madden*, 786 F.3d at 251.

under Section 27 to set interest rates as the state bank deems appropriate, subject only to the law of the state bank's home state. *Madden* upsets the expectations of both parties to the loan contact. The consumer agreed to the rate of interest when the loan was made by the state bank and the disclosed terms (including rate of interest) and the other rights provided to the borrower should remain constant. If the interest rate on the loan was subject to change each time the loan was sold, transferred or assigned, it would create a significant amount of confusion for consumers and secondary market participants.

As to the fourth point, it is clear that effectively compelling state banks to forgo sales of loans or participation interests in loans or securitizations would, as explained above, significantly and improperly intrude on their statutorily granted powers.[24] As to the second and third points, subjecting state banks to a patchwork of dozens of state-law interest rate limits would impose an extraordinary burden. For every loan that a state bank might want to, or needed to, sell or securitize at some point, it would have to forgo its rights under Section 27 and comply with the interest rate restrictions in each individual jurisdiction. Instead of employing standardized loan products and nationwide underwriting programs, state banks would be forced to establish different lending programs for each state. Further, the question of state interest rate caps is not limited to a simple analysis of a stated percentage rate (or, often, rates);[25] it also entails a detailed and complex analysis of what is deemed to constitute interest (*e.g.*, fees) for this purpose. Employing state-specific lending programs therefore would significantly increase the costs and administrative burdens of loan origination for the many state banks that make loans to borrowers in multiple states, and such increased cost would most certainly be passed on to borrowers in the form of higher interest rates. Thus, applying state interest rate limits to securitized loans would significantly interfere with the lending powers of state banks, regardless of whether they seek to comply with those limits in order to continue securitization or forgo securitization to retain their rights under Section 27. As explained below, there is already evidence that, by threatening the ability of state banks to exercise validly these powers, *Madden* is causing interference in the lending and securitization markets.

II. The Proposed Rule will help avoid disruption to the lending and securitization markets.

Madden, if not fixed, will continue to negatively impact U.S. credit markets. Non-bank purchasers of loans will hesitate to purchase loans originated by state banks for fear that the act of selling the loan will trigger a change in the rate of interest that can be charged on the loan. State banks will hesitate to sell loans because of an increased risk of liability to the purchasers if the loans are later held to be usurious. Indeed, they may not be able to sell or securitize loans because they will not be able to make standard representations and warranties regarding the validity of the loan. To the extent that non-bank purchasers do purchase loans from state banks, those purchasers will need to

[24] Courts have reached similar conclusions. *See, e.g.*, *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288–89 (7th Cir. 2005) (Posner, J.) (bank would be improperly "deprived" of power to transfer interest in loan if original interest rate could not be charged post-transfer); *Strike v. Trans-West Discount Corp*., 155 Cal. Rptr. 132, 139 (Cal. Ct. App. 1979) (restriction of bank's ability to access secondary loan market "would be disastrous in terms of bank operations and not conformable to the public policy" of exempting banks from usury laws).

[25] Many states establish multiple permissible rate levels for loans subject to the laws of the state depending, among other things, on the type of borrower, type or purpose of the loan, and/or the size of the loan.

engage in due diligence to understand the potentially relevant new rates, and then potentially discount the purchase price to reflect the differing rates, the increased litigation risk, and time and money spent on the due diligence.

If state banks are unable to sell or securitize loans, or are restricted in those transactions, they will be forced to reduce the amount of credit they extend and to increase the price for the reduced amount of credit they do extend. The resultant reduction in bank lending would adversely impact the economy in several ways. First, it would result in higher borrowing costs for those receiving credit. This would mean higher interest rates for consumers and small businesses obtaining credit. Second, fewer borrowers would be able to obtain credit from state banks, resulting in less credit for consumers and small businesses, especially those with lower credit scores or thin credit files. As scholars have long pointed out with respect to these types of loans, "restrictions in credit markets hurt highest-risk borrowers the most."[26]

Although *Madden*'s long-term effects on the credit markets are still being studied and analyzed, there already are indications of its adverse impact on certain types of loans and consumers located in Connecticut, New York and Vermont.[27] Likewise, some financial institutions are reported to have imposed restrictions on credit facilities used to finance consumer lending, prohibiting loans to borrowers in the Second Circuit if those loans bear interest at rates higher than the state-permitted rates.[28]

These adverse effects inevitably will grow if *Madden* is not corrected, and this is especially so if *Madden* is followed in other circumstances and by courts in other Circuits. In the current low interest rate environment, many loans are made at rates that would not be deemed usurious under many states' laws. But, as interest rates rise, more loans will necessarily be made at rates that exceed those permitted by numerous states.[29] In turn, banks and other lenders—as a result of *Madden*—likely will have to impose tighter restrictions on lending to ensure that the loans they make will not be subject to state interest rate limits if sold.

If adopted, the Proposed Rule would (i) alleviate these concerns, (ii) provide borrowers with greater access to credit, (iii) provide investors, state banks engaged in securitizations and secondary market purchasers of state bank loans and participation interests greater certainty around

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[26] William F. Baxter, Section 85 of the Nat'l Bank Act and Consumer Welfare, 1995 Utah L. Rev. 1009, 1023 (1995). Small businesses likely will be similarly affected because they lack access to the broader capital markets, and are more dependent on bank financing than large corporations. *See* Karen Gordon Mills & Brayden McCarthy, The State of Small Business Lending: Credit Access during the Recovery and How Tech. May Change the Game (Harvard Bus. Sch. Working Paper No. 15-004, 2014).

[27] *See* Colleen Honigsberg, Robert Jackson and Richard Squire, "How Does Legal Enforceability Affect Consumer lending? Evidence from a Natural Experiment," Journal of Law and Economics, vol. 60 (November 2017); and Piotr Danisewicz and Ilaf Elard, "The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy" (July 5, 2018).

[28] *See, e.g.*, Troubled Company Reporter, FREED ABS 2020-1: DBRS Assigns Prov. BB(low) Rating on C Notes (Jan. 26, 2020), 2020 WLNR 2563819 (noting that "[l]oans originated to borrowers in states with active litigation (Second Circuit (New York, Connecticut, Vermont), Colorado, and West Virginia) are excluded from the pool" for a recent securitization).

[29] For example, the standard maximum permissible interest rate is 12% in Virginia, *see* Va. Code Ann. 6.2-303(A), and 17% in Arkansas, see Ark. Const. Amend. 89 § 3.

the enforceability of these loans, (iv) as discussed below, enhance safety and soundness,[30] and (v) alleviate concerns that courts outside the Second Circuit will adopt *Madden*'s flawed reasoning.[31]

III. The Proposed Rule will help the safety and soundness of the financial system.

State banks depend on the ability to sell, assign, or securitize the loans they originate to provide liquidity to support their lending operations and to foster their safety and soundness. If these loans could not be sold or securitized, or the ability to do so was severely restricted, state banks would be required to reduce the amount of credit they extend to avoid carrying potentially too many illiquid loans and to increase the costs for the reduced amount of credit they do extend.

Indeed, the *Madden* decision greatly complicates all loan sales by forcing market participants to consider the following factors in originating, purchasing or securitizing loans that they did not have to consider before:

- How readily will the original lender, or a subsequent purchaser, be able to sell, or resell, the rights to the loan to another party?
- What state law will govern the rate (and definition) of interest collectible on the loan?
- Will the purchaser be able to collect based on the original loan terms?
- Will the assignee be subject to suit in the Second Circuit, or only a court that applies the traditional valid-when-made rule?

The multiple uncertainties will constrict the availability of liquidity in the credit markets, because secondary market participants will likely be less willing, indeed sometimes unwilling, to purchase loans, participation interests in loans or interests in securitizations of loans that may be subject to state law interest rate limits that are lower than the stated rate of the loan. This is especially true given that some purchasers may even be subject to criminal sanctions in a number of states.[32] And, to the extent market participants do purchase loans or participation interests in loans, they are likely to discount the value to reflect the risk they take of receiving lower rates of interest than allowed on the face of the loan, or even the voiding of the loan.

In addition, sales of loans or participation interests in loans usually include representations and warranties that the loan is collectible in accordance with its terms and that the sale does not violate any law. However, in light of *Madden*, sellers in the Second Circuit may now be unable to make those representations and warranties, which could further depress the price of any loans sold by

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[30] Courts have generally recognized the preemptive authority of Section 27 and FDIC interpretations of Section 27 have received deference. *See Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007); *Griner v. Synovus Bank*, 818 F.Supp.2d 1338 (N.D. Ga. 2011).

[31] Although beyond the scope of this comment letter, SFA believes that the FDIC's interpretation of Sections 24(j) and 27 as set forth in a final rule would be entitled to deference.

[32] *See, e.g.*, Mich. Comp. Laws Ann. 438.41 (interest in excess of 25% is punishable by up to five years imprisonment and/or $10,000 fine); N.Y. Penal Law 190.40 (interest in excess of 25% is a felony punishable by up to four years imprisonment and/or $5,000 fine).

state banks or, at worst, render such sales infeasible. To the extent sellers make such representations and warranties and *Madden* is not fixed, the sellers could be subject to liability in private lawsuits. Moreover, the impact of *Madden* is not limited to future loan sales. Any entity that has purchased or sold loans in the past now faces the possibility that those prior transactions—entered into in reliance upon on the valid-when-made doctrine—may now become subject to disputes with, and potential liability to, purchasers seeking to recover for the loss in value of the loans they purchased.

By threatening to reduce the value and liquidity of the multi-trillion-dollar portfolio of loans that banks currently hold or have securitized, the decision could reduce the liquidity and capital of banks, and ultimately have implications for the safety and soundness of the banking system.

IV. Suggestions for clarifying the text of the Proposed Rule.

As noted, SFA and BPI are highly supportive of the FDIC's efforts to address the adverse effects of the *Madden* decision on the origination, secondary, and securitization markets via the Proposed Rule and would ask the FDIC to finalize the proposal as soon as possible to address the uncertainty in the market.

Although the Proposed Rule is not a joint rulemaking, we encourage the FDIC to work with the OCC to harmonize the text of the Proposed Rule with the proposed rule and existing rule issued by the OCC based on its comparable authority under 12 U.S.C. § 85 and 12 U.S.C. § 1463 with respect to national banks and federal savings associations. Recognizing the value of uniformity in applicable interest laws amongst the various types of depository institutions, Congress extended the longstanding principles of Section 85 to federal savings associations and other state banks when it enacted DIDMCA.[33]

The FDIC historically has interpreted this interest rate authority provision in Section 27 in a consistent manner with Section 85 and OCC precedent.[34] From the perspective of investors, secondary market purchasers of loans and participation interest in loans and depository institution lenders, it is important that there remains interest rate authority parity amongst depository institutions regardless of whether they may be a national bank, federally-licensed branch, federal savings association, or state-chartered insured depository institution. Harmonizing the Proposed Rule with the OCC's proposed and existing rules will also help ensure that this parity amongst depository institutions continues and the effect on interest after a loan is sold, transferred or assigned will not vary depending upon whether the lender is a national bank, federal savings association or state bank.[35]

[33] *See* 12 U.S.C. § 1831d; 12 U.S.C. § 1463(g).

[34] *See Greenwood Trust Co. v. Mass.*, 971 F.2d 818, 827 (1st Cir. 1992) (Section 1831d borrows from Section 85 to achieve parity between national banks and their state-chartered counterparts.). For this reason, courts have held that Section 85 and Section 1831d should be interpreted the same way. *Id*.

[35] For example, the FDIC's definition of interest in the Proposed Rule is comprehensive and helpful and follows the language in the OCC's current definition in 12 C.F.R. § 7.4001. 84 Fed. Reg. 66,853 (Dec. 6, 2019).

V. Conclusion

SFA and BPI appreciate the opportunity to provide the foregoing comments on the Proposed Rule. Should you wish to discuss any matters addressed in this comment letter further, please contact Kristi Leo of SFA at (202) 847-4556 or at kristi.leo@structuredfinance.org, or Naeha Prakash of BPI at (202) 589-2429 or at Naeha.Prakash@BPI.com.

Respectfully submitted,

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