STRUCTURED
FINANCE
ASSOCIATION

bpi
BANK POLICY INSTITUTE

January 21, 2020

Office of the Comptroller of the Currency
Chief Counsel's Office
Attention: Comment Processing Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Docket ID OCC-2019-0027, RIN 1557-AE73

Re: Permissible Interest on Loans that are Sold, Assigned or Otherwise Transferred (84 Fed. Reg. 64229 - November 21, 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 Office of the Comptroller of the Currency ("OCC") concerning Section 85 of the National Bank Act ("Section 85") and Section 4(g)(1) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1463(g)(1) ("Section 1463"). The Proposed Rule amends 12 C.F.R. § 7.4001 and 12 C.F.R. § 160.110 in a manner that would directly rectify the 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 erroneously held that a loan that is validly originated by a national bank under Section 85 may, at a subsequent time, become usurious if that national bank sells or assigns the loan to any person or entity that is not a bank.

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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.

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 ensuring that they are able 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).[3] 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.[4] 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[5] against the credit card securitization programs of two of the largest national banks, threaten to disrupt substantially the multi-trillion dollar U.S. origination, securitization, and secondary markets for loans.[6] These recent cases do not target payday or similar short-term high interest loans but rather credit cards, the most prevalent form of U.S consumer credit. Specifically, these cases throw into doubt the enforceability of the interest rate terms of loan agreements following a national bank'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 OCC and the Federal Deposit Insurance Corporation ("FDIC") to help address this issue.[7] Accordingly, SFA and BPI strongly support the Proposed Rule.

First, the Proposed Rule would fix the plainly erroneous ruling in *Madden* by correctly articulating the function of Section 85 and Section 1463, which allow national banks and federal savings associations 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 interference from state law. This is especially true because, as explained below, Sections 85 and 1463 were enacted in the context of the already long-established, "cardinal rule" that a loan "valid-when-

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[3] https://www.fdic.gov/bank/statistical/stats/2019sep/industry.pdf

[4] *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/.

[5] *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).

[6] *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).

[7] 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).

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 national banks and federal savings associations to support their customers and communities by extending credit to consumers and small businesses, without fear that the 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 bank will be more reluctant to make loans with higher credit risk if they must be held to maturity or are less salable. Allowing national banks and federal savings associations to sell, assign, or securitize loans or participation interests in loans will also provide them with the additional capital they need to continue lending into the market.

Third, the Proposed Rule would increase the safety and soundness of the financial system by allowing national banks and federal savings associations the flexibility to easily liquidate loans in times of stress. For national banks and federal savings associations, 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 for several reasons. Securitization, loan sales, and the sale of participation interests in loans enable banks to increase liquidity in an economic downturn, to meet unusually high deposit withdrawal demands, or to pay unexpected liabilities. Securitization, loan sales, and the sale of participation interests in loans also enable banks to increase liquidity and meet increasing credit demand from borrowers. Banks may also need to sell loans to avoid excessive concentrations in particular asset classes. Additionally, 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. Without the ability to sell, assign, or securitize loans or participation interests in loans, a bank's or federal savings association's lending would be constrained by the size of its balance sheet.

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.

In enacting the National Bank Act ("NBA") in 1864, "Congress intended to facilitate . . . a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314–15 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864) (statement of Rep. Hooper)). To achieve this purpose, the NBA sought to insulate national banks from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873). Section 85 and 12 U.S.C. §86 ("Section 86") are two ways that Congress protected national banks from state usury claims.

Under Section 85, national banks are permitted to "charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located," rather than complying with local law in every jurisdiction in which the borrower may be located. Section

86 then provides the exclusive remedy for a bank's charging of interest at a rate greater than permitted by Section 85. Courts have long recognized that together these two sections completely preempt the application of state usury laws to loans originated by a national bank. *See, e.g., Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 11 (2003) ("[T]here is . . . no such thing as a state-law claim of usury against a national bank."); *Marquette*, 439 U.S. at 318 & n.31 ("To the extent the enumerated federal rates of interest are greater than permissible state rates, state usury laws must, of course, give way to the federal statute.").

Section 1463 permits federal savings associations to charge interest at the highest rate allowed to competing lenders by the state where the association is located and to export this rate to borrowers in other states, regardless of any other state law purporting to limit the interest permitted on bank loans. Exportation of interest rates under Sections 85 and 1463 allows national banks and federal savings associations to operate uniform nationwide lending programs without regard to multiple and variable state limits on interest rates. Investors and secondary market purchasers of 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 national bank or federal saving institution.[8] The Proposed Rule is consistent with the underlying purposes of the NBA and HOLA and reduces uncertainty in the marketplace by providing that interest on a loan that is permissible under Sections 85 and 1463, respectively, is unaffected by the sale, assignment, or other transfer of the loan by the institution.[9]

Under the NBA and HOLA, the authority of national banks and federal savings associations to sell, assign, and securitize those validly originated loans is clear for several reasons.

First, the rule established by Sections 85 and 1463 is not a departure from, but rather is consistent with and codifies, common law. Well before the enactment of the NBA or HOLA, 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.[10] Indeed, the Supreme Court called this principle the "cardinal rule[ ] in the doctrine of usury."[11] 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.[12] This

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[8] 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 or in the secondary market.

[9] Under the NBA and HOLA, the OCC has the authority to prescribe regulations with respect to national banks and federal savings associations and has previously exercised this interpretive authority with respect to Sections 85 and 1463. *See* 12 U.S.C. § 93a. (OCC "authorized to prescribe rules and regulations to carry out the responsibilities of the office."); 12 U.S.C. § 1463(a)(2) (OCC authorized to "prescribe regulations with respect to savings associations, as the Comptroller determines to be appropriate. . . .".

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

[11] *Id.*

[12] *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.").

longstanding doctrine certainly applies to loans made by a national bank or federal savings association.[13] Congress is presumed to have understood this long-standing doctrine and incorporated it into the NBA and HOLA.[14] Accordingly, a loan by a national bank or federal savings association made in compliance with Section 85 or 1463 is not rendered usurious in the hands of the subsequent holder of the loan.

Second, apart from the valid-when-made doctrine, the Proposed Rule aligns with the original purpose of the National Banking Act of 1864. In passing that Act, "Congress intended to facilitate . . . a 'national banking system,'" *Marquette*, 439 U.S. at 314–15 (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864) (statement of Rep. Hooper)), and insulate national banks from "the hazard of unfriendly legislation by the States," *Tiffany*, 85 U.S. at 413. Furthermore, the Proposed Rule is supported by the inherent power of a national bank or federal savings association to originate, sell, or assign contracts. Clearly, a state statute that would require the bank to restructure a loan before it could be resold is a direct infringement of the bank's right to sell the loans made. 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."[15] Rather, the application of Madden constitutes a direct infringement of the rights of a national bank under the NBA to set interest rates as the national bank deems appropriate, subject only to the law of the bank's home state. Moreover, national banks and federal savings associations have the authority to make loans and assign their loan contracts to third parties.[16] Because the assignee steps into the bank's or federal savings association's shoes upon assignment, the third party receives the benefit of and may enforce the permissible interest term under the loan agreement. Again, the loan does not become usurious after the assignment simply because a third party is enforcing the contractually agreed upon interest term. *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 national bank or federal savings association 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 changed each time the loan was sold, transferred or assigned, it would create a significant amount of confusion for consumers and secondary market participants.

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[13] 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.

[14] *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).

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

[16] *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); 12 C.F.R. § 160.30 (authority for federal savings associations to make, sell, invest in and participate in or otherwise deal in loans).

Third, in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which was enacted before the Second Circuit issued *Madden*, Congress indicated its clear desire to maintain the *status quo* ability of national banks and federal savings associations to originate loans and to sell or assign those loans without the risk that that they would become usurious under state law as a result of the sale or assignment to an entity that is not a bank. Specifically, although Congress enacted provisions for when "state consumer financial laws" are preempted, including through the application of the U.S. Supreme Court's preemption test in *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996), *see* 12 U.S.C. § 25b(b), Congress specifically stated that no provision of Dodd-Frank "shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of 'interest' under such provision." 12 U.S.C. § 25b(f). If Congress had desired to do anything but reaffirm the centuries-old *status quo* that a validly originated loan may be sold or assigned without making the loan usurious, Congress would have spoken at that time.

Fourth, even if a court were to apply the U.S. Supreme Court's decision in *Barnett Bank*—under which a state law is preempted if it would "prevent or significantly interfere with the national bank's exercise of [those] powers"—also supports the OCC's proposed rule.[17] "[T]he level of 'interference' that gives rise to preemption under the NBA is not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). If state usury limits applied to sold, assigned, or securitized loans, national banks and federal savings associations could be forced to (i) forgo loan sales, sales of participation interests or securitizations in order to maintain the benefits of preemption under Sections 85 and 1463; (ii) originate loans in compliance with each individual state's interest rate restrictions, in order to preserve the option of sale, assignment, or securitization; or (iii) reduce the interest rates on the loans prior to sale or assignment. Any of these alternatives would substantially interfere with a national bank's or federal savings association's operations in violation of 12 U.S.C. § 25b(b)(1)(B) or 12 U.S.C. § 1465.

As to the first and third points, it is clear that effectively compelling national banks and federal savings association 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. For example, when one state passed a law that expanded the scope of liability for assignees of certain mortgage loans, the OCC opined that the state law was inconsistent with "the exercise of national banks' real estate lending powers, *including the power . . . to securitize these loans*," and that the state law was therefore preempted. Preemption Determination and Order, 68 Fed. Reg. 46,264-02, 46,278–79 (Aug. 5, 2003) (emphasis added).[18]

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[17] Congress has codified the *Barnett Bank* standard. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(f), 124 Stat. 2017 (codified at 12 U.S.C. 25b(f)); 12 U.S.C. § 1465 (covering federal savings associations).

[18] 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).

As to the second point, subjecting national banks and federal savings associations to a patchwork of dozens of state-law interest rate limits would impose an extraordinary burden. For every loan that a national bank or federal savings association might want to, or needed to, sell or securitize at some point, it would have to forgo its rights under Sections 85 and 1463 and comply with the interest rate restrictions in each individual jurisdiction. Instead of employing standardized loan products and nationwide underwriting programs, national banks and federal savings associations 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);[19] 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 burden of loan origination for the many national banks and federal savings associations 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 national banks and federal savings associations, regardless of whether they seek to comply with those limits in order to continue securitization or forgo securitization to retain their rights under Sections 85 and 1463. As explained below, there is already evidence that, by threatening the ability of national banks and federal savings associations to validly exercise 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 national 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. National banks and federal savings associations will hesitate to sell loans because of an increased risk of liability to the purchasers if the loans are later held to be usurious (particularly where 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 national banks or federal savings associations, those purchasers will need to engage in due diligence to understand the potentially relevant new rates, and then potentially discount the purchase price to reflect the different rates and time and money spent on the due diligence.

If 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 costs for the reduced amount of credit they do extend. This will reduce the overall liquidity to the financial markets. The 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 banks, resulting in less credit for consumers and small businesses, especially those with lower credit scores or thin credit files. As scholars have long

[19] 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.

pointed out with respect to these types of loans, "restrictions in credit markets hurt highest-risk borrowers the most."[20]

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.[21] 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.

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 may exceed those permitted in the numerous states that have fixed interest rates.[22] In turn, banks and other lenders—as a result of *Madden*—will likely 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 in its current form, the Proposed Rule would (i) alleviate these concerns, (ii) provide borrowers with greater access to credit, (iii) provide investors, banks engaged in securitizations and secondary market purchasers of bank loans and participation interests greater certainty around the enforceability of these loans, (iv) as discussed below, enhance safety and soundness,[23] and (v) alleviate concerns that courts outside the Second Circuit will adopt *Madden*'s flawed reasoning.[24]

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

National banks and federal savings associations 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

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[20] 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).

[21] *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).

[22] 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.

[23] The Dodd-Frank Act explicitly stated that Section 85 would not be impacted by the new preemption standards of Title X. *See* 12 U.S.C. §25b(f). Furthermore, the OCC received deference in *Smiley* in interpreting Section 85. *See Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 739 (1996).

[24] While beyond the scope of this comment letter, SFA believes that the OCC's interpretation of Sections 85 and 1463 as set forth in a final rule would be entitled to deference.

severely restricted, national banks and federal savings association would be required to reduce vastly 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.[25] 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 national banks or federal savings associations 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 for collecting interest as permitted in loan agreements valid at origination and claims by purchasers against loan sellers seeking to recover for the loss in value of the loans they purchased.

[25] *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).

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 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 OCC'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 OCC 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 OCC to work with the FDIC to harmonize the text of the Proposed Rule with the proposed rule issued by the FDIC based on its comparable authority under 12 U.S.C. § 1831d ("Section1831d") with respect to FDIC-insured state depository institutions. 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 state-chartered insured depository institutions when it enacted the Depository Institutions Deregulation and Monetary Control Act of 1980.[26]

The FDIC historically has interpreted this interest rate authority provision in Section 1831d in a consistent manner with Section 85 and OCC precedent.[27] 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 FDIC's proposed rule 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-chartered insured depository institution.[28]

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

[27] *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*.

[28] For example, we believe the FDIC's definition of interest in its 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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