September 3, 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-2020-0026, RIN 1557-AE97

Re: National Banks and Federal Savings Associations as Lenders (85 Fed. Reg. 44223 – July 22, 2020)

Dear Ladies and Gentlemen:

The Structured Finance Association ("SFA")[1] appreciates the opportunity to comment on the notice of proposed rulemaking ("Proposed Rule") by the Office of the Comptroller of the Currency ("OCC") concerning when national banks and federal savings associations (collectively, the "Bank") make a loan and are the "true lender" in the context of a partnership between a bank and a third party.[2] Under the Proposed Rule, a Bank makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan.

SFA and its members have a substantial interest in the Proposed Rule. SFA's core mission is to support the structured finance industry's and public policymakers' efforts to grow credit availability and the real economy in a responsible manner, making credit more affordable to Americans and their businesses through providing a robust and liquid securitization market. As of Q1 2020, securitization transactions were the source of more than $11.9 trillion in funding for the U.S. economy.[3] More specifically, securitization is a significant source of funding in key

[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] *See* 12 U.S.C. § 85 ("Section 85 of the National Bank Act") and 12 U.S.C. § 1463(g)(1) ("Section 1463 of the Home Owners' Loan Act").

[3] *See* Sec. Indus. & Fin. Mkts. Ass'n, *US ABS Issuance and Outstanding* (March 31, 2020), https://www.sifma.org/resources/research/us-abs-issuance-and-outstanding/; Sec. Indus. & Fin. Mkts. Ass'n, *US Mortgage-Related Issuance and Outstanding* (March 31, 2020), https://www.sifma.org/resources/research/us-mortgage-related-issuance-and-outstanding/.

consumer asset types – outstanding asset-backed securities in these sectors currently stand at $10.3 trillion for residential mortgage debt, $219 billion for auto loans and leases, $157 billion for student loans, and $87 billion for credit cards.

SFA supported the OCC's rule related to Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred (the "Valid-When-Made Rule"). The Valid-When-Made Rule was intended to fix the plainly erroneous ruling in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), by correctly articulating the function of Section 85 of the National Bank Act and Section 1463 of the Home Owners' Loan Act, 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. The Valid-When-Made Rule will provide fixed income bond investors (such as pension funds, mutual funds and insurance companies) who purchase securities backed by loans originated by Banks that have been transferred to non-bank entities, and secondary market purchasers of bank loans and participation interests, with greater certainty around a foundational legal imperative: the enforceability of these loans.

SFA believes that the Proposed Rule is an important corollary to the Valid-When-Made Rule and necessary to ensure the enforceability of the interest rate and other terms of loan agreements following a Bank's origination and assignment of a loan to an entity that does not hold a bank charter. Absent the Proposed Rule, the legal certainty created by the Valid-When-Made Rule could be undermined by a growing number of claims that a Bank is not the true lender for purposes of Sections 85 of the National Bank Act or 1463 of the Home Owner's Loan Act. Moreover, these cases have resulted in a myriad of inconsistent and often conflicting rulings with considerable subjectivity in who is the true lender.

This uncertainty and subjectivity presents significant concerns for loan purchasers and fixed income investors, who face the continued possibility that a court could determine that they are the true lender or that they have financed or purchased loans where the interest rate is subsequently found to be unenforceable. In turn, banks as well as their financing partners and asset purchasers are likely to impose tighter restrictions on their lending and financing activities impacting consumers' access to and cost of credit.

Therefore, SFA is highly supportive of the OCC's efforts to address this growing uncertainty and believes that further objective clarification is required by the OCC to ensure that investors and other secondary market participants can determine when a loan is made by a Bank while at the same time ensuring fair and responsible lending to consumers and protection against predatory, high cost lending. Further, SFA believes that additional emphasis on the regulatory expectations of the OCC for Bank oversight of partnership programs would be appropriate.

A key objective of the Proposed Rule is to provide the regulatory clarity and certainty that would enable banks to originate and sell loans to third-party or affiliated non-bank purchasers in a manner consistent with their business objectives and risk appetite and in compliance with applicable laws and regulations. SFA agrees with this key objective and believes that the Proposed Rule could enable Banks to support their customers and communities by extending credit to consumers and small businesses while ensuring that secondary market participants and other investors will have the certainty that a loan is made by a Bank.

While supporting the OCC's decision to provide clear guidance regarding when a Bank makes a loan, SFA requests that the OCC consider the following comments on the Proposed Rule. First, SFA requests that the OCC use its prudential authority to ensure that clear, objective standards and safeguards for third-party partnerships are in place prior to implementation of any final rule to limit risk to Banks and consumers. This could include weighing the appropriate consumer protection, safety and soundness, and financial stability impacts posed by the Proposed Rule. Second, SFA members have noted that areas of the proposal would benefit from additional clarification to avoid unintended impacts. For example, clarification of the term "funds a loan" to expressly exclude certain types of well-established financing transactions, such as structures commonly referred to as "warehouse lending facilities," would ensure bank financing arrangements critical to the consumer lending ecosystem are not unintentionally impacted. These two points are discussed below in more detail.

OCC Considerations and Safeguards

SFA agrees that appropriate regulatory safeguards for bank-originated loans are important and that emphasis on these points from the OCC will encourage responsible lending through bank partner relationships. SFA appreciates the OCC's ongoing recognition of its responsibility for ensuring that loans are made both in a safe and sound manner and in accordance with applicable laws and regulations, even if the loan is made in the context of a third-party partnership and even if the Bank's partner is the customer-facing entity.

As the prudential regulator of Banks, the OCC directly supervises the lending activities of these institutions. In order to encourage responsible lending and fair access and treatment to all consumers, the OCC must institute appropriate safeguards to manage the risks associated with lending partnerships and ensure compliance with applicable statutes and regulations, enforceable guidelines, and other issues including appropriate safeguards with respect to a Bank's use of its lending power. Furthermore, the OCC must enforce these applicable laws and regulatory safeguards to ensure that responsible lending occurs whenever Banks are the lenders.

In finalizing the Proposed Rule and developing appropriate standards, we would encourage the OCC to present its analysis, demonstrating how the agency considered the relevant factors and articulate the connection between the facts found and the choice made. This should include weighing the appropriate consumer protection, safety and soundness, and financial stability impacts posed by the Proposed Rule's efforts to simplify and clarify regulatory expectations.

Additional Clarification Can Avoid Unintended Impacts

Under the Proposed Rule, a Bank makes a loan when the Bank, as of the date of origination: (a) is named as the lender in the loan agreement; or (b) *funds the loan* (emphasis added). Without further clarification, SFA is concerned that Banks providing financing to lenders or loan purchasers through warehouse lending, loan syndications and other credit facilities or repurchase agreements could inadvertently be considered the lender with respect to the underlying loans if the proceeds from these financing arrangements are used by the lender to fund the underlying loans. Similar concerns have been raised about whether "funding a loan" would include Bank purchases of retail installment contracts from automobile dealerships.

We do not believe that the OCC intended to include these types of funding arrangements within the "funds the loan" prong of the proposal, but the Proposed Rule is broad enough to introduce substantial uncertainty. Without further clarity regarding when a Bank "funds the loan" under the Proposed Rule, it is possible that the broad and abbreviated language could be misconstrued to deem as "true lender" Banks providing financing to lenders or loan purchasers or Banks purchasing retail installments sales contracts for automobile dealers. Accordingly, we ask that the OCC clarify that it is not the intended effect of the Proposed Rule to cover these types of financing arrangements.

Conclusion

Banks' ability to efficiently provide affordable credit to fuel household economic growth and manage their balance sheet risk is supported by investors, financing partners and asset purchasers, with over $11.9 trillion of financing provided by the robust and liquid securitization market. Uncertainty of foundational aspects of the legal and regulatory framework for these financing and sales arrangements can increase costs, and limit access, for banks and thus their customers. Therefore, SFA supports the OCC providing the much needed clarity and a uniform standard to the "true lender" issue. Importantly, the OCC should provide this clarity and transparency through rulemaking, guidance and enforcement adequate to eliminate the additional costs to, and limitations on, access to credit while also ensuring banks are extending fair and responsible credit to consumers and strengthening the safety and soundness of the banking system.

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SFA appreciates 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,

Respectfully submitted,

Kristi Leo
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