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MORTGAGE BANKERS ASSOCIATION

January 21, 2020

Federal Deposit Insurance Corporation
Robert E. Feldman, Executive Secretary
550 17th Street NW, Washington, DC 20429
RIN: 3064-AF21

The Honorable Joseph M. Otting
Comptroller
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218, Washington, DC, 20219
Docket ID OCC-2019-0027; RIN: 1557-AE73

RE: OCC Notice of Proposed Rulemaking, "Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred"; FDIC Notice of Proposed Rulemaking, "Federal Interest Rate Authority"

The Mortgage Bankers Association ("MBA")[1] respectfully submits these comments on the rules proposed by the Office of the Comptroller of the Currency ("OCC") and Federal Deposit Insurance Corporation ("FDIC") which clarify that the interest rate on a loan originated by a national bank or savings association (together "national bank"), if permissible at time of origination, will continue to be a permissible and enforceable term of the loan following a transfer, sale or assignment of a loan.

MBA supports this proposal to address the ambiguity created by the Second Circuit in *Madden v. Midland Funding, LLC* ("*Madden*"). This rule would codify the valid-when-made doctrine, providing: "Interest on a loan that is permissible under 12 U.S.C. § 85 shall not be affected by the sale, assignment, or other transfer of the loan."[2] The valid-when-made doctrine is a critical component of a robust secondary market for certain real estate secured loans. It also is consistent with the underlying purpose of Section 85.

Specifically, the National Bank Act allows national banks to export interest rates permitted by their own states, even if those rates are higher than those allowed in other states in which they operate.[3] Similarly Section 1463(g) of the Home Owners' Loan Act permits federal savings

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.
[2] 12 C.F.R. pt. 7 & 160.
[3] *Marquette National Bank of Minneapolis v. First Omaha Services Corporation*, 439 U.S. 299, 301 (1978).

associations "[n]otwithstanding any State law . . . charge interest . . . at the rate allowed by the laws of the State in which such savings association is located." Section 1463(g) is modeled after and interpreted consistent with Section 85 of the National Bank Act.

Additionally, for non-federally chartered financial institutions, Section 501(a) of the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") preempts interest rate caps on most first-lien mortgage loans.[4] The preemption authority of DIDMCA is not available in every state and is subject to possible change in some areas.[5]

While, generally speaking, federal preemption applies to the interest rate cap on first-lien mortgages, state specific usury limits may govern first-lien origination fees as well as interest rate caps and origination fees on subordinate liens and home equity loans. Thus the interest rates charged would generally not exceed state usury caps, but the definition of interest can include charges or other contractual fees that makes clarity and certainty important for those that originate loans that may be saleable in the future.

This proposed rule would level the playing field by allowing all purchasers of these loans to collect the same agreed upon interest rate and contractual loan terms as the originator. Such uniformity is critical for a vibrant and diverse secondary market, and deep liquid markets for financial assets are critical to financial stability. The valid-when-made doctrine has been around for decades, with both banks and nonbanks relying on it to enforce credit agreements according to their terms. Absent this certainty, it could impair a national bank's ability to value such loans which, in turn could impair the bank's ability to sell, assign or otherwise transfer such loans to non-bank counterparties. This could force banks to hold more loans in their portfolio or restrict their ability to diversify certain risks based on geographic concentration, an outcome that may be inconsistent with safe and sound banking in some instances. Uncertainty would also make buyers reluctant to purchase such loans and possibly face potential violations of state usury laws for following the agreed-upon contractual terms. This would have the effect of increasing transaction costs in due diligence reveiws or creating possible legal liability, making these loans less attractive for some secondary market purchasers.

The impairment of market liquidity negatively affects consumers. If investors deem these loans not worthy of the risk, the lack of available secondary market purchasers can impact originators, potentially increasing the cost of credit for borrowers. MBA appreciates the proposal providing a solution to the uncertainties created by recent court decisions and giving nationwide clarity to those in the lending industry.

Sincerely,

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[4] Section 501(a) of DIDMCA provides for a general preemption of all state limits on the "<u>rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received or reserved</u>" in connection with "federally related mortgage loans," which essentially includes all first-lien residential mortgage loans, made after March 31, 1980, by virtually any lender. <u>See</u> P.L. 96-221 § 501(a)(1), codified in 12 U.S.C. § 1735f-7a.

[5] DIDMCA affords states the opportunity to override this preemption pursuant to Sections 501(b)(2) or 501(b)(4).

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