ICBA
INDEPENDENT COMMUNITY
BANKERS of AMERICA®

January 30, 2020

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

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

Re: Federal Interest Rate Authority (FDIC RIN 3064-AF21); Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred (Docket ID OCC-2019-0027)

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on proposed rules by both the FDIC and the OCC which would clarify that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. In other words, whether the interest on a loan is permissible under federal law would be determined when the loan is made and would not be affected by any subsequent events such as a sale, assignment, or other transfer of the loan or if there is a change in state law.

[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.*

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Background

Federal law[2] authorizes national banks and savings associations to charge interest at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. Similarly, Section 27 of the Federal Deposit Insurance Act provides state banks 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. In either case, the bank's power to make loans implicitly carries with it the power to assign loans at the same rate.

The decision of the U.S. Court of Appeals for the Second Circuit in *Madden v. Midland Funding LLC* has created considerable uncertainty about the validity of interest-rate terms after a national or state bank sells, assigns, or otherwise transfers a loan. The *Madden* court concluded that Section 85 (i.e., 12 U.S.C. 85)—which authorizes national banks to charge interest at the rate permitted by the law of the State in which the national bank is located, regardless of interest rate restrictions by other states—does not apply to non-bank assignees of loans. While the *Madden* case concerned the assignment of a loan by a national bank, the decision has also caused uncertainty regarding the enforceability of loans originated and sold by state banks pursuant to Section 27 of the Federal Deposit Insurance Act since Section 27 is patterned after and interpreted in the same manner as Section 85.

Accordingly, both the FDIC and the OCC are proposing regulations that would clarify that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer.

ICBA's Position

ICBA strongly supports both the OCC and the FDIC proposed regulations regarding federal interest rate authority. We agree that the bank's power to make loans implicitly carries with it the power to assign loans, and thus a national or state bank's authority under Section 85 or Section 27 respectively 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 would effectively prohibit assignment and render the power to make the loan at the rate provided by the federal statute illusory.

The ability of a nonbank assignee to enforce interest rate terms is also consistent with contract law which states that an assignee succeeds to all the assignor's rights in a contract, standing in the shoes of the assignor.[3] Therefore, the non-usurious character of a loan would not change when the loan changes hands, because the assignee is merely enforcing the rights of the assignor and stands in the assignor's shoes. ICBA supports the "valid-when-made" doctrine which holds that if a loan is valid when it is made, with respect to the interest rate and other terms of the loan, then the loan remains valid and enforceable when assigned to another party.

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[2] 12 U.S.C. 85 which is sometimes referred to as "Section 85."

[3] See *Dean Witter Reynolds Inc. v. Variable Annuity Life Insurance Company*, 373 F. 3d 1100 (10th Circ. 2004).

The proposed rules by the OCC and the FDIC would address the uncertainty regarding the applicability of state law interest rate restrictions to national and state banks and would reaffirm the ability of national and state bank to sell and securitize loans they originate. Banks depend upon a stable and a consistent national legal framework to operate efficiently and in a safe and sound manner. But currently, there is a lack of consistency because of the *Madden* decision. Banks located in the Second Circuit are particularly concerned that the decision will eventually lead to significant pricing adjustments on the loans they sell and impair their ability to maintain proper levels of liquidity. Furthermore, potential purchasers of loans and interest in loan securitizations are faced with the risk that a loan that was valid at origination may be ruled invalid after the transfer if the purchaser is located in a state with a usury limit that is lower than the interest rate on the loan. This uncertainty and disruption in the secondary market discourages lending and can have a chilling effect on a community bank's ability to provide loans to customers in its service area.

Conclusion

ICBA fully supports the FDIC and the OCC's proposal to codify by regulation their previous positions concerning the "valid-when-made" doctrine and reverse the negative impact that the *Madden* decision has had on the secondary market for loans. Both Section 85 as well as Section 27 of the Federal Deposit Insurance Act support the agencies' legal position that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. Furthermore, these regulations will encourage lending and provide some needed consistency to the national legal framework in which banks operate in.

ICBA appreciates the opportunity to comment on this proposed rulemaking by both the OCC and the FDIC. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 821-4431 or Chris.Cole@icba.org.

Sincerely,
/s/Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel