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February 3, 2020

VIA ELECTRONIC SUBMISSION

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

Dear Mr. Feldman:

Our client OppLoans Opportunity Financial, LLC. ("OppLoans") appreciates the opportunity to comment on **Notice of Proposed Rulemaking RIN 3064-AF21 – Federal Interest Rate Authority**. OppLoans strongly supports the proposed issuance of a formal rule by the FDIC to address the legal uncertainties that have arisen regarding the validity of interest under Section 27 of the Federal Deposit Insurance Act (the "FDI Act") when a State bank sells, assigns, or otherwise transfers loans. This issue has enormous importance not just for State banks, but for the non-bank providers of financial services, such as OppLoans, that banks increasingly rely on as even the most basic of banking products and services continue to become more technologically-advanced.

OppLoans was founded in 2009 and is based in Chicago, Illinois. It's business activities are devoted to making personal loans available to consumers, including both persons who are middle-income, and those who would have difficulty obtaining credit under traditional underwriting practices. In August 2019, OppLoans was recognized by *Inc.* magazine for the fourth year in a row as one the fastest growing companies in the United States. This growth has been achieved while placing a premium on treating customers fairly, as is evidenced by the firm's A+ rating from the Better Business Bureau. OppLoans' highly-innovative financial technology platform lies at the heart its ongoing success. The firm both lends directly to consumers and offers services to banks, including loan servicing and access to its technology platform. OppLoans views the provision of bank services as an integral part its current and future business plans and thus, has a strong interest in the proposed rulemaking.

OppLoans, along with other fintech providers of innovative services, enable State banks to make loans to consumers who would not qualify for credit under traditional bank underwriting standards. This already important capability is about to become a critical need. An article published in *Wall Street Journal* on January 22, 2020, entitled "Credit Scores to Drop for Millions," explained that changes being made to the methodology Fair Isaac Corp. uses to calculate FICO scores "will likely make it harder for many Americans to get loans." The reported millions of consumers who will see their creditworthiness decline will continue to need access to credit, but regulated banks may not be among the credit sources they look to absent assistance from fintech providers. [1] The FDIC acknowledged this risk in its Federal Register comments, noting that "in the absence of the proposed rule . . [underbanked] consumers might be unable to obtain credit from State banks and might instead borrow at high rates from less-regulated lenders."

A Rule Interpreting Section 27 Cannot Exclude Addressing the Real Party in Interest

In its Federal Register comments, the FDIC states that the proposed rule will not address whether the bank is "the real party in interest with respect to a loan or has an economic interest in the loan under state law; e.g., which entity is the true lender." Those exclusions are unnecessary and belie the critical importance with which the Second Circuit viewed the issue of whether or not a bank was the real party in interest in *Madden*. In addition, we note that in its parallel recent rulemaking the OCC described what was out-of-scope for purposes of the true lender issue more narrowly; i.e., "This rule would not address which entity is the true lender when a bank makes a loan and assigns it to a third party."[2]

In *Madden*, the Second Circuit framed the federal preemption issue before the court as whether the usury laws of the State of New York significantly interfered with the ability of a national bank to exercise its rights under section 85 of the National Bank Act. In finding that the application of New York law "would not significantly interfere with any national bank's ability to exercise its powers under the NBA," the court devoted much of its opinion to distinguishing the decision of the Eighth Circuit in *Krispin v. May Department Stores*.[3] Specifically, the court found *Krispin* inapplicable because the bank had retained ownership of the subject loan accounts and thus, was the "real party in interest." According to *Madden*, this finding in *Krispin* was essential to the Eighth Circuit's ultimate conclusion that the "application of state law to the

[1] FDIC Chairman Jelena McWilliams has highlighted this risk in a number public speeches; see, e.g., https://www.fdic.gov/news/news/speeches/spnov1318.pdf

[2] 84 Fed. Reg. 84229, 8432

[3] 218 F.3d 919 (8th Cir. 2000).

accounts [contested in that case] would have conflicted with the bank's power's authorized by the NBA."[4]

The critical importance of knowing whether a bank is the real party in interest is illustrated by the decision of the state district court of Colorado in *Meade v. Funding*, which was issued in August 2018.[5] The *Meade* the court found it unnecessary to even consider the valid when made doctrine because "the Administrator's factual allegations assert[ed] that the Marlette and Avant loans made to Colorado consumers were *invalid when made*. . ."[6] Rather, the court opined that "the real question" that needed to be addressed was whether "those loans were valid in the first place. . ."[7]

In OCC Interpretative Letter 822, which the FDIC substantially mirrored in General Counsel Opinion 11, the OCC noted that "clear rules" governing the ability of a national bank to charge interest are consistent with the need many courts have recognized for "a company with far-flung operations to adopt a uniform law to govern its transactions. . ."[8] A rule that stopped short of addressing whether the bank is the lender, and instead left that question to be decided by the respective court systems of each state – effectively providing, *if* a State bank is the lender, *then* section 27 governs the lawful rate of interest – would be at odds with a uniform standard.

Fact-Intensive 'True Lender' Tests Are Unnecessary

There is no need for the FDIC to undertake fact-intensive 'true lender' inquiries, similar to what some state courts perform, in order to provide clear and unambiguous direction in the proposed new rule. First, and foremost, the FDIC could clarify what it means for purposes of section 27 for a State bank to "take, receive, reserve, and charge on any loan or discount *made*, . . ." without performing a court-like true lender analysis. The FDIC did just that in General Counsel Opinion 11 when it adopted a "non-ministerial activities" test for determining when and where a loan is "made" for purposes of interstate branch banking.[9] Unlike the true lender tests that courts employ, the relatively simple three-part test established in General Counsel Opinion 11 focuses on certain core lending activities performed by the State bank itself (i.e., "non-ministerial" activities) , as opposed to ancillary activities performed by non-bank third party

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[4] *Madden v. Midland Funding, LLC*, 786 F.3d 246, 252 (2d Cir. 2015), cert. denied, *Midland Funding, LLC v. Madden*, 2016 U.S. 2039 (U.S., 2016).
[5] 2018 Colo. Dist. LEXIS 3856 *.
[6] *Id.* at *57.
[7] *Id.* at *58.
[8] OCC Interpretive Letter No. 822 (Feb. 17, 1998), footnote 32.
[9] Notwithstanding the FDIC's Federal Register discussion of General Counsel Opinion 11, proposed Part 331.2 (Definitions) includes no definition of the term "made" in any context, including interstate branch banking.

service providers, such as loan program marketing and account servicing (i.e., "ministerial" activities).[10]

OppLoans urges the FDIC to establish a clear-cut rule for identifying when a loan is made by a State bank through expanding the coverage of the test previously adopted in General Counsel Opinion 11. To this end, consistent with the FDIC's statement of policy in its Federal Register preamble disfavoring lending arrangements where a non-bank is seeking to use a State bank's charter solely as a means of evading state usury laws, the fact that a bank *would* be the lender if a given loan or category of loans is made does not mean that the subject bank *should* lend as matter of policy, including in view of the policies promulgated and maintained by the applicable state banking agency in the state, or multiple states, where the bank is located.

Second, the FDIC should recognize, consistent with *Krispin* and *Madden*, that section 27 applies in all cases where a State bank is both named as the lender in the loan documents and continues to own the loan accounts. This is what exists under any loan participation-based marketplace lending program, which has emerged as the predominate structure for such programs. If the bank own the loan accounts, then the laws, supervisory expectations, safety and soundness standards, and expectations for the fair and equitable treatment of customers that apply to the bank will necessarily apply throughout the loans' entire product and service lifecycle. The FDIC strongly emphasized this point in its draft Proposed Guidance for Managing Third Party Lending, which we urge the FDIC to finalize. The specific standards that apply to marketplace lending programs include those set forth in the FDIC's Guidance for Managing Third-Party Risk, FIL 44-2008, and its Supervisory Guidance on Model Risk Management, FIL 22-2017..[11]

Predominate Economic Interest Should Be Considered Irrelevant

[10] In *Discover Bank v. Vaden*, 396 F.3d 366, 367 (4th Cir.2005), at the request of the Fourth Circuit Court of Appeals, the FDIC concluded that Discover Bank, and not its corporate affiliate Discover Financial Services, Inc., as alleged by the plaintiff, was the true lender based on an analysis that centered on the bank's activities and responsibilities. In contrast, the true lender analyses applied by state courts when considering a marketplace lending program focus almost entirely on the non-bank party.

[11] If those standards are not being properly adhered to, the FDIC has the ability to enforce them through formal enforcement action. *See, e.g., the FDIC's March 2018 consent* order action against Cross River Bank: https://www.fdic.gov/news/news/press/2018/pr18021a.pdf

A stated goal of the proposed rulemaking is to "reaffirm the ability of State banks to sell and securitize loans they originate." Yet, a transfer of the predominate economic interest in subject loans is the intended outcome of every loan securitization. Therefore, it would be seemingly impossible for the proposed rule to both provide the above-stated reaffirmation and ignore the bank's "economic interest in the loan under state law," as is proposed. Moreover, it is also confusing for the FDIC to assert in proposed Part 33.4(e) that "Whether interest on a loan is permissible under section 27 . . is determined as of the date the loan was made," yet leave open the possibility that the sale by a State bank of its economic interests in loans made, including its contractual commitment to sell future loan receivables, could wind up deciding whether or not the bank was the true lender in state court.

In sum, OppLoans strongly supports the intended purposes of the proposed rule, but believes those purposes are at risk of being frustrated unless the FDIC clarifies that whether a State bank holds the predominate economic interests in the loans has no relevance for purposes of section 27.

Conclusion

The FDIC continues to be a welcome and highly influential champion of financial innovation. The proposed rule offers the FDIC a unique opportunity to not only undo the unfortunate effects of Madden, but to further innovation by eliminating legal uncertainties that currently dissuade most State banks from even considering engaging in marketplace lending programs aimed at lower-income borrowers. In order to have those effects, the proposed rule will need to address whether a State bank is the real party in interest by defining when a loan is "made." In this regard, the fact that the bank is named as the lender in loan documents and holds the loan accounts should be considered dispositive of whether section 27 applies, consistent with *Krispin*. Finally, whether a State bank holds the predominate interest should be considered as irrelevant for purposes of section 27

Thank you again for inviting public comment on the proposed rulemaking. Please be assured that OppLoans is grateful to the FDIC for its willingness to address the vitally important legal issues in question.

Please do not hesitate to call email me if you have any questions regarding the above.

Sincerely,

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