MARLETTE
FUNDING

1523 Concord Pike
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February 4, 2020

Via www.fdic.gov/regulations/laws/federal

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Federal Interest Rate Authority
RIN 3064-AF21

Ladies and Gentlemen:

Marlette Funding, LLC ("Marlette") hereby submits its comments to the FDIC's proposed regulation on "Federal Interest Rate Authority," to be codified at 12 C.F.R. part 331, 84 Fed. Reg. 66845 (Dec. 6, 2019) (the "Proposal"). Marlette fully supports the Proposal, and focuses this letter on the aspect of the Proposal relating to the ability of assignees of a loan to enforce interest rate terms under Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d. The Proposal should be finalized as soon as possible to bring needed certainty to the consumer credit market in the face of the unwarranted and unnecessary cloud cast by the decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).

Marlette operates the Best Egg consumer-lending platform, and is a financial technology provider seeking better ways to assist banks in making money accessible to consumers. Marlette's team mixes decades of banking experience with deep customer knowledge and smart technology to deliver lending-related digital products, services, and experiences to consumers on behalf of banks in a more relevant way. Marlette works with banks, facilitating the banks' origination of consumer loans through the Best Egg platform. The Best Egg platform provides a frictionless online personal loan experience where qualified applicants can instantly view loan offers with no impact to their credit scores and receive funds from a bank in as little as one business day. Since March 2014, the online loan platform has helped banks deliver almost $10 billion of prime loans, including particularly to underserved consumers, with strong credit performance.

Marlette is a member of the Marketplace Lending Association, a group of innovative companies that have brought new and beneficial consumer lending products to consumers across the country. Marlette joins and fully supports the comments that are being submitted separately by the Marketplace Lending Association.

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Marlette currently works with Cross River Bank, a state-chartered, FDIC-insured bank, and that bank originates all of the loans that are made through the Best Egg platform. Some of the loans originated by the platform are sold to third-party investors, or included in securitization transactions. As a result, resolution of the uncertainty created by *Madden* is directly relevant to Marlette's business.

Marlette also has a distinct interest in the Proposal because Marlette is currently a defendant in an action brought by Colorado's Administrator of the Uniform Consumer Code, the state official charged with enforcing Colorado's consumer credit laws including its interest rate limitations. *See Martha Fulford, Administrator, Uniform Consumer Credit Code v. Marlette Funding LLC d/b/a Best Egg, et al.*, Case No. 17CV30376 (District Ct., Denver Cty., Colo.). The Administrator claims that, among other things, loans that were originated by a bank but then sold to a non-bank entity lost the benefit of federal preemption as a result of the *Madden* decision. If that theory is successful, it will adversely affect Cross River Bank's ability to continue to make loans, and therefore Marlette's continued ability to operate the Best Egg platform on Cross River Bank's behalf. The regulatory interpretations in the Proposal, will provide important guidance to the court hearing this case (as well as courts hearing similar cases). Marlette therefore urges the FDIC to finalize the Proposal as expeditiously as possible, in its current form with the enhancements outlined below.

Marlette agrees with the FDIC's analysis in support of the Proposal. The Proposal is properly grounded in the well-established principles of contract law and assignments as well as the valid-when-made doctrine, and is a necessary corollary of banks' authority to sell the loans that they originate. The Proposal is necessary to ensure a properly functioning secondary market for credit obligations – and that secondary market is necessary to ensure that banks can fully exercise their authority to lend on a nationwide basis and provide the benefits of credit intermediation. Further, a functioning secondary market is critical to ensuring safe and sound operations of banks via balance sheet management. And the Proposal will ensure that valuable consumer lending products – such as the loans offered through the Best Egg platform – can remain available to consumers. Studies have demonstrated that the *Madden* decision led to decreased availability of credit in the states of the Second Circuit. Colleen Honigsberg, Robert Jackson and Richard Squire, "How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment," 60 J. Law & Econ. 673 (2017); and Piotr Danisewicz and Ilaf Elard, "The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy" (July 5, 2018).

The administration and members of Congress have supported the action now being proposed by the FDIC. 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 James Otting, Comptroller of the Currency from Members of Congress dated September 19, 2019 (requesting that the OCC take action mitigate the consequences of the Madden decision).

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The FDIC's action is also well supported by the principles of administrative law, and the Proposal (when finalized) should be entitled to deference by courts. *See, e.g., National Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). We urge the FDIC to fully set forth its bases for the rulemaking in the final action. And we urge the FDIC continue to be clear that its action is intended to clarify existing law under Section 27, not to create new law.

We also request that the FDIC work with the OCC to finalize the Proposal so that the final language of both proposals is similar. Because these federal interest rate statutes have been historically interpreted together – and to ensure continued similar treatment of national banks, Federal savings associations, and state banks – similarly worded regulations would be helpful. We think the FDIC's language in the Proposal is a well-considered and should be used by the OCC as well.

Finally, we urge the FDIC to take up directly the so-called "true lender" question and, at a minimum, to clarify in its final rulemaking that this question is a question of federal law rather than state law. Recently, including in the Colorado litigation mentioned above to which Marlette is a party, a few state regulators and courts have impermissibly attempted to use state law doctrines to interfere with the federal interest rate statutes applicable to banks, arguing that a bank is not the "true lender" based on a state-law test such as the which entity has the "predominate economic interest" in the loan. The FDIC, not scattered judicial decisions in cases brought by state regulators and private plaintiffs, is best situated to provide certainty on this important question. Moreover, the question of whether a bank is the lender of a loan pursuant to Section 27 is a federal law question, not a state law question. Allowing a state to define when a loan is a bank loan (and when it is not) would circumvent federal law, and the nationwide uniformity that federal interest rate provisions intended. *See Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1367-68 (D. Utah 2014). In the related context of preemption for "branch bank" affiliates of national banks, for instance, the Supreme Court rejected the attempted imposition of "state law definitions of what constitutes 'branch banking,'" because "to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers"—a result that was impermissible under federal law. *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133-34 (1969). The same analysis governs here. The Supremacy Clause and Section 27 do not permit states to be the "sole judges of their own powers" in that way. *First Nat'l Bank*, 396 U.S. at 133-34. Thus, we urge the FDIC to clarify that federal law governs the question of whether a loan is made by a bank pursuant to Section 27, and ultimately to take up the true lender question in a separate rulemaking. In addition, to the extent that there are concerns about specific, very high interest rates programs offered by banks, the FDIC and other federal banking regulators can – and have in the past – taken action to address such concerns. The right answer is ***not*** to broadly prohibit bank partnerships that are offering valuable, innovative products to consumers.

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Marlette fully supports the FDIC's Proposal, and urges that it be finalized promptly. If we can provide any additional assistance to the FDIC in connection with this matter, please contact the undersigned at (302) 449-4905 or frank.borchert@bestegg.com or contact our outside counsel in this matter, John Van De Weert at Sidley Austin LLP, (202) 736-8094 or jvandeweert@sidley.com.

Sincerely,

[redacted]

Frank R. Borchert, III
General Counsel