Texas Bankers Association

Submitted via Electronic Delivery
at comments@fdic.gov

February 4, 2020

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

Re: RIN 3064–AF21(Federal Interest Rate Authority)

Dear Sir:

The Texas Bankers Association (TBA) takes this opportunity to submit the following comments in support of the Notice of Proposed Rulemaking published in the *Federal Register* of December 6, 2019.[1] TBA is the oldest and largest state banking association in the nation consisting of approximately 420 federally-insured depository institutions headquartered or doing business in the State of Texas.

Please accept these comments in furtherance of our prior letter, dated April 18, 2016, urging each of the federal bank supervisory agencies to supplement the legal efforts of the Solicitor General of the United States in seeking Supreme Court review of the May 22, 2015 decision of the U.S. Court of Appeals for the Second Circuit that usury protections accorded to a loan made by a bank did not pertain to a non-bank acquiror of the note.[2] The *Madden* decision, as it has become known, negated centuries of well-established common and statutory law that a bank's power to make a loan implicitly includes the power to assign the loan and to do so in a manner that unequivocally vests the assignee with all the assignor's rights in the contract.[3]

These are not just significant historical legal precedents, they constitute the very foundation of the asset-backed secondary market which is estimated by the Securities Industry and Financial Markets Association to be in excess of 1.6 trillion dollars.[4] This core market function is not only an essential liquidity management tool for banking institutions but is a proven vehicle for attracting additional national and international capital to the U.S. economy.

Briefly by way of background, this needless uncertainly was introduced into the securitization market, when the Justice Department under the previous Administration submitted an *amicus curiae*

[1] (84 *Fed. Reg.* 66846).

[2] *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015).

[3] E.g., *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873).

[4] U.S. Asset-Backed Securities Outstanding (2nd Qtr., 2019).

petition in opposition to the 2016 filing for Supreme Court review of the *Madden* case. This was done with inadequate explanation even though the Solicitor General agreed that the Second Circuit decision in the *Madden* case was in clear error of Supreme Court precedent dating back as far as 1828: "[T]he rule cannot be doubted, that if the note be free from usury, in its origin, subsequent usurious transactions respecting it, can affect it with the taint of usury."[5]

As is often the case, the Supreme Court adopted the Justice Department procedural recommendation and *Madden* litigants settled according to subsequent court filings.[6] Thus, the *Madden* case remains controlling law in the very Circuit overseeing the center of the American financial services industry. For this reason alone, the Federal Deposit Insurance Corporation (FDIC) rulemaking in coordination with the Office of the Comptroller of the Currency (OCC)[7] are critically important until the *Madden* case can be properly reviewed on its merits by the Supreme Court.

In this regard, we further commend the FDIC for its ongoing efforts, likewise in coordination with the OCC, to keep this issue active on the judicial front as per the recent joint filing which also referenced the negative impact the ruling is having on the general credit markets.[8] One such study showed that in New York and Connecticut (another state covered by the Second Circuit), there was a marked decline in the number of consumer loans made subsequent to the *Madden* Ruling.[9] Moreover, another finding in that study reported that "Not only did lenders make smaller loans in these states post-*Madden*, but they also declined to issue loans to the higher-risk borrowers most likely to borrow above usury rates."[10]

In conclusion, TBA fully supports and urges prompt action by way of finalizing the Proposed Rule in general and §331.4(e) in particular which specifically states that the legal status of bank generated loans do not change by virtue of subsequent events, such as the sale, assignment, or other transfer of the loan.

Thank you for taking these views under consideration.

Sincerely,

[redacted]

John M. Heasley
Texas Bankers Association

[5] Brief of the United States as *amicus curiae;* No. 15-610, p.8. (May 2, 2016).

[6] Joint Motion for Preliminary Approval of Civil Action No.: 11-cv-8149 (LMS) (S.D.N.Y, Mar. 1, 2019).

[7] OCC Proposes Rule to Clarify "Valid When Made" Doctrine News Release 2019-132 (November 18, 2019).

[8] *In Re Rent-Rite Superkegs West Ltd*., No.1:19-cv-01552 (D. Colo., 2019).

[9] How Does Legal Enforceability Affect Consumer Lending? Colleen Honigsberg, Robert J. Jackson, Jr. and Richard Squire (October 2017).

[10] *Id.*, at p. 28.