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:

WebBank is grateful for the opportunity to submit this comment letter in response 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"). The Proposal addresses, among other things, the application of Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d ("Section 27") to loans made by a state-chartered, FDIC-insured bank. WebBank applauds the Proposal and urges the FDIC to finalize the Proposal to provide important and needed certainty to banks and other participants in the financial services industry.

WebBank is a member of the Marketplace Lending Association ("MLA"), and joins and supports the comments submitted by the MLA. In addition, WebBank is a member of the National Association of Industrial Bank ("NAIB") and the Utah Association of Financial Services ("UAFS"), and WebBank joins and supports the comments submitted by the NAIB and the UAFS in conjunction with the Consumer Bankers Association.

WebBank is an FDIC-insured, Utah-chartered industrial bank, engaged in nationwide lending programs. WebBank frequently sells loans that it has originated to both bank investors and non-bank investors, and thus the subject matter of the Proposal is of great interest to WebBank.

WebBank has a particular interest in the finalization of the Proposal because WebBank is an Intervenor-Defendant in litigation currently pending in Colorado, *Martha Fulford, Administrator, Uniform Consumer Credit Code v. Avant of Colorado LLC d/b/a Avant, et al.*, Case No. 2017CV30377 (Denver District Court, Colorado). In that case, the Plaintiff is the Administrator of the Uniform Consumer Credit Code, who is the state official responsible for enforcement of the Colorado state interest rate limitations that apply to consumer loans. The Plaintiff claims, relying on the decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), that loans originated by WebBank lose the benefit of federal interest rate preemption if those loans are sold by WebBank to a non-bank purchaser. If the Plaintiff prevails with this

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theory, it will negatively impact WebBank's ability to continue to originate consumer loans. The Proposal, if finalized, will provide important guidance to the court hearing this case on the interpretation of the federal interest rate laws. Thus, WebBank strongly supports the Proposal.

WebBank fully supports the analysis in the Proposal. The power to make a loan with particular interest terms necessarily includes the ability to transfer that loan, including the right to collect the contractually agreed interest. The valid-when-made doctrine is a long-standing principle of usury law, and was necessarily incorporated as a background principle when Congress first enacted the National Bank Act, and then later both Section 27 and the comparable provision of the Home Owners' Loan Act. Further, this principle is part of the common law of contracts, applicable in the case of any assignment of a contract. Finally, the rule avoids absurd results and is necessary to facilitate the vibrant secondary market that currently exists in the United States for credit obligations. Without the valid-when-made rule, a consumer could enter into a valid loan obligation but then, if the lender sold the obligation days, weeks, months, or years later – in a secondary market transaction to which the consumer is not a party – the terms of the loan could become unenforceable depending on the identity of the purchaser. That result would be absurd. *See, e.g., Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005) (Posner, J.).

Studies have demonstrated that the *Madden* decision resulted in credit being less available to consumers. *See* 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). WebBank itself has made credit less available under some of its lending programs to borrowers in the Second Circuit states, because of the lack of liquidity in the secondary market.

In the Supplementary Information explaining the Proposal, the FDIC explains that the Proposal is not intended to address the question of "determining whether a State bank … is a real party in interest with respect to a loan or has an economic interest." 84 Fed. Reg. at 66850. In explaining this limitation of the scope of the Proposal, WebBank urges the FDIC to reconsider the explanation of this position as not being "intended to affect the application of ***State law***" in making this determination. *Id.* (emphasis added). Federal law, not State law, governs this issue.

In recent years, some litigation has been brought alleging that loans originated by FDIC-insured, state-chartered banks should be recharacterized as loans made by a non-bank, typically relying on a State-law test of recharacterization. *See, e.g., CashCall, Inc. v. Morrisey*, No. 12–1274, 2014 WL 2404300 (W. Va. May 30, 2014). However, the question of whether a loan is made by a Bank under the authority of Section 27 is necessarily a federal law question. If this question were determined by State law, then a State could easily circumvent the intent of Section 27 by redefining, as a matter of State law, the definition of when a loan is "made." *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, WebBank urges the FDIC to clarify that this important question, although not the subject of the Proposal, is ***not*** a question of State law.

In summary, we fully support and encourage the FDIC to finalize the Proposal promptly. WebBank would be pleased to discuss these matters with the FDIC further if that would be useful. Please do not hesitate to contact the undersigned at (801) 456-8460, kevin.leitao@webbank.com, or Kelly M. Barnett, the Bank's President, at (801) 456-8351, kelly.barnett@webbank.com.

Sincerely,

Kevin D. Leitão
General Counsel