MERCATUS CENTER
George Mason University

Bridging the gap between academic ideas and real-world problems

PUBLIC INTEREST COMMENT

FDIC GUIDANCE FOR THIRD-PARTY LENDING

BRIAN KNIGHT
Senior Research Fellow, Mercatus Center at George Mason University

Request for Comment on Examination Guidance for Third-Party Lending
Agency: Federal Deposit Insurance Corporation
Proposed: July 29, 2016
Comment period closes: October 27, 2016
Submitted: October 17, 2016
Document number: FIL-50-2016

Thank you for the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed Examination Guidance for Third-Party Lending (hereinafter "FDIC draft guidance"). The Mercatus Center at George Mason University is dedicated to bridging the gap between academic ideas and real-world problems and to advancing knowledge about the effects of regulation on society. This comment, therefore, does not represent the views of any particular affected party or special interest group but is designed to assist the FDIC in establishing guidance that will help banks partner with third parties and fulfil the crucial role of providing access to credit.

The ability of banks to partner with third parties to expand their credit operations has significant benefits for borrowers, including those who are uninterested in or not well served by traditional banking services. The FDIC's interest in ensuring the safety and soundness of banks that participate in third-party lending is understandable. It is also important, however, that banks' efforts to expand credit access are not dampened by excessively onerous requirements or unnecessary legal and regulatory confusion. To that end, the FDIC should provide

For more information, contact
Chad Reese, Assistant Director of Outreach for Financial Policy
703-993-8921, creese@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

clarity to lenders by unambiguously acknowledging the legitimacy of the third-party loan origination model.

As the FDIC notes in its draft guidance, there is disagreement among courts about whether a nonbank entity that purchases a loan from a bank is allowed to take advantage of the bank's power under the Federal Deposit Insurance Act (FDIA) to export its home state interest rates.[1] This ambiguity has harmed consumers by increasing costs and limiting access to credit.[2] The FDIC can address this issue by clarifying that a bank's power to originate loans that conform to the laws of its home state includes the ability to sell its rights under that loan to third parties. This position is consistent with the position taken by the Office of the Comptroller of the Currency (OCC) and the Solicitor General.[3] The power of a state-chartered bank under section 27 of the FDIA[4] mirrors the power of a nationally chartered bank under section 85[5] of the National Bank Act.[6] As such, the ability to sell or assign the rights under a loan to a third party applies to state-chartered banks just as it does to nationally chartered banks.

By explicitly acknowledging the power of a bank to make and sell loans consistent with the requirements of its home state, the FDIC can help provide clarity and certainty to a market that desperately needs them. Doing so would benefit borrowers by providing an environment where lenders feel confident in their legal status. The results—which would benefit the whole economy—would be increased investment, greater access to credit, and lower prices. In short, greater legal certainty regarding third-party lending arrangements would help banks better serve the needs of their communities.

---

1. FDIC, *Examination Guidance for Third-Party Lending as of July 29, 2016*, available at https://www.fdic.gov/news/news/financial/2016/fil16050a.pdf, 2n3.
2. See, for example, Colleen Honigsberg, Robert J. Jackson Jr., and Richard Squire, "The Effects of Usury Laws on Higher-Risk Borrowers" (Columbia Business School Research Paper No. 16-38, Columbia Business School, New York, May 2016), 6. The authors note that access to marketplace lending credit for riskier borrowers in New York, Vermont, and Connecticut declined significantly after the *Madden v. Midland Funding, LLC* decision, 786 F.3d 246 (2d Cir. 2015).
3. "Properly understood, a national bank's Section 85 authority to charge interest up to the maximum permitted by its home State encompasses the power to convey to an assignee the right to enforce the interest-rate term of the agreement." Brief for the United States as Amicus Curiae Supporting Petitioners at 6, *Midland Funding, LLC, et. al., v. Saliha Madden,* No. 15-610 (May 24, 2016).
4. Codified at 12 U.S.C. § 1831d(a) (2014).
5. Codified at 12 U.S.C. § 85 (2014).
6. "The historical record clearly requires a court to read the parallel provisions of DIDA and the Bank Act *in pari materia*. It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way." Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992). See also FDIC, *General Counsel's Opinion No. 10; Interest Charges under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 74 (1998). Congress sought to "allow[ ] competitive equity among financial institutions, and reaffirm[ ] the principle that institutions offering similar products should be subject to similar rules." 126 Cong. Rec. 6,907 (1980) (statement of Sen. Dale Bumpers), quoted in *Greenwood*, 971 F.2d at 826.