April 14, 2017

The Honorable Mike Crapo
Chairman
Committee on Banking. Housing, and
Urban Affairs
United States Senate
534 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sherrod Brown
Ranking Democratic Member
Committee on Banking. Housing, and
Urban Affairs
United States Senate
534 Dirksen Senate Building
Washington. DC 20510

Re: Response to Requests for Proposals to Foster Economic Growth

Dear Senators Crapo and Brown:

Thank you for the opportunity to submit a proposal to help consumers, market participants, and financial companies responsibly participate in the economy in a more effective and efficient manner. Fundamental to economic recovery and growth, as well as job creation, is the availability of credit at rational interest rates. Historically, this credit has largely taken the form of unsecured consumer and small business loans, which were made by large and small banks nationwide. Individuals borrow money for a wide range of purposes including emergency expenses, life events, medical expenses, home improvement, relocation and consolidation of existing debt at lower interest rates. Small businesses borrow money for working capital, expansion, hiring additional employees, purchasing inventory, purchasing technology and other financing needs.

But in the wake of the financial crises, many banks withdrew from, or greatly reduced their participation in, this segment of the market – thus creating a void. Local banks continued to lend (albeit at a reduced volume), but they were not equipped to lend beyond their branch footprint. To address this unmet demand, various state-chartered, federally regulated banks (such as Cross River Bank) partnered with financial technology (fintech) platform companies to offer credit on a nationwide basis. And after loans are originated, they can sell the loans freely in the secondary market, which in turn makes more credit available to lend to consumers and small businesses.

It is important to stress that under no circumstances is the level of consumer protection reduced in any way by the legislation in this proposal. All banks, whether national or local, are subject to strict supervision and oversight by the banking regulators (OCC, FDIC, FRB, and/or state regulators). This will not change nor is any suggestion being made that it should change.

In order to serve this critical segment of the market, banks rely on two fundamental aspects of federal banking law: (a) right to lend nationwide by exporting rates and fees permitted by the state where the bank is based ("federal preemption"), and (b) a loan which is valid when made remains valid even if it is later sold or transferred ("valid when made" doctrine).

But, these essential and long standing rules have come under attack in some courts and by some states. Although many believe that the so-called "true lender" cases such as Madden v. Midland Funding (Second Circuit Court of Appeals) were wrongly decided, court decisions such as these effectively limit

the ability of national banks to issue credit and banks will have to restrict the availability of loans to countless borrowers, particularly those with less access to traditional lending sources. While local banks are required to comply with local/state rules, it is impractical for banks lending on a national basis to do so. Without federal preemption, banks lending nationally would have to separately comply with each state's interest rates and other fees and governing law. It should be pointed out that the stated purpose of the statutes permitting federal preemption was to encourage banks to provide more credit nationally and for banks to compete on a more level playing field. This must be maintained.

In addition to the uncertainty created by various court decisions, such rulings have also emboldened certain states and other plaintiffs to attempt to further undermine the key legal doctrines of "federal preemption" and "valid when made". Following the "rationale" of the court decisions, states like Colorado recently brought lawsuits to attempt to effectively compel banks comply with state rules, by disregarding long-standing federal law.

The secondary markets, which are a critical source of market liquidity, abhor uncertainty. Where it exists, it is typical to see market participants withdraw, and this credit market is no exception. Various market participants will no longer lend or buy loans in the Second Circuit (New York, Connecticut and Vermont) and this contagion is already spreading to Colorado and West Virginia. The court rulings and state actions have already damaged credit markets in certain states and threatens to impact credit access and innovation nationwide.

Uncertainty has the potential to erode confidence in the secondary markets that rely on the 'valid-when made' doctrine, driving up the cost and limiting the availability of credit.

Unless and until there is legislation which confirms and clarifies these rules, there will be growing uncertainty in the markets, which will in turn negatively impact the market and liquidity, and the resulting availability of credit.

ADDITIONAL SPECIFIC BACKGROUND (Cross River Bank - a case study):

Cross River Bank ("CRB") is a New Jersey state-chartered bank, supervised by the FDIC and headquartered in Fort Lee, NJ. One of the few banks chartered since the financial crisis.

A key part of CRB's business model is to partner with financial technology platforms to help CRB originate unsecured consumer loans and unsecured small business loans. These platforms offer a range of services and business models, providing marketing and processing prior to loan origination and loan servicing thereafter. These bank-platform partnerships allow CRB to easily reach customers both in New Jersey and nationally with valuable product and services. Since the financial crisis and the resulting increase in regulatory scrutiny, many banks withdrew or significantly reduced their unsecured lending. The resulting void has been largely filled by various smaller banks (such as Cross River) working with technology-based platforms.

CRB diligences each platform and works to establish program parameters that meet all regulatory requirements and CRB's needs within the context of the platform and its service offerings. These parameters typically include, at a minimum, an acceptable credit policy, a positive customer experience, as well as strong compliance and technology. CRB controls the credit policy and oversees the entire loan origination process. Loans are made to borrowers nationally under New Jersey state law under the provisions of the Federal Deposit Insurance Act (FDIA Section 27).

After origination, CRB typically sells a large portion of these loans to investors, while retaining some on its balance sheet. Often, the platform partner facilitates this process and, in some instances may provide loan servicing to the ultimate purchaser or CRB. CRB is thus able to generate successful loans for its balance sheet and earn additional fee income. CRB provides continuing oversight of each platform, and continues to monitor the customer experience via periodic reporting and direct engagement with each platform.

The services provided by these platforms are closely supervised by CRB, and are subject to regular examination by the FDIC. The FDIC has issued extensive guidance around managing 3rd party relationships and specific proposed guidance that addresses oversight and management of platforms involved in the lending process. CRB has embraced this guidance and created a robust oversight framework to effectuate this monitoring.

CRB's approach stands in successful and profitable contrast to that of most small banks which limit their business to a branch footprint and are unable to achieve economies of scale related to consumer or commercial lending. Working with technology platforms allows CRB to compete successfully with larger banks (which also operate nationally) and to deliver products with a superior customer experience.

Recently the Colorado Administrator, a department of the CO Attorney General's office, has brought actions against two marketplace platforms – Marlette Funding (a CRB service provider) and Avant (a WebBank service provider) seeking to impose CO usury limits (21%) and require inclusion of CO choice of law clauses. CRB continues to originate and retain Colorado loans for our portfolio subject to New Jersey law. Yet, the Administrator's lawsuit claims that loans which CRB originates and sells via the Marlette platform must comply with Colorado law. CRB believes that this legal question is addressed by the FDIA and the National Bank Act. Ironically, many of these same Colorado consumers are using this CRB loan to refinance higher priced credit card debt which they may have from a different national lender. In an effort to avoid addressing these federal issues, the Colorado Administrator did not name CRB in the lawsuit against Marlette; she named Marlette only. As a result, and in an effort to defend the industry, the bank-platform business model and access to affordable credit by Colorado residents, CRB brought a declaratory judgment action against the Colorado Administrator in federal court, requesting a declaration that federal preemption is controlling and the "valid when made" doctrine applies.

Actions like those of the Colorado Administrator, and of other states, highlight the need for a solution to this true lender/preemption challenge. We note that the OCC has proposed to approve national bank charter applications by marketplace platforms, provided that they offer one or more core banking service (e.g., lending or deposit-taking or payments). While we applaud these efforts, they are not enough. Such solutions deprive traditional, small banks of reasonable opportunities to expand their customer base, successfully grow their own businesses and compete with larger banks. In addition, removing these loans from the tried and true banking system to an unknown regime could have an adverse effect on the intended borrower audience.

These actions are eroding confidence in the secondary markets that rely on the 'valid-when made' doctrine, driving up the cost and limiting the availability of credit.

Unless and until there is legislation which confirms and clarifies these rules, there will be growing uncertainty in the markets, which will in turn negatively impact the market and liquidity, and the resulting availability of credit.

Proposed legislation:

Congress must act to address this growing challenge. Attached, we have suggested text of legislation introduced last Congress which has bi-partisan support that would provide statutory clarity on this issue. Under this bill, when a bank makes a loan, it is the true lender and, provided that the loan is valid at the time made (for usury or other purposes), the terms of loan remain valid for all subsequent purchasers.

We thank you for your focus on bipartisan solutions to foster responsible innovation and protect consumers, and we urge you to find a bipartisan solution to this problem.

Best regards,

/s/ Gilles Gade
Chief Executive Officer
Cross River Bank

Summary

This bill amends the Revised Statutes and the Federal Deposit Insurance Act to state that bank loans that are valid when made as to their maximum rate of interest in accordance with federal law shall remain valid with respect to that rate regardless of whether a bank has subsequently sold or assigned the loan to a third party. (Under these laws, interest may be charged on loans to customers at the greater of: (1) a rate not more than 1% above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank for the district in which the lender is located, or (2) the highest rate allowed by the laws of the state in which the lender is located.)

SEC. __. RATE OF INTEREST AFTER TRANSFER OF LOAN.

(a)AMENDMENT TO THE REVISED STATUTES.—Section 5197 of the Revised Statutes of the United States (12 U.S.C. 85) is amended by adding at the end the following new sentence: "A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.".

(b) AMENDMENT TO THE FEDERAL DEPOSIT INSURANCE ACT.—Section 27(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831d(a)) is amended by adding at the end the following new sentence: "A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.".