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U.S. Federal Banking Regulators Propose a *Madden* Fix

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Since the 2016 Second Circuit decision in *Madden v. Midland Funding, LLC*,[1] banks and their non-bank lending partners have faced legal uncertainty about their ability to assign or transfer loans. The *Madden* decision and subsequent actions by state courts have called into question the “valid-when-made” doctrine, which stands for the proposition that a loan that is valid at its inception cannot become usurious upon a later sale or transfer to another person. For a discussion of the valid-when-made doctrine, the uncertainty created by Madden and other developments, and the ability of the U.S. banking regulators to address this uncertainty, see our white paper *Federal Banking Regulators Can and Should Resolve Madden and True Lender Developments* (available **here**).

The Office of the Comptroller of the Currency (**OCC**) and the Federal Deposit Insurance Corporation (**FDIC**) have proposed a *Madden* fix.[2] The legal underpinning for this fix is a recognition that the statutory authority for banks to make loans inherently carries with it the authority to assign and sell loans—without an otherwise permissible interest rate becoming impermissible upon assignment or sale.

- The OCC’s proposal, remarkable for the brevity of its rule text, would amend existing regulations that govern permissible interest rates for national banks and federal savings associations to provide that “[i]nterest on a loan that is permissible . . . shall not be affected by the sale, assignment, or other transfer of the loan.”
- The FDIC’s proposal would create new regulations under Section 27 of the Federal Deposit Insurance Act (**FDIA**). The proposal would provide that “[w]hether interest on a loan is permissible under section 27 of the [FDIA] is determined as of the date the loan was made”—not when an interest payment is taken or received. And, further, that the permissibly of that interest rate

> would not be affected by subsequent events, including (among other events) the sale, assignment, or transfer of the loan.[3]

These clarifications would provide welcome certainty for banks, their non-bank lending partners, and U.S. loan markets. As recognized by the OCC and FDIC, banks' ability to sell and assign loans is not only fundamental to banks' lending businesses and risk management functions but also to the "stability and liquidity of domestic loan markets."[4] The proposals have garnered criticism from consumer groups, based largely upon concerns about abusive lending practices by payday lenders. The proposals are subject to a 60 day comment period, and we expect there to be a vigorous debate on this important step taken by the OCC and FDIC.

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[1] Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016).

[2] The OCC's proposal is available **here**; the FDIC's proposal is available **here**.

[3] The FDIC proposal also would codify in regulation two longstanding opinions of the FDIC's general counsel. These opinions confirm that section 27 of the FDIA permits a state-chartered, FDIC insured bank to export interest rate charges allowed by the state where the bank is located to out-of-state borrowers, even if the bank maintains a branch in the state where the borrower resides.

[4] FDIC release at 22.