

The OCC Reaffirms the Valid-When-Made Doctrine

June 1, 2020

On his first day in office, Acting Comptroller of the Currency Brian Brooks finalized a proposed regulation that codifies the valid-when-made principle, that a loan that is legally originated continues to be valid upon its transfer, sale, or assignment ([Final Rule](#)). Codified at 12 C.F.R. § 7.4001 and § 160.110, the Final Rule will apply to both banks and savings associations and is designed to resolve the legal uncertainty and risk created by the *Madden* decision. The Final Rule, like the OCC's proposal, does not address the related true lender issues.

The OCC adopted the Final Rule as proposed. It will become effective 60 days from its publication in the *Federal Register*.

Background and Overview

The decision of the U.S. Court of Appeals for the Second Circuit in *Madden v. Midland Funding, LLC* (***Madden* decision**) failed to acknowledge or address a long-settled legal principle known as the “valid-when-made” doctrine.¹ Recent developments originating from the *Madden* decision, despite often being intended to address important consumer protection concerns, deviate from this principle. The *Madden* decision created legal uncertainty for banks' authority to sell, assign, or otherwise transfer loans, which is a core banking power. For more information on the *Madden* decision, you can read our [white paper](#).

To address this uncertainty, the Final Rule codifies the valid-when-made doctrine by providing that when a national bank or savings association sells, assigns, or otherwise transfers a loan, interest permissible under 12 U.S.C. § 85 or § 1463(g) before the transfer continues to be permissible after the transfer.

The OCC concluded that the Final Rule is an appropriate application of federal banking law and interpretation of congressional intent, rejecting the position, asserted by some commenters, that the OCC did not have the authority to adopt this rule. Acknowledging some commenters' concerns about predatory lending, the OCC made it clear that the Final Rule would not change its strong position against predatory lending.

The FDIC's To-Come Rule

The FDIC [proposed](#) a similar rule in December 2019, which has not yet been finalized. The OCC notes in the preamble to the Final Rule that it expects the FDIC's rule, upon finalization, to be consistent with the OCC's Final Rule and the effects of the FDIC's rule to be the same for FDIC-regulated institutions as those under the Final Rule for OCC-regulated ones.

The Outstanding True Lender Question

Notwithstanding several commenters' requests, the OCC reiterated that the Final Rule does not address the question of which entity is the true lender when a bank makes a loan and assigns it to a third party. Acting Comptroller Brooks's [statement](#) on May 29, 2020 indicates that work to clarify what true lender means is one of the agenda items of the OCC's priorities.

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

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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