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Chief Counsel's Office
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Office of the Comptroller of the Currency
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Re: Marketplace Lending Association Comment on Proposal Entitled "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred," Docket ID No. OCC-2019-0027; RIN 1557-AE73

Ladies and Gentlemen:

The Marketplace Lending Association (MLA)[1] submits this comment with respect to the proposal by the Office of the Comptroller of the Currency (OCC) to amend its regulations[2] to provide that interest on a loan that is lawful under the Federal usury statutes applicable to national banks and Federal savings associations[3] at the time the loan is made remains lawful upon the sale, assignment, or other transfer of the loan. MLA strongly supports the OCC's proposal and, for the reasons described in this letter, urges the OCC promptly to finalize the regulation.

MLA supports the OCC's proposal for the following reasons:

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[1] MLA is an association of technology-enabled lending companies with a mission to promote transparent, efficient, and customer-friendly financial systems by supporting the responsible growth of marketplace lending, fostering innovation in financial technology, and encouraging sound public policy. Our members include two-sided platforms that connect borrowers and investors, technology-enabled platforms that lend from their balance sheets, and hybrids of these two models. As we discuss in detail in Section 1 of this letter, MLA is unique in that our members have committed to the highest lending standards in the industry, including a commitment to lend at no greater than 36% APR.

[2] "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred," 84 Fed. Reg. 64,229 (November 21, 2019) (sometimes referred to in this letter as the "valid-when-made proposal").

[3] 12 U.S.C. §§ 85 (national banks), 1463(g) (Federal savings associations).

- Consistent with existing law, the proposal reasonably interprets the Federal usury statutes applicable to national banks and Federal savings associations at 12 U.S.C. §§ 85 and 1463(g), respectively, to incorporate the valid-when-made principle;
- The proposal recognizes and addresses the adverse economic consequences of the Second Circuit's *Madden* decision[4] by promoting clarity and certainty in financial services markets; and
- The proposal promotes innovation in the banking system by helping to ensure that bank-fintech partnerships remain a viable option for banks seeking to diversify their product offerings and delivery channels.

We explain these reasons more fully in the discussion that follows. In addition, MLA suggests two technical revisions to the language proposed by the OCC, and we encourage the OCC to take up the so-called "true lender" issue in a separate rulemaking after promptly finalizing the current proposal.

1. ***Consistent with existing law, the OCC's proposal reasonably interprets the Federal usury statutes applicable to national banks and Federal savings associations at 12 U.S.C. §§ 85 and 1463(g), respectively, to incorporate the valid-when-made principle.***

MLA has carefully reviewed the OCC's discussion of the legal reasons that support its proposal. We agree that section 85, especially as construed in the context of other provisions of the National Bank Act authorizing lending activities, incorporates the principle that a loan that is not usurious when made does not become usurious when it is sold, assigned, or otherwise transferred.[5] MLA believes that the valid-when-made principle is a necessary part of section 85 and that *Madden* was wrongly decided. To the extent there is ambiguity in the statute, the OCC's reasonable interpretation, as set forth in the proposal, should receive deference from a reviewing court.

In construing the authority to charge interest under section 85, the OCC reasonably looks to the valid-when-made principle of usury law, which the Supreme Court has characterized as a cardinal rule,"[6] and to well established principles of contract law[7] to inform its interpretation.

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[4] *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015) (holding that the interest term of a loan originated by a national bank that was valid under section 85 at the time it was made became invalid when the bank charged off the loan and sold it to a debt collector).

[5] For the sake of simplicity, throughout our comment letter we usually refer to section 85 without adding explicit references to section 1463(g). In our view, the same arguments support the OCC's proposed amendments to both statutory provisions. As the OCC has noted, section 1463(g) "is modeled on and interpreted *in pari materia* with section 85 . . ." 84 Fed. Reg. at 64,230 (citations omitted).

[6] *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833); *see also Gaither v. Farmers & Mechanics Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828).

[7] 84 Fed. Reg. at 64,230, *citing* Restatement (Second) of Contracts § 317 (1981) and 29 Williston on Contracts § 74:10 (4th ed.).

Specifically, the OCC interprets the authority to charge interest conveyed by section 85 to incorporate the principle that interest on a loan that is permissible -- that is, not usurious -- at the time the loan is made does not become usurious when the loan is assigned. This principle was well established by the time section 85 was enacted in 1864. Because Congress is presumed to legislate with the expectation that well established common law principles will apply,[8] it is appropriate to inform the interpretation of section 85 with the common law principle that is today called "valid-when-made."[9]

The OCC also reasonably interprets the authority to charge interest conveyed by section 85 in a way that is consistent with the grant of other authorities, such as the powers to lend and to assign loan contracts[10] that the OCC describes in the preamble.[11] While banks today have different reasons and opportunities to sell loans than they did in 1864 -- examples include modern liquidity management needs and requirements, the development and subsequent growth of securitization markets, and partnerships with fintech companies who market and services loans -- a loan is not readily marketable unless its value can be ascertained. If doing so requires obtaining a legal opinion on which state's law governs the interest term of the loan after sale, the combination of the compliance cost of doing so and the discounted price for the loan burdens the exercise of the authority to sell to an extent inconsistent with the grant of the power. There is no

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[8] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (noting, in the context of applying adjudicatory principles, that there is a presumption that Congress has legislated with the common law in mind); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017) (discussing "presumption that Congress legislates against the background of general common-law principles").

[9] *See* Brief for the United States as Amicus Curiae, *Midland Funding, LLC v. Madden*, 2016 WL 2997343 (S. Ct. 2016) (jointly filed by the Solicitor General and the Office of the Comptroller of the Currency) (hereafter "SG/OCC Brief"):

> A national bank's power to charge the interest rate authorized by Section 85 includes the power to transfer a loan, including the agreed-upon interest-rate term, to an entity other than a national bank. When Congress enacted Section 85's earliest statutory antecedent, it was already established that a bank's power to sell loans was a 'necessarily implied' corollary of the power to originate loans. *Planters' Bank of Miss. v. Sharp*, 47 U.S. (6 How.) 301, 322 (1848) (holding that state law that barred state bank from transferring a loan violates the constitutional prohibition on state impairment of contracts, U.S. Const. Art. I, § 10, Cl. 1).

[10] The core provisions of section 85 were enacted as part of section 30 of the Act of June 3, 1864; the power-granting "business of banking" authorizations were enacted as part of section 8 of that same law. *See* Committee on Banking and Currency, U.S. Senate, Federal Banking Laws and Reports 1780-1912 (Committee Print March 15, 1963) at 348-374, 360, 350-51.

[11] 84 Fed. Reg. at 64,230-31.

evidence that the Congress in 1864, or any Congress subsequently, intended that result. In fact, modern cases have upheld the valid-when-made principle.[12]

The OCC's authority to interpret section 85 to incorporate the valid-when-made principle is not open to serious question. Section 85 is a statute that the OCC administers; previous OCC interpretations of this statute have been upheld by the Supreme Court. For example, the Supreme Court has affirmed that a national bank may charge interest permitted by the state of its location to borrowers outside that state even when the borrower's state prescribes a lower rate.[13] It has also affirmed the OCC's definition of the term "interest."[14]

In light of these precedents, the OCC should prevail in a challenge to a final regulation resulting from the proposal. Courts "defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering … [which] extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws."[15]

The OCC's proposal stands in contrast to the Second Circuit's *Madden* decision, raising the question whether a final OCC regulation would be binding in the jurisdictions comprising the Second Circuit.[16] The Supreme Court has explained that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."[17] Thus, only a judicial construction "holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[18] Finally, the Supreme Court precedents we have cited conclusively demonstrate that section 85 is ambiguous -- neither *Marquette* nor *Smiley* withheld deference from an OCC interpretation of section 85 because the analysis concluded at *Chevron* Step 1 -- and that the OCC acts within the scope of its authority when it resolves the ambiguity in the statute. Accordingly, the OCC should be entitled to deference in its interpretation of the statute at issue here, the National Bank Act and section 85.

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[12] *See, e.g.*, *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285 (7th Cir. 2005); *Krispin v. May Dep't. Stores*, 218 F.3d 919 (8th Cir. 2000); *FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981); *see also Strike v. Trans-West Discount Corp.*, 155 Cal. Rptr. 132, 139 (Cal. App. 1979).

[13] *See Marquette Nat'l Bank v. First of Omaha Svc. Corp.*, 439 U.S. 299, 313–19 (1978).

[14] *Smiley v. Citibank*, 517 U.S. 735 (1996).

[15] *Id.* at 739 (deferring to the OCC's interpretation of what comprises interest for purposes of section 85); *see also NationsBank, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (the Comptroller may reasonably determine the nature and scope of national bank powers).

[16] The OCC previously has made clear that *Madden* was wrongly decided. *See* SG/OCC Brief; *see also* Brief Amicus Curiae of the FDIC and the OCC, *In re Rent-Rite Superkegs West Ltd. v. World Business Lenders, LLC,* 2019 WL 4569774 (D. Colo. Sept. 10, 2019).

[17] *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

[18] *Id.* at 982–83.

At least one commenter[19] has asserted that the OCC's proposal is illegal because the OCC did not follow the procedural steps, outlined in section 1044 of the Dodd-Frank Act, that are required when the OCC issues a regulation, order, or determination concluding that a state law is preempted because, among other reasons, under the Supreme Court's decision in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), the state law prevents or significantly interferes with the exercise of a national bank power.[20] As in many cases both before and after it, *Barnett Bank* concluded that a state law conflicted with the exercise of a national bank's exercise of one or more of its authorized powers. Section 85 presents preemption of a different kind that could be characterized as classic conflict preemption. The language of the statute both authorizes national banks to charge interest and specifies that a particular state's law -- the law of the state of the bank's location -- determines what that interest comprises. The statutory directive to charge interest in accordance with the law of State A necessarily precludes the national bank from charging interest in accordance with the law of some other state. As the *Smiley* Court put it, "there is no doubt that § 85 preempts state law,"[21] but preemption occurs not based on the OCC's determination of the nature or scope of a national bank power or its conclusion that a state law impermissibly interferes with the exercise of that power, but because the text of the statute compels it. The absence of overlap between section 85 and *Barnett*-type frustration of purpose preemption is confirmed in section 25b(f) of the National Bank Act, which provides that the preemption provisions of the Dodd-Frank Act shall not "be construed as altering or affecting the authority conferred by section 85."[22]

The combination of authorities that derive from section 85 -- a national bank's ability to charge interest in accordance with the law of the state of its location and to "export" that interest to borrowers in other states -- concerns critics of the OCC's rulemaking. First, some critics assert that the interest authorized as permissible by section 85 is too high. Second, some believe that these authorities attract would-be national bank partners whose business model exploits borrowers with little meaningful involvement by the national bank lender. With respect to the first point, the statutory text directs the determination of what interest is permissible for a national bank, and Congress adopted that language at a time when interest rates were not uniform.[23]

With respect to the second point, MLA believes that the OCC should reaffirm that it has used, and will continue to use, its regulatory and supervisory authorities to ensure that predatory

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[19] Letter to the Office of the Comptroller of the Currency from Adam J. Levitin, January 5, 2020, at pp. 5–8.

[20] *See* 12 U.S.C. § 25b(b)(1). Section 25b(b)(1) provides that a state consumer financial law is preempted if it has a discriminatory effect on national banks; under the *Barnett Bank* standard, it preempts or significantly interferes with the exercise of a national bank power; or it is preempted by a provision of Federal law other than title LXII of the Revised Statutes.

[21] *Smiley v. Citibank*, 517 U.S. 744.

[22] 12 U.S.C. § 25b(f).

[23] Charles Horn & Melissa Hall, *The Curious Case of* Madden v. Midland Funding *and the Survival of the Valid-When-Made Doctrine*, 21 N.C. Banking Inst. 1, 3–4 (2017).

lending does not gain a foothold in the Federal banking system. The OCC can -- and has -- set standards for national banks' lending programs, including those programs that involve partnering with non-bank companies.[24] The OCC can -- and has -- taken supervisory and, in an appropriate case, enforcement action when a national bank does not conduct its programs in accordance with applicable standards. For example, the OCC has made it clear that abusive payday lending arrangements, where the bank's involvement is nominal and the sole purpose of the arrangements was to avoid state interest-rate regulation, were not welcome in the national banking system. Just two years ago, the OCC moved to encourage small-dollar installment lending while reiterating the principles of safety and soundness that should inform such programs. The OCC can -- and should -- augment its standards where doing so would promote credit availability and deter abusive lending programs. Indeed, properly structured partnerships between banks and fintech companies -- such as those used by many MLA members -- bring valuable lending products to consumers, in particular to otherwise underserved consumers, and enable banks to lend in safe and sound manner.

MLA is well positioned to make these recommendations because our members have committed to the highest lending standards in the industry, including a commitment to lend at no greater than 36% APR. MLA's members have worked successfully to build a new mainstream asset class around consumer credit. Many of our partners are banks, of course, but we also partner with asset managers, registered investment companies, and insurance companies. Because we sell to a broad market, we are firmly in the mainstream of credit providers. As regulated entities themselves, our partners hold us accountable and expect our members to adhere to high standards.

Our members meet that expectation; they do adhere to high standards. Admission to membership in MLA requires that a company:

- Have one year of operating history;
- Transparently disclose prices to all borrowers, including the APR for consumer loans and the annualized interest rate for APR for commercial loans; and any fees or scheduled charges for the loan, including any charge that functions as a prepayment penalty;
- Disclose this information in writing, in plain English, at the time the loan offer is presented to the applicant;
- Not offer access to payday or high-cost installment loans, as defined by the Consumer Financial Protection Board, through the company's platform;
- <u>Not offer</u> loans at an APR greater than 36%;
- If offering small business financing, adhere to the responsible lending standards of the Small Business Borrowers' Bill of Rights or equivalent standards.

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[24] *See, e.g.*, Office of the Comptroller of the Currency, OCC Bull. 2018-14, Installment Lending: Core Lending Principles For Short-Term, Small-Dollar Installment Lending (May 23, 2018); OCC Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002); OCC Advisory Letter 2000-7, Abusive Lending Practices (July 25, 2000); OCC Advisory Letter 2000-10, Payday Lending (Nov. 27, 2000); OCC Advisory Letter 2000-11, Title Loan Programs (Nov. 27, 2000).

As our standards demonstrate, MLA is, and will continue to be, an advocate for responsible partnerships between fintech companies and regulated financial institutions.

2. *The OCC's proposal recognizes and addresses the adverse economic consequences of the Second Circuit's* Madden *decision by promoting clarity and certainty in financial services markets.*

The *Madden* decision created substantial uncertainty in the financial markets in which national banks and Federal savings associations participate. Put simply, if the interest term of a loan originated by a national bank and then sold depends on who holds the loan after it has been sold, then the value of the loan cannot be determined until after the loan is sold. Moreover, multiple subsequent sales could cause the interest term to change multiple times. This uncertainty about the value of a loan[25] has had the effect of adversely affecting credit availability by limiting direct lending, including to underserved borrowers, by threatening the viability of banks' participation in securitization activity, which provides liquidity to banks and enhances their capacity to lend, and by raising questions (even in jurisdictions beyond the Second Circuit where there is concern that the *Madden* decision may be followed by other courts)[26] about whether national bank borrowers whose loans have been sold have any obligation to repay them. A regulation clarifying that the interest term of a loan that is valid when made remains valid if the loan is sold, assigned, or otherwise transferred will help stabilize the market for bank loans, with attendant positive consequences for credit availability and banks' liquidity.

Following the Second Circuit's decision in *Madden*, empirical studies assessing the case's impact have concluded that the decision led to a considerable decline in credit availability in jurisdictions within the Circuit. This is significant because credit availability serves as a "crucial ingredient in any advanced economy's recipe for economic growth because credit can support investment in productive enterprises and can smooth household spending from fluctuations in income."[27]

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[25] "[T]he marketability (and therefore the value) of a national bank's loan portfolio could be significantly diminished if the national bank could not transfer to assignees the right to charge the rate of interest that the national bank itself could charge." SG/OCC Brief, 2016 WL 2997343, at *9. The government's brief, in which both the Solicitor General and the OCC joined, asserted that the Second Circuit's Madden decision was "incorrect," but opposed a grant of *certiorari* by the Supreme Court on technical legal grounds.

[26] *See, e.g.*, *Meade v. Marlette Funding LLC*, No. 17CV30376 (D. Colo. 2017); *Meade v. Avant of Colorado LLC*, No. 17CV30377 (D. Colo. 2017) (actions brought by Colorado's Uniform Consumer Credit Code Administrator alleging *Madden* claims as well as that bank partners of Marlette and Avant were not the "true lenders" on loans made through those partnerships and seeking therefore to impose state usury caps on these companies).

[27] James McAndrews, Fed. Reserve Bank of N.Y., Credit Growth and Econ. Activity after the Great Recession (Apr. 16, 2015).

For example, one study, which relied on data from marketplace lending platforms, concluded that lenders "restricted credit availability -- measured by both loan size and volume -- after the [*Madden*] decision, with the largest impact being on high-risk borrowers."[28] This is important because impairing the ability of banks to extend credit can have wide-ranging economic consequences, including "the potential to hinder investment and adversely affect the overall economy."[29] Honigsberg et al. explained that borrowers with FICO scores below 625 felt the brunt of *Madden*'s negative impact. They found that, following *Madden*, loans made to borrowers with FICO scores below 625 *dropped* by 52%. Yet outside the Second Circuit, loans to these same borrowers *increased* by 124%. The data showed, moreover, almost no difference in loan growth for borrowers with FICO scores above 700 -- that is, those borrowers that would not have been impacted by *Madden*. Moreover, *Madden* impacted loan size as well as the volume of borrowing. Honigsberg et al. also showed that *Madden* reduced the average loan by roughly $400 more than expected, with the greatest decrease in loan size hitting the lowest-quality borrowers -- those who already have the most difficult time in accessing the banking system.

Another study on *Madden*'s impact conducted by professors Piotr Danisewicz and Ilaf Elard supports these conclusions.[30] They researched *Madden*'s impact on marketplace lending and also found that low-income households had severely reduced access to credit after the decision. For example, lending to borrowers with income under $25,000 fell by 64% compared with the control group; yet lending to borrowers with income above $100,000 had almost no change.

Danisewicz and Elard also found that borrowing fell drastically to certain borrowers: those seeking loans for debt-refinancing (15%); small business loans (33%); and medical procedures (68%). Indeed, the authors explained that the volume and number of marketplace loans fell sharply after *Madden*, and fell particularly hard on those individuals in the greatest need of outside funding to withstand income shocks and unexpected expenses, like medical bills and refinancing debt. In other words, the economic impact of *Madden* hit hardest those least able to absorb the impact.[31]

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[28] Honigsberg, Jackson, and Squire, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J. L. & Econ. 673, 709 (2017) (Honigsberg et al.). Coauthor Robert J. Jackson, Jr., currently is a commissioner at the U.S. Securities and Exchange Commission. *See also* Charles Horn & Melissa Hall, *The Curious Case of* Madden v. Midland Funding *and the Survival of the Valid-When-Made Doctrine*, 21 N.C. Banking Inst. 1, 3–4 (2017) (explaining that firms have started to exclude some Second Circuit states from lending programs and even removed loans to borrowers in the Second Circuit from securitization pools).

[29] McAndrews, *supra* note 6.

[30] *See* Piotr Danisewicz and Ilaf Elard, *The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy* (2018), available at https://ssrn.com/abstract =3208908.

[31] *See also* Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 Vand. J. Ent. & Tech. L. 129, 188 (2017) (explaining that "experience of marketplace lenders post-*Madden*" is one "where uncertainty about the legality of loans has crippled access to lending for certain borrowers.").

Moreover, Danisewicz and Elard's study also determined that the restriction in marketplace lending caused by *Madden* led to more bankruptcy filings. In particular, they found that the reduced credit availability caused by *Madden* triggered an 8% increase in bankruptcy filings in the Second Circuit compared to non-Second Circuit states. In explaining their data, they noted that the "results suggest that marketplace lending may help households, particularly those on low incomes, avoid bankruptcy and suggest that the screening and lending technology behind marketplace credit may have some positive welfare effects compared with other forms of costly credit, such as payday loans and credit card debt, associated with worsening personal bankruptcy."

The adverse consequences of *Madden* are not limited to those related to marketplace lending. In a report issued in 2018, the Treasury Department predicted that other credit markets such as "bank/loan intermediary partnerships, debt collection activities, loan securitization activities, and simple loan transfers" would also be impacted if *Madden* were adopted more broadly.[32] This effect is occurring already. Honigsberg et al. found that, after *Madden*, to adjust to the increased legal risk, lenders were forced to lower the price of notes backed by loans affected by the *Madden* decision in states within the Second Circuit.[33] This not only leads to a less efficient market but also affects the marketability of these loans and thus banks' ability to maintain sufficient liquidity. Other scholarly work has warned of similar costs associated with failing to enforce the valid-when-made principle.[34]

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[32] U.S. Dep't of Treas., Report, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation*, at 92 (July 31, 2018). Indeed, this Treasury Report also recommended that "Congress codify the 'valid when made' doctrine to preserve the functioning of U.S. credit markets and the longstanding ability of banks and other financial institutions, including marketplace lenders, to buy and sell validly made loans without risk of coming into conflict with state interest-rate limits." *Id.* at 93.

[33] Honigsberg et al., at 674–75 (2017).

[34] *See, e.g.*, Kirby M. Smith, *Banking on Preemption: Allowing National Bank Act Preemption for Third-Party Sales*, 83 U. Chi. L. Rev. 1631, 1681 (Summer 2016) ("[A] finding that preemption does not continue upon sale of a loan would harm all consumers by increasing the cost of credit likely cutting some marginal debtors out of the market."); Note, Michael Marvin, *Interest Exportation and Preemption: Madden's Impact on National Banks, the Secondary Credit Market, and P2P Lending*, 116 Colum. L. Rev. 1807, 1848 (Nov. 2016) (explaining that the costs of *Madden* include both "a fixed operational cost associated with implementing new transaction structures and as a variable risk liability tied to the possibility that the loans originated and assigned through the new structures will fail to entitle the assignees to NBA preemption under *Madden*"); *cf.* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593, 1639–40 (2014) (explaining that "the standard neoclassical analysis is that usury laws are inefficient, resulting in high-risk borrowers being cut off from credit").

Following *Madden*, several suits have been brought challenging securitization structures on the grounds that the originating national bank's interest rate is no longer permissible.[35] Lawsuits such as these, if successful, would adversely affect credit availability by requiring banks to keep more loans on balance sheet, thus reducing a substantial source of liquidity for banks and constricting the origination of new loans.

In other cases calling into question the rule that a loan that is valid when made does not become usurious on account of a subsequent usurious transaction, courts have upheld the valid-when-made rule and have acknowledged the economic harm that would result if not upheld.[36] Finally, Congress has recognized the harm that has stemmed from *Madden*, with the House of Representatives passing a bill in the 115th Congress aimed at codifying the valid-when-made doctrine and bolstering stability in the credit markets.[37]

Avoiding the economic harm resulting from *Madden* is particularly important because of the threat that it poses to the expanded access to credit that online lending platforms, among others, can offer to consumers and small businesses. The growth of online lending platforms over the past decade has been well documented -- these platforms offer both more efficient access and expanded access to credit for less-established individuals and businesses. Yet to continue to deliver these benefits, the online lending industry depends on clarity in the law. Online lending platforms seeking to purchase loans from national banks must be able to count on the bank's ability to issue, sell, and securitize those loans under federal law. Thus, we believe that the proposed rule to clarify that a loan is valid when made will not only stabilize the market for bank loans but will also promote credit availability, especially for underserved borrowers.

3. ***The OCC's proposal promotes innovation in the banking system by helping to ensure that bank-fintech partnerships remain a viable option for banks seeking to diversify their product offerings and delivery channels.***

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[35] *See, e.g.*, *Cohen v. Capital One Funding, LLC*, No. 1:19-cv-03479-KAM-RLM (E.D.N.Y. 2019); *Petersen v. Chase Card Funding*, No. 1:19-cv-00741-LJV (W.D.N.Y. 2019).

[36] *See Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 287-288 (7th Cir. 2005) (rejecting such a rule on the ground that it would "produce[] a senseless result" that "would push the debt buyers out of the debt collection market and force the original creditors to do their own debt collection"); *cf. LFG Nat'l Capital, LLC v. Gary, Williams, Finney, Lewis, Watson & Sperando P.L.*, 874 F. Supp. 2d 108, 125 (N.D.N.Y. 2012) (explaining that a rule like this one "would in effect prohibit--make uneconomic--the assignment or sale by banks of their commercial property to a secondary market," which "would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance" (quotations and citation omitted)).

[37] See H.R. 3299, 115th Cong. (2017); Rachel Witkowski, *Legislation Proposed to Counteract Court Ruling on State Usury Caps*, Wall St. J. (July 11, 2016), https://www.wsj.com/articles/legislation-proposed-to-counteract-court-ruling-on-state-usury-caps-1468278817.

The OCC has made responsible innovation in the banking system a high priority. Indeed, it has recognized the promise of technology for promoting financial inclusion and expanding financial services to the underserved and established an Office of Innovation to promote these goals.[38] The OCC's proposal will help to foster this kind of responsible innovation within the financial technology industry.

For example, the OCC's proposal would encourage more partnerships between banks and fintech companies. These bank-fintech partnerships are essential to the modern credit industry and have generated significant growth in online lending and access to credit. In fact, the OCC has recognized that "banks and nonbank innovators can benefit from collaboration" and that "[t]hrough strategic and prudent collaboration, banks can gain access to new technologies, and nonbank innovators can gain access to funding sources and large customer bases."[39]

In particular, these bank-fintech partnerships fill a void within consumer lending left vacant by most national banks. Although these banks face rising demand from consumers seeking short term credit, most banks simply do not have the technology to successfully underwrite these loans. Financial technology firms, on the other hand, like members of the MLA, are able to harness big data in order to identify the millions of Americans who may have low credit scores but have the income or trajectory to pay off a loan.[40] And as nearly all borrowers move to the digital space, these partnerships provide the resources necessary to effectively access creditworthiness and make credit decisions about funding these small-dollar loans.

Thus, "marketplace lending platforms that operate as a service provider to an issuing bank partner can provide significant benefits to borrowers by offering responsible and innovative credit products, within a strong regulatory framework."[41] And as the empirical studies in the prior section confirm, the proposal will make it more likely that marketplace lenders enter the market, thus increasing access to credit, especially for lower-income borrowers.[42]

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[38] *See* Office of the Comptroller of the Currency, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, at 2 (2016); Office of the Comptroller of the Currency, *Recommendations and Decisions for Implementing a Responsible Innovation Framework* (2016).

[39] *Id.* at 4.

[40] *See* https://www.americanbanker.com/opinion/congress-should-intervene-to-let-more-banks-make-small-dollar-loans.

[41] Examining Opportunities and Challenges in the Financial Technology ("Fintech") Marketplace, 115th Cong. 50 (2018) (testimony of Nathaniel L. Hoopes, Executive Director, Marketplace Lending Association).

[42] We note that the FDIC's parallel proposal recognized the harm that could stem from prohibiting these partnerships. *See* Federal Deposit Insurance Corporation, Notice of Proposed Rule: *Federal Interested Rate Authority*, 84 Fed. Reg. 66845 (Nov. 11, 2019) ("Since marketplace lending frequently involves a partnership in which a bank originates and immediately sells loans to a nonbank partner, any question about the nonbank's ability to enforce the contractual interest rate could adversely affect the viability of that business model.").

Without the OCC's proposal, financial technology companies face increasing litigation risk when they purchase, service, or securitize bank loans, risk that ultimately will likely eliminate the bank-fintech partnership model. Such a result would have an outsized impact on smaller banks who lack the resources to purchase the requisite technology or to hire in-house resources and, as a result, rely more heavily on bank-fintech partnerships. As this letter has shown, litigation already has increased and, in the *Madden* states, negative consequences, especially for underserved borrowers, already have occurred. The OCC's proposal thus promotes the stability and certainty necessary to ensure that banks, especially smaller ones, and pioneering financial technology firms, are able to collaborate to expand access to financial services.[43]

In short, the OCC's proposal will provide financial technology firms the runway to develop new and improved ways in which to offer both individuals and businesses better access to credit. Members of the MLA are constantly looking for ways to lower the cost of credit, increase access to capital, and provide the groundwork for a stronger financial system. The stability that the proposal provides will do just that -- fueling more innovation and driving down costs for consumers.

4. Technical Suggestions

The OCC may wish to consider two technical revisions to its proposed valid-when-made rule. The first would clarify that permissible interest on a loan also is not affected by the "sale, assignment, or other transfer of the loan ***or any interest in the loan***." The second would make the timing element in the proposal explicit by referring to "interest on a loan that is permissible . . . ***when the loan is made*** shall not be affected . . . ." With these technical revisions, the provision would read: "Interest on a loan that is permissible under U.S.C. 85 **when the loan is made** shall not be affected by the sale, assignment, or other transfer of the loan **or any interest in the loan.**"

These revisions should not implicate the Administrative Procedure Act's requirement that a final rule be a "logical outgrowth" of the proposal because, in both cases, the technical revisions make explicit what already is present in the proposal. Thus, the authority to assign a loan in its entirety necessarily subsumes the authority to assign an interest in the loan that is less than the whole. Similarly, the implication of the OCC's proposal is that the permissibility of the interest term of a loan is determined at inception. The express reference to the time when the loan is made simply makes that timing explicit and serves to align the language of the OCC's proposal more closely with that of the FDIC.

Finally, we note that the wording of the OCC's proposal differs from that of the FDIC's proposal. The FDIC's proposal lists other circumstances -- specifically, "any subsequent events" including a change in state law or a change in the relevant commercial paper rate -- that will not affect the permissibility of the interest under 12 U.S.C. § 1831d. The two statutes are construed *in pari materia*, and, to reinforce that they accomplish identical purposes, the OCC and the FDIC

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[43] *See generally* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. Rev. 232 (2018).

may consider further conforming their final rules so that the wording of both is more nearly identical. That would eliminate any confusion that could result from differences in regulatory language. As an alternative, the OCC could clearly explain how the result effected by each rule is the same and therefore consistent with the *in pari materia* canon of construction. For example, a change in state usury law typically would not be worded or construed to apply retroactively, so that, arguably, it is not necessary to say explicitly that a subsequent change in state law does not affect the validity of the interest on a loan that is permissible when the loan is made.

5. ***The OCC should separately undertake a rulemaking to address the valid partnership issue.***

As we have explained, the OCC's rulemaking to address the wrongly decided *Madden* case is critically important, and MLA supports the OCC's expeditious adoption of a final rule based on the proposal. As the OCC and the FDIC have acknowledged, however, courts have begun to issue decisions purporting to define the circumstances under which Federally chartered institutions may be considered the "true lender" when they lend in partnership with non-bank -- often fintech -- companies. These state court decisions effectively substitute state law for a determination about when a Federally chartered lender has made a loan. As important as the timing and transferability of "interest" is under Federal law, the determination of when a lender has "made" a loan under Federal law is even more important. If a bank is not the "true lender" on a loan, the question of whether the interest charged by the bank transfers with the loan never comes up.

This issue is of equal significance with valid-when-made for institutions that wish to offer innovative products and services to their customers. As with valid-when-made, "true lender" challenges create uncertainty, discourage lending partnerships, and constrict credit availability. The OCC should initiate a rulemaking to clarify the circumstances under which a national bank or Federal savings association is the "true lender" when it engages in lending through a partnership with a non-bank company. In particular, the OCC's rulemaking should make clear that when a bank and a non-bank company engage in a responsible partnership -- in compliance with federal banking and consumer protection law -- the bank will be considered the true lender. This would include, for example, classifying the bank as the true lender in those partnerships that adhere to the FDIC's guidelines on offering small-dollar credit with APRs no greater than 36 percent.[44] Finally, as is the case with valid-when-made, the OCC should not be deterred by allegations that a "true lender" rulemaking will encourage irresponsible lending because the OCC has the authority to set standards, to supervise Federally chartered institutions' conduct of lending partnerships, and to take supervisory or enforcement action as necessary or appropriate if those lending programs are not conducted in accordance with Federal standards.

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[44] *See* FDIC, PR 52-2007, Small Dollar Loan Guidelines, available at http://www.fdic.gov/news/news/press/2007/pr07052a.html.

MLA appreciates the opportunity to present our views on this important rulemaking. As we said at the outset, we strongly support the proposal and encourage the OCC to finalize a regulation as quickly as possible.

Please do not hesitate to contact me at nat.hoopes@marketplacelendingassociation.org or (202) 662-1825 should you have any questions.

Sincerely,

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Marketplace Lending Association