OCC Issues *Madden* Fix

The OCC issued a final rule providing that the interest rate that is permissible for a loan originated by a supervised bank will not be affected by the sale, assignment, or transfer of the loan to a FinTech or other non-bank.

As we previously reported, in late 2019 the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") proposed regulations would seek to address the uncertainty and lack of uniformity in the secondary credit markets that was created by *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). That case held that interest rate preemption under the National Bank Act ("NBA") did not apply following a national bank's assignment of a credit card loan to a non-bank debt collector.

Last week, the OCC issued a final rule providing that interest on a loan that is permissible for a national bank under the NBA "shall not be affected by the sale, assignment, or other transfer of the loan." (Under the final rule, the same provision also applies to interest on a loan that is permissible for a federal savings association under the Home Owners Loan Act ("HOLA").)

The final rule is generally positive for banks and FinTechs. As the Marketplace Lending Association ("MLA") noted in a January 2020 comment letter regarding the OCC's then-proposed rule:

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.

Despite the OCC's issuance of the final rule, however, FinTechs must still be cautious for two reasons. First, the final rule may be subject to legal challenge. The New York State Department of Financial Services ("DFS"), in particular, wrote in a January 2020 comment letter that it "strongly objected" to the OCC's proposed rule as "creat[ing] a back door that nonbanks can use to reap the advantages of being a bank while avoiding the regulation and oversight that banks are subject to." DFS also argued that the OCC had ignored procedural and substantive requirements under the NBA. DFS's comment letter is particularly notable given that DFS has sued the OCC to prevent it from accepting special purpose national bank ("FinTech") charters.

Second, the OCC's final rule does not address the "true lender" theory that has been adopted by some courts. Under the "true lender" theory, courts have held that a non-bank partner to which a loan was assigned by a bank was the loan's "true lender" – rather than the bank that originated the loan – because the non-bank partner had the predominant economic interest in the loan. As the MLA noted in its recent comment letter, "[i]f 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." In the absence of a separate rulemaking from the OCC on the "true lender" issue – which the MLA and others have requested – FinTechs partnering with banks should work with counsel to minimize the chances that courts will consider them to be the "true lenders" of loans originated by banks.

Banks should note that there remains some uncertainty regarding the OCC's views on bank-FinTech partnerships that are intended solely to evade state usury laws. The OCC previously stated, in a recently-rescinded bulletin, that it "views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing state(s)." In the commentary to its final rule, meanwhile, the OCC noted:

> *[T]he agency has consistently opposed predatory lending, including through relationships between banks and third parties. Nothing in this rulemaking in any way alters the OCC's strong position on this issue, nor does it rescind or amend any related OCC issuances.*

The OCC's final rule applies to interest on loans originated by national banks and federal savings associations. The FDIC has not yet issued its final rule, which would apply to state-chartered depository institutions that are FDIC-insured.

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