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On May 29, 2020, the Office of the Comptroller of the Currency (“OCC”) issued a final rule to clarify that, when a federal or state-chartered savings association transfers a loan portfolio, interest permissible on the loans before the transfer continues to be permissible after the transfer. In this way, the OCC hopes to resolve the uncertainty created by the Madden v. Midland Funding, LLC decision (“Madden”).

Prior to Madden, it had long been understood that a non-usurious loan does not become usurious due solely to the fact that it was assigned or sold to a third party. This “valid-when-made” doctrine allowed the sale and purchase of loans with reasonable confidence that they would be enforceable after their sale. But the Madden court held that the purchaser of a credit card portfolio, because it was not a national bank could not charge the same interest rates that had been permissible for the national bank. Although the court didn’t discuss the valid-when-made doctrine, by declaring the credit card interest rates to be usurious after the accounts had been sold to a non-national bank, the court upended longstanding market practices.

The OCC’s Final Rule amends the existing regulations that implement Section 85 for national banks and 12 U.S.C. § 1463(g) for savings associations (“Section 1463(g)”), in each case with the addition of a single paragraph stating that interest on a loan that is permissible under Section 85 or Section 1463(g), as applicable, “shall not be affected by the sale, assignment, or other transfer of the loan.”
By carefully characterizing the Final Rule as simply interpreting the scope of Section 85 and Section 1463(g), rather than as a rule providing for preemption of state law, the OCC supports a similar approach and result from the FDIC for state chartered banks. Thus, the FDIC can follow the OCC and issue a final rule based on their interpretation of the scope of Section 27(a). In doing so, they too can avoid any politically sensitive preemption determinations.

The OCC’s Final Rule is good news for national banks, savings associations, their investors and the lending market place. It is reasonable to expect that the FDIC will take a similar step to help state banks and their investors, finally bring financial institutions back to the pre-\textit{Madden} days.

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