DREHER TOMKIES LLP ALERT

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CONGRESSMEN ENCOURAGE OCC TO "FIX" *MADDEN*

Twenty-six Congressmen recently signed a letter encouraging the Office of the Comptroller of the Currency ("OCC") to update its regulatory interpretation of the term "interest" under the National Bank Act to mitigate the harm created by *Madden v. Midland Funding*, a decision from the U.S. Court of Appeals for the Second Circuit that has created uncertainty regarding the validity of long-standing "valid when made" doctrine.

The letter outlined the negative consequences caused by the *Madden* decision. According to the letter, credit availability to borrowers with lower credit scores has declined in states within the Second Circuit's jurisdiction. The letter noted that bank-Fintech partnerships have fought *Madden* challenges in courts in other jurisdictions. The uncertainty created by the decision continues to hinder the operation of credit markets, impede financial innovation and threaten bank-Fintech partnerships.

The Congressmen's encouragement of an administrative solution by the OCC comes over a year after the U.S. House of Representatives' legislative solution to "fix" the *Madden* decision stalled. In February 2018, the House passed the Protecting Consumer's Access to Credit Act of 2017 (H.R. 3299), a bill that codifies the common law "valid when made" doctrine for loans made under the National Bank Act, the Home Owners' Loan Act, the Federal Credit Union Act and the Federal Deposit Insurance Act and re-affirms the doctrine's long-recognized validity. The Senate received H.R. 3299 and referred the bill to the Banking, Housing and Urban Affairs committee where the bill has remained.

Meanwhile, courts continue to evaluate how to interpret the Second Circuit's *Madden* decision. On September 10th, the OCC and the Federal Deposit Insurance Corporation ("FDIC") filed an amicus brief in a federal district court supporting a bankruptcy court's ruling that the interest rate in a promissory note to a bank remains valid after the promissory note was assigned to a nonbank. *See Rent-Rite Super Kegs West Ltd. v. World Business Lenders, LLC*, No. 19-cv-01552 (D. Colo. Sept. 10, 2019). The OCC and FDIC wrote:

> *Madden*'s disregard of two centuries of established law — without even addressing such law — is not just wrong: it is unfathomable. And it is doubly disconcerting given its negative impact on the credit markets and the banking system.

In their letter, the Congressmen expressed appreciation for the OCC's and FDIC's amicus brief, but encouraged the OCC to make a *Madden* fix a priority on the OCC's rulemaking agenda. ❑

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