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CLIENT ALERT

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By: Michael C. Flynn

OCC Issues Proposed Rule to Clarify “Valid-When-Made” Doctrine; Would Affirm That an Interest Rate that Is Permissible at the Time the Loan is Made Remains Permissible After Sale of the Loan.

Today, the Office of the Comptroller of the Currency issued a Notice of Proposed Rulemaking (Notice) that would affirm that when a national bank or savings association sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. A link to the Notice is below. Tomorrow, the FDIC’s Board is expected to move forward to issue a similar proposed rule, which, if ultimately adopted, would confirm that the “valid when made” doctrine is established as a rule for national and state-chartered banks.

Since the *Madden* opinion in 2015 (*Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015)), there has been confusion as to whether, and in what jurisdictions, the “valid-when-made” doctrine applies to loans made by a bank and then sold or otherwise assigned to a third party. Since that decision, lenders and loan purchasers have sought clarification that the “valid-when-made doctrine” is still applicable.

The Notice states that after review of the applicable legal doctrines, the OCC has concluded that “when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer.” The Proposed Rule would expressly provide that the “valid-when-made” doctrine applies to any loan made under the provisions of 12 U.S.C. 85 and 12 U.S.C. 1463(g)(1) (which allow a national bank or savings association to make loans in any state where the bank or savings association is located at the interest rate permitted to state banks by that state).

The Notice states specifically that the Proposed Rule does not address the “true lender” issue; i.e., which entity is the true lender when a bank makes a loan and assigns it to a third party.

Comments on the Proposed Rule are due within 60 days after publication in the Federal Register.

<https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-132a.pdf>

Buchalter is a leading firm representing financial institutions, including in complex commercial transactions and in mortgage lending. For further information on the “valid-when-made” doctrine or to discuss other issues, please contact Mike Flynn or Jason Goldstein, Co-Chairs of Buchalter’s Mortgage Banking Practice Group, at mflynn@buchalter.com or jgoldstein@buchalter.com.



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