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Borrowers Beware: The OCC’s “Madden-fix” Rules
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I. INTRODUCTION

It is no secret that the lending market values clarity and stability. As a result, banks and nonbank lenders seek certainty in the application of laws and regulations. In 2017, the lending market faced a disruption in the form of *Madden v. Midland Funding, LLC*. *Madden* brought to the forefront a debate over two facets of the lending world, both of which had been fermenting for some time. Specifically, the Office of the Comptroller of the Currency (“OCC”) saw *Madden*’s holding as an attack on two long-held assumptions—the Valid When Made and True Lender doctrines. Through two separate rules, the OCC has attempted to restore

3. *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130 (S.D.N.Y. 2017) (deciding on remand from the 2d Cir. Court of Appeals in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015)).
4. See id. For a discussion of the doctrines prior to *Madden*, see infra-Part II.
5. The premise of the Valid When Made doctrine is that once an acceptable interest rate is created on a loan, then it stays valid and applicable even through subsequent transfers or purchases. This doctrine has long been understood to apply to federal and state-chartered banks via interest rate choices of law granted under 12 U.S.C. §§ 85 and 1831d, but the central debate is whether these interest rates remain valid when in the hands of a non-bank entity who alone could not enjoy the choice of law of either statute. Drew Robertson, *Five Years Later: Madden v. Midland Funding, LLC’s Limited Impact on the Valid When Made Doctrine*, KANE RUSSELL COLEMAN LOGAN (Feb. 27, 2020) https://lawofbanking.com/2020/02/27/five-years-later-madden-v-midland-funding-llcs-limited-impact-on-the-valid-when-made-doctrine/ [https://perma.cc/L9C9-65H6] (providing a brief history of the doctrine and viewing it alongside the market effects of *Madden*).
6. The True Lender doctrine is a creation that works in tandem with the Valid When Made doctrine, allowing courts to examine the nature of lending relationships, revealing potential predatory lending practices. This doctrine focuses on relationships where a chartered bank
clarity to the lending market by providing its stance on the two contentious issues (the “Madden-fix rules”). Instead, the only thing that is clear about the OCC’s rules is that, in their current form, consumers are left powerless and without redress for the harms caused by predatory lending practices. The OCC should revisit and revise these rules to prevent a resurgence in predatory lending.

Madden’s core decision rested on the Second Circuit’s belief that a non-bank entity could not enjoy the interest rate choice of law granted to national or state chartered banks under 12 U.S.C. § 85, the National

offloads a loan to a non-bank entity, a common permissible practice but one that predatory lenders have traditionally sought to exploit. The OCC and FDIC Plan to Trample State Laws by Gutting the Longstanding “True Lender” Doctrine, CTR. FOR RESPONSIBLE LENDING (Aug. 10, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-gutting-true-lender-rule-10aug2020.pdf (giving a strong overview of the role of the True Lender doctrine in rooting out predatory lenders).


8. Prof. Adam J. Levitin has been a vocal critic of the OCC’s Madden-fix approaches. He offers a very convincing set of arguments both about the history of the doctrines and how he believes that the OCC and Congress fell short in their responses by opening a gap for predatory lenders to exploit. See, e.g., Adam J. Levitin, ‘Madden Fix’ Bills Are a Recipe for Predatory Lending, AM. BANKER (Aug. 28, 2017), https://www.americanbanker.com/opinion/madden-fix-bills-are-a-recipe-for-predatory-lending (arguing that the attempted codification of the Valid When Made doctrine, discussed at infra Part III.A, would increase the risk of predatory lending to at-risk consumers); see also See Adam J. Levitin, Guess Who’s Supporting Predatory Lending, CREDIT SLIPS (Aug. 9, 2017), https://www.creditslips.org/creditslips/2017/08/guess-whos-supporting-predatory-lending.html#more (blaming the Democrat sponsors of the Madden-fix bills for “supporting predatory lending” by not accurately accounting for the role of the Valid When Made doctrine); see also Adam J. Levitin, Trump Administration Declares Open Season on Consumers for Subprime Lenders, CREDIT SLIPS (Nov. 18, 2019), https://www.creditslips.org/creditslips/2019/11/trump-administration-declares-open-season-on-consumers-for-subprime-lenders (criticizing the Trump administration and the OCC’s Madden-fix rules for the potential harm that they could cause to subprime lenders).

9. See infra Part V.
Bank Act ("NBA"), and its sister statute, 12 U.S.C. § 1831d. For over forty years these two laws have allowed federal and state banks to issue loans based on the interest rates of the state where they are headquartered. The Valid When Made and True Lender doctrines have evolved under these statutes. The former assumes that an interest rate created by a bank under either statute will "stick with" the loan through any subsequent transfers or sales to a non-bank lender ("marketplace lenders"). Therefore, as per its namesake, the Valid When Made doctrine would render the rate "valid" when it was made. The True Lender doctrine worked as a tool to root out predatory marketplace lenders who used the Valid When Made doctrine to circumvent state usury laws.

10. The OCC’s Valid When Made and True Lender rules both cite the NBA as its authority for promulgation. 12 U.S.C. § 85 (1980). While the Madden Court discussed the application of the National Bank Act as a “preemption” of state usury laws, this Note argues that this label is a misnomer. Instead of working to preempt an inconsistent state law, the NBA chooses one state’s usury law (the state of the bank’s headquarters) and declares it superior to that of a competing state. See Marquette Nat. Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313 (1978) (showcasing the leading Supreme Court case where the NBA is applied, and a bank’s “location” is the state of its headquarters).


13. See William Atherton, Lisa Ledbedder & Heith Rodman, Bank Regulators Clarify the "Valid When Made" Doctrine, JD Supra (Nov. 25, 2019), https://www.jdsupra.com/legalnews/bank-regulators-clarify-the-valid-when-45960/ [https://perma.cc/ZDW6-N75L] (“The ‘valid-when-made’ doctrine is a long-standing common law doctrine providing that bank loans carrying interest rates that are valid when made under applicable federal law remain valid with respect to that rate, regardless of whether a bank has subsequently sold or assigned the loan to a third party.”)

14. See Robertson, supra note 5 (“The ‘valid-when-made-doctrine’ is an important component of usury law. It provides that a loan that has a non-usurious interest rate when it is made cannot become usurious if the loan is subsequently transferred to a third party, even if the third party is in a different state with different lending laws.”).

15. See id. (“For example, if a lender charges interest in Wisconsin that is not usurious under Wisconsin law, a third party in Texas can buy that loan without having to conform the interest rate to Texas’s more conservative interest cap.”).

On its face, the *Madden*-fix rulemaking seemed to provide some much needed clarity.\(^\text{17}\) Admittedly, many marketplace lenders—such as financial technology ("fintech") firms—were left in limbo after *Madden*.\(^\text{18}\) The OCC sought to provide certainty to these entities, allowing them to continue their business practices without the worries of conflicting stances on these foundational doctrines.\(^\text{19}\) However, when one looks beyond these surface-level benefits, problems arise.\(^\text{20}\)

The reality is that the OCC’s *Madden*-fix is anything but clear.\(^\text{21}\) In one fell swoop, the OCC has offered certainty to legitimate businesses while inviting predatory lenders to find new footholds in avoiding state usury laws.\(^\text{22}\) Now, inquiries into suspect lending relationships are told


\(^{18}\) See Benjamin Lo, *Online Lenders Shouldn’t Get Mad Over Madden*, 10 J. BUS. ENTREPRENEURSHIP & L. 63, 71–74 (2016) (critiquing *Madden* and suggesting changes that financial technology companies should make to limit their exposure but also cautioning against hasty overhauls of business models).

\(^{19}\) See *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,532 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) ("[T]o effectively assign a loan contract and allow the assignee to step into the shoes of the national bank assignor, a permissible interest term must remain permissible and enforceable notwithstanding the assignment.").

\(^{20}\) Commentators who oppose the *Madden*-fix have offered a whole myriad of issues and problems which they perceive to be plaguing the rules. Ranging from potential violations of the Dodd-Frank Act and the Administrative Procedure Act, to more practical concerns on future lending, the comment letter from the Center for Responsible Lending, et al., provides a comprehensive summary of all these arguments. See Center For Responsible Lending, Comment Letter to the Office of the Comptroller of the Currency, at 38 (Sept. 3, 2020) https://consumerfed.org/wp-content/uploads/2020/09/OCC-True-Lender-Comment_Sep3_FINAL.pdf [https://perma.cc/TY8U-PXSV] [hereinafter CRL Comment Letter] (arguing that the practical impacts of these rules will severely damage lending to small businesses and consumers).


\(^{22}\) See Levitin: *Predatory Lending*, supra note 8 (“Usury laws represent judgments by state legislatures about rates at which borrowing is presumptively too risky. If Congress wants to preempt those usury laws, that’s one thing, but it’s outrageous to allow national banks to launder usurious loans for predatory lenders.”).
to cease upon discovery of a loan’s originating entity, granting predatory lenders carte blanche to operate in the shadows of a bank’s charter.23 The combination of these rules has the potential to do more harm to the lending market than Madden ever could have.24 Therefore, the OCC should revise its Madden-fix rules to preclude certain lending relationships by forcing banks to take the initial risk of their loans while allowing states to retain more flexibility in enforcing consumer protection and usury laws.25 Without such a change, states and consumers will be left powerless and unprotected from predatory lenders.26

This note proceeds in six parts. Part II briefly analyzes the facts of Madden and discusses where the Second Circuit went wrong in its interpretation of the NBA. Part III reviews the lending world and the Valid When Made and True Lender doctrines pre-Madden, highlighting just how significant the OCC’s Madden-fix rules truly are. Part IV looks at the rules themselves, bifurcating the positive impacts which should be preserved from the negatives which must be addressed. Part V offers several potential solutions for the OCC to consider in revisiting its Madden-fix rules.

23. See Arthur E. Wilmarth, Jr., The OCC Should Withdraw its Proposed “True Lender” Rule, THE FIN REG BLOG (Aug. 31, 2020) https://sites.law.duke.edu/thefinregblog/2020/08/31/the-occ-should-withdraw-its-proposed-true-lender-rule/#_ftn1 [https://perma.cc/2RTS-RDQK] (“The proposed rule would allow a national bank or federal thrift to act as a mere conduit by quickly transferring loans to its nonbank ‘partner,’ which could assume all of the economic risks and control the terms and enforcement of the loans.”).

24. Much of this Note is premised on the argument that Madden’s market impact was quite negligible in terms of affecting the Valid When Made and True Lender doctrines. However, the OCC’s Madden-fix rules have the potential for a much more worrisome impact on the market and on consumer protection. See Charles M. Horn & Melissa R. H. Hall, The Curious Case of Madden v. Midland Funding and the Survival of the Valid-When-Made Doctrine, 21 N.C. BANKING INST. 1, 22 (2017); see also Wilmarth, Jr., supra note 23 (observing that after the “anxiety and disruption” of Madden’s ruling passed, the marketplace was able to adjust to the holding).

25. See infra Part V.

II. **Madden** and its Effects

The premise of **Madden** was relatively simple. Saliha Madden owed $5,000 on her credit card bill to Bank of America (“BoA”), a nationally chartered bank.\(^27\) The debt between Ms. Madden and BoA was set at an interest rate of 27%, a rate higher than the allowable 25% in Ms. Madden’s home state of New York.\(^28\) As per the interest rate choice of law granted to BoA under the NBA,\(^29\) BoA could charge Ms. Madden the interest rate of the state where the bank is headquartered.\(^30\)

Subsequently, BoA transferred Ms. Madden’s debt to its newly consolidated credit card service, FIA Card Services, N.A. (“FIA”).\(^31\) After determining that Ms. Madden’s debt was “uncollectable,” FIA sold her debt to a purchaser, Midland Funding, LLC (“Midland”).\(^32\) At this point, as the court in **Madden** emphasized, neither BoA nor FIA held any interest in Ms. Madden’s debt.\(^33\) Ms. Madden then challenged Midland’s

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\(^{27}\) See generally **Madden v. Midland Funding, LLC**, 237 F. Supp. 3d 130 (S.D.N.Y. 2017) (deciding, on remand from the Second Circuit, that New York usury laws prevented Midland Funding from collecting Madden’s debt at its 27% rate).

\(^{28}\) See **Madden v. Midland Funding, LLC**, 786 F.3d 246, 248 (2d Cir. 2015) (“Accordingly, because FIA is incorporated in Delaware, which permits banks to charge interest rates that would be usurious under New York law, FIA's collection at those rates in New York does not violate the NBA and is not subject to New York's stricter usury laws, which the NBA preempts.”).

\(^{29}\) See Bank of Am., Bank of America FAQ’s, https://www.bankofamerica.com/help/facts/ [https://perma.cc/LRC5-4PKD] (last visited Dec. 9, 2020) (stating that BoA’s corporate address is 100 North Tryon Street, Charlotte, NC 28255).


\(^{31}\) To understand this transaction, it must be clear which entities came to have ownership over Ms. Madden’s debt and how. In 2006 Bank of America acquired a large cardholder association, the Maryland Bank National Association (“MBNA”). Within the same year, MBNA was acquired by another banking group known as Lloyd’s Banking Group. However, while it was held by Bank of America, MBNA was consolidated into FIA, the entity which eventually sold Ms. Madden’s debt to Midland Funding, LLC. See **Madden v. Midland Funding, LLC**, 786 F.3d 246, 248 (2d Cir. 2015) (giving the procedural background and history of Ms. Madden’s debt and its passing through various entities, ending with Midland Funding, LLC); see also Christina Majaski, *What is FIA Credit Card Services*, CARDS MIX, (Feb. 17, 2017) https://cardsmix-usa-avqfktzlevohtmsx.netdna-ssl.com/fia-credit-card-services [https://perma.cc/ZG7L-XM83] (tracing the history and transformation of FIA Card Services).

\(^{32}\) See **Madden v. Midland Funding, LLC**, 786 F.3d 246, 248 (2d Cir. 2015) (“Madden owed approximately $5,000 on her credit card account and in 2008, FIA ‘charged-off’ her account . . . . FIA then sold Madden's debt to Defendant–Appellee Midland Funding, LLC [ ] a debt purchaser.”).

\(^{33}\) See id. (“Upon Midland Funding’s acquisition of Madden’s debt, neither FIA nor BoA possessed any further interest in the account.”).
ability to charge her the 27% interest rate set by BoA. Midland was neither a national nor a state-chartered bank, and such a rate—absent an applicable choice of usury law provision—was clearly more than the maximum interest allowed under New York usury laws.

The Second Circuit Court of Appeals agreed with Ms. Madden. In reversing the district court’s holding, the Second Circuit pointed to the fact that “neither defendant is a national bank nor a subsidiary of a national bank,” as its reasoning for withholding NBA interest-rate choice of law from Midland. In sum, the Second Circuit looked solely at the NBA and the fact that Midland was not a nationally chartered bank. From there, it concluded that the NBA’s choice of state usury laws was not applicable to such a secondary loan purchaser. Once the loan left the hands of a chartered bank, the Second Circuit believed that the loan lost the ability to charge the customer based on a different state’s interest rate.

A. Where the Madden-Court Went Wrong

The first major problem with Madden’s holding was that the Second Circuit seemed to ignore the existence of the Valid When Made and True Lender doctrines. In fact, the case makes no mention of either doctrine. Because of the ruling’s implicit potential effect on the

34. See id. (offering the background on Ms. Madden’s subsequent class action against Midland, along with her central claims).

35. See id. at 249 (“Because neither defendant is a national bank nor a subsidiary or agent of a national bank or is otherwise acting on behalf of a national bank, . . . . we reverse the District Court’s holding that the NBA preempts Madden’s claims and accordingly vacate the judgment of the District Court.”).

36. Id.

37. See id. at 247–49 (providing the Second Circuit’s guiding reason as to why it declined to apply the NBA to the debt held by Midland).

38. See id. at 248 (defining a nationally chartered bank).

39. See id. at 249–50 (showcasing the Second Circuit’s interpretation of the NBA as applying to banks and certain agents/extensions of banks but declining to extend its coverage to an entity such as Midland Funding).

40. See id. at 250 (“The defendants argue that, as assignees of a national bank, they too are allowed under the NBA to charge interest at the rate permitted by the state where the assignor national bank is located . . . . [w]e disagree.”).

41. See id. at 249–50 (offering an entire section of the Madden opinion, dedicated to discussing the NBA as “preemption”); see also Horn & Hall, supra note 24, at 27–28 (“Because the valid-when-made doctrine was not an issue that had been brought before the District Court, its decision made no mention of the doctrine, nor did the decision address any substantive issues regarding the nature and extent of national bank preemption in the loan transfer context.”).

42. See generally Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).
viability and application of the doctrines, many observers read in-between the lines of the holding. Some commentators, including the OCC, saw this holding as a challenge to the very existence of both doctrines. The OCC acknowledged the disruption caused by Madden, nodding to it as the necessary cause for promulgating its final Valid When Made rule. The OCC then cited the “ambiguity” and silence of the NBA as its basis for issuing the rules. In contrast to this broad interpretation, other commentators advocated for reading Madden narrowly since it ignored any discussion of these two doctrines. Some even argued that Madden may have been decided on a misunderstanding of the law and should be overturned.

This led to the second problem with Madden’s holding—the Second Circuit appears to have misinterpreted the NBA along with Section 1831d, and their respective interest rate provisions. Indeed,

43. See Michael Cumming et al., OCC Madden Rule Is First Step Toward Needed Clarity for Banks Fintechs and Nonbank Lenders, JD SUPRA (June 5, 2020), https://www.jdsupra.com/legalnews/occ-madden-rule-is-first-step-toward-11851/ ("Although the court did not directly address the ‘valid when made’ doctrine, many viewed the decision as an assault on that doctrine, stating that Madden undercut settled expectations that interest rates, valid at origination, would continue to be enforceable following a bank’s sale of the loan.").


45. See id. at 3352 (claiming that the “ambiguity created by the silence in section 85 (NBA)” was highlighted and drove the OCC’s authority to promulgate this rule).

46. See id. at 3351 (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) as an example of the courts deferring to the OCC’s ability to interpret “ambiguity” within the NBA); but see National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (arguing that the NBA is not interpreting the NBA with its “True Lender” rule but nevertheless reaffirming its authority to do so in the face of “ambiguity,” again citing Smiley v. Citibank).

47. See Horn & Hall, supra note 24, at 1–2 (“The outcome of the Madden decision involves a somewhat specific interaction of usury and federal preemption principles, discussed below, that may not necessarily be broadly replicated in many types of commercial and consumer loan transactions.”).

48. See id. at 9–10 (discussing how the practice of interest rate exportation and the applicable law(s) “do not require or impose a separate federal interest rate,” which is the core of preemption and the Supremacy Clause of the Constitution, but instead allow covered institutions to “rely on a single state interest rate” throughout all its lending practices) (emphasis added).
both the Second Circuit and the OCC referred to the NBA’s choice of interest rate law as a “preemption.” This interpretation was not only erroneous, but it likely led to the Court’s failure to account for the interplay of the Valid When Made and True Lender doctrines with the matter in front of it. As has been recognized in much of the post-Madden literature, the NBA, and Section 1831d commentary, true preemption is when a federal and state law conflict over the same matter. In such instances, the federal law will either explicitly preempt the state law, or it will impliedly prevail via the Supremacy Clause of the Constitution.

Contrasting this definition with the NBA and Section 1831d interest rate provisions, it is clear that they function more as a federal choice of state law. Unlike a competition between federal and state law, both provisions allow a bank to choose the applicable usury law of the

50. See Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,531–33 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (declining to make a definitive determination on the NBA’s potential preemptive characteristics but recognizing the debate); see also National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,743 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (discussing the potential impact(s) should non-bank lenders be given the “benefits of federal preemption” without being subject to the OCC’s oversight).

51. See Federal Preemption, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.”).

52. See Horn & Hall, supra note 24, at 2 (“[W]e conclude that Madden was wrongly decided due to a misplaced primary focus by the defendants on federal bank preemption principles, causing the Second Circuit to all but ignore the valid-when-made doctrine.”).

53. See Horn & Hall, supra note 24, at 9–10 (“This interest rate exportation authority, however, is often discussed as deriving from principles of federal preemption, a notion that is only partially accurate. In fact, the interest rate exportation authority in Section 85 and Section 27 (collectively, the ‘Exportation Provisions’) constitutes federal ‘preemption’ only in the sense that it allows an insured depository institution to rely on its home state usury law in setting the rate(s) of interest for loans to customers in other states rather than the usury law of the customer’s state of residence. In other words, the interest rate Exportation Provisions do not require or impose a separate federal interest rate, but instead allow a depository institution to rely on a single state interest rate.”).

54. See id. at 8 (“The fundamental legal basis of federal preemption in the national bank context is that because national banks are organized under and derive their powers from federal law, it is federal, and not state, law that principally governs their activities and operations. The principle of preemption is grounded in the Supremacy Clause of the U.S. Constitution . . . .”).

55. See id. at 9 (tracing the Congressional response to an expansive use and interpretation of state law preemption powers by the OCC and showing how Congress subsequently limited these abilities in 2008 with Dodd-Frank).
state of its headquarters. In situations such as *Madden*, there are no competing federal and state interest rate laws when applying either the NBA or Section 1831d. Due to the Second Circuit’s insistence on referring to the situation as “interest rate preemption,” the Court failed to account for how the NBA should be applied alongside the Valid When Made and True Lender doctrines.

*Madden*’s holding was so shocking to those in the lending industry that the Second Circuit actually became the subject of case studies in an attempt to measure its impact on consumer lending. While some analyzed the actual effects of *Madden* on the secondary lending market, others claimed that the Second Circuit made an erroneous ruling, and its impact should be limited. Because of this debate around what exactly *Madden* meant to the Valid When Made and True Lender doctrines, many commentators called upon the OCC to respond. And that is exactly what the OCC did.

56. See, e.g., 12 C.F.R. § 7.4001 (2016) (applying 12 U.S.C. § 85 and exhibiting a clear ability for national banks to choose the application of state usury laws based upon the place of their headquarters).

57. In *Madden*, the Second Circuit was arguably swayed not by a competing federal usury law, but by the framing of the case as a “preemption” matter versus a “valid when made” matter. For a more thorough discussion on this view, see Horn & Hall, supra note 24, at 20–21 (tracing the different outcomes of *Madden* depending on how one frames the issues).

58. See id. at 17 (“What is particularly curious about the Madden decision is its singular focus on the application of National Bank Act preemption to the nonbank defendants without also taking into account the valid-when-made principle.”).

59. See Colleen Honigsberg et al., *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 THE J. OF LAB. & ECON. 673, 673 (2017) (studying the impact of *Madden* on low-credit borrowers and concluding that it “reduced credit availability for higher-risk borrowers in affected states.”).

60. See id. (analyzing what appeared to be a decrease in loan capital/access for subprime consumers in the Second Circuit post-*Madden*); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (“Two commenters provided empirical studies analyzing the effects of the *Madden v. Midland Funding, LLC* decision, including evidence that *Madden* restricted access to credit for higher-risk borrowers in states within the Second Circuit and that it caused a rise in personal bankruptcies due to a decline in marketplace lending, especially for low-income households.”).

61. See Robertson, *supra* note 5 (tracing the aftermath of *Madden* and how the market has responded).

62. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (stating the sheer volume of comments that the OCC has received in response to its proposed true lender and valid when made rules).

63. See generally National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7); see also Permissible Interest
III. THE LENDING WORLD PRE-MADDEN

To properly understand the impact of the Madden-fix rules, it is necessary to view them through the scope of how the lending market operated prior to the case.\textsuperscript{64} This analysis focuses on the Valid When Made and True Lender doctrines before the OCC’s Madden-fix rules, along with how federal choice of interest rate law comes into play.\textsuperscript{65}

\textbf{A. The Valid When Made Doctrine}

The Valid When Made doctrine has arguably existed in various functions and forms for well over 100 years.\textsuperscript{66} At its core, the doctrine states that an interest rate, which is non-usurious at its inception, does not become usurious upon subsequent assignment or transfer of the loan.\textsuperscript{67}

The Supreme Court first dealt with this concept in 1833 in the case \textit{Nichols v. Fearson}.\textsuperscript{68} Although it was not concerned with bank loans, \textit{Fearson} dealt with the validity of a promissory note’s interest rate and its interplay with state usury laws.\textsuperscript{69} While it never explicitly named the doctrine, the Court in \textit{Fearson} recognized that a contract that is non-usurious at its point of creation cannot later be invalidated by a usurious

\begin{itemize}
  \item \textsuperscript{64} For good discussions of how the lending market operated prior to Madden, along with analyses of its impact, see generally Lo, \textit{supra} note 18, at 65–67 (discussing the role of the NBA in lending relationships, how it applied along with the OCC’s regulatory authority over certain lending relationships, and how Madden was likely a misinterpretation of the NBA as a “preemption” versus a choice of law statute).
  \item \textsuperscript{65} See infra Part III.A–D.
  \item \textsuperscript{66} See, e.g., \textit{Nichols v. Fearson}, 32 U.S. 103 (1833) (providing the first observable instance of the concept of interest rates remaining valid upon transfer). \textit{But see} Brief of Professor Adam J. Levitin as Amicus Curiae in Support of Appellant, In re: Rent-Rite SuperKegs W. Ltd., 484 B.R. 1 (Bankr. D. Colo. R., 2012) (No. 1:19-cv-01552-REB) [hereinafter \textit{Brief of Prof. Adam J. Levitin as Amici Curiae in Support of Appellant}] (arguing that the Valid When Made doctrine is not as old as people assume it to be and is rather based off a misunderstanding of older law).
  \item \textsuperscript{68} \textit{Nichols v. Fearson}, 32 U.S. 103, 109–10 (1833) (examining the potential for a promissory note’s interest rate to continue despite transfer of the note post-execution).
  \item \textsuperscript{69} See \textit{id.} at 103–04 (outlining the background of the case, which involved the transfer of a promissory note and its interplay with applicable usury laws of the time).
\end{itemize}
transaction. As such, Fearson was likely the beginning of the Valid When Made doctrine in the United States.

In 1978 the Supreme Court dealt directly with the NBA—12 U.S.C. § 85—and its deference to state usury laws of the location of a national bank’s headquarters. In Marquette Nat. Bank v. First of Omaha Svc. Corp., the Court held that a national bank is located where it is headquartered and thus may export that state’s interest rate limits to borrowers located in other states, even if those limits are in excess of permissible rate(s) in the borrower’s own state. In function, the Court saw the NBA as a permissive grant for a federally chartered bank to choose the usury laws of its state of headquarters and apply it to loans across the country. However, the Court only analyzed this choice of law through the lens of the federally regulated bank and its out-of-state customers but not that of any subsequent transferees of the loan. While the Court recognized the potential for impairment of the usury laws in the borrower’s state, it claimed that such was the nature of the NBA’s intent.

Post-Marquette, national banks largely enjoyed the ability to choose the usury laws of the state of its headquarters. However, prior to 1980, state banks had no such choice of law privilege and were limited by their state’s usury laws and a lack of parity with banks covered by the

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70. See id. at 103 (“[A] contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction.”).

71. See, e.g., Atherton et al., supra note 13 (citing Fearson as the first example of the “long-standing common law doctrine” of Valid When Made).


73. Marquette Nat. Bank v. First of Omaha Svc. Corp., 439 U.S. 299, 310 (1978) (“The congressional debates surrounding the enactment of § 30 [the original version of 12 U.S.C. § 85] were conducted on the assumption that a national bank was ‘located’ for purposes of the section in the State named in its organization certificate.”).

74. See id. (“Omaha bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State.”).

75. See id. at 312–13 (discussing that the “mere fact” of a bank’s enrollment of a state’s citizens into loans “does not suffice” to locate the bank in that state for the purposes of usury law limitations).

76. See id. at 318 (“This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring Stat to receive credit at foreign interest rates.”).

77. See Adam J. Levitin & Susan M. Wachter, The Public Option in Housing Finance, 46 U.C. DAVIS L. REV. 1111, 1164 (2013) (examining the impact of Marquette specifically on the housing finance market, but also discussing its overall effects on interest rate and usury laws throughout the states).
In 1980, Congress passed 12 U.S.C. § 1831d. Acting as a complement to the NBA, Section 1831d provided a similar privilege for state-chartered banks, allowing them to choose and enjoy the rates of the state of their location. Together, these acts created a robust system of banks originating loans and subsequently offloading them to entities across the country.

The Valid When Made doctrine impliedly arose in this context. After cases such as Fearson and Marquette, lenders assumed that once a loan was created by a national or state bank, it carried its interest rate with it through any subsequent sales or transformations. This allowed the doctrine to grow in both its prevalence and in the reliance that lenders placed upon it. Although it was widely utilized, the Valid When Made doctrine never appeared in anything more than an implied assumption or relatively dated judicial opinions recognizing it. Congress did attempt to codify the doctrine in 2017. However, the contentious bill never

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78. See, e.g., John J. Schroeder, “Duel” Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions, 36 Indiana L. Rev. 197, 202 (2003) (tracing parity laws in all the states that have them and examining how they affect state bank action(s)).
79. See 12 U.S.C. § 1831d (1980) (showing the same concept(s) as the NBA in terms of interest rate choice of law, except applicable to state-chartered banks).
80. See id. (mimicking the NBA’s choice of usury law provisions as applied to state-chartered banks).
82. See Federal Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 148–49 (5th Cir. 1981) (“The non-usurious character of a note should not change when the note changes hands.”) (providing an example of the Valid When Made doctrine in action).
84. See Horn & Hall, supra note 24, at 7 (“Certainly, as a business matter, the valid-when-made principle has been universally relied on in the lending business, inasmuch as the ability of a loan transferee to rely upon the enforceability and collectability in full of a loan that is validly made is central to the stability and liquidity of the domestic loan markets, to say nothing of core principles of commercial dealing.”).
85. See id. at 7 n.29–30 (noting examples of case law that recognized the Valid When Made doctrine but also noting their relative age and lack of recent developments).
87. See Levitin: ‘Madden-fix’ Bills, supra note 8 (arguing that the bill is based upon a “faulty reading of case law”).
became law.\textsuperscript{88} Congress’ failure to codify the Valid When Made doctrine makes the OCC’s \textit{Madden}-fix rules that much more impactful,\textsuperscript{89} potentially leaving it open to reversal.\textsuperscript{90}

\textbf{B. The Valid When Made Doctrine in Action}

As \textit{Marquette} and its progeny developed and attempts at codification failed, complaints that courts and Congress largely misunderstood the proper application of the Valid When Made doctrine arose.\textsuperscript{91} Like many of those complaints, the \textit{Madden} court may very well have underestimated the reach of its holding beyond third-party loan purchasers.\textsuperscript{92} In particular, the \textit{Madden} court did little to look beyond its holding and the potential impacts it might have on marketplace lenders, including the rise of fintechs and their business models.\textsuperscript{93}

Known colloquially as “marketplace lending,” many lending businesses are predicated on an ability to assume non-usurious loans and

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\item \textsuperscript{88} See H.R. Res. 3299, 115th Cong. § 2(2)(3) (2018) (as referred to S. Comm. on Banking, Housing, and Urban Affairs, Feb. 15, 2018) (showing that the bill never made it out of its Senate subcommittee and is therefore null).
\item \textsuperscript{89} There is a tenable argument that the OCC’s codification of the \textit{Madden}-fix rules in fact violate the non-delegation doctrine. See John Hannon, \textit{The True Lender Doctrine: Function over Form as a Reasonable Constraint on the Exportation of Interest Rates}, 67 DUKE L.J. 1261, 1289 (2018). For the purposes of this Note, it is enough to recognize that Congress’s failure to pass any bill related to the doctrines may evince a lack of consensus by legislators on how to address the problem. \textit{Id.} at 1290 n.161 (“Congress could, of course, codify the basic principles of the [T]rue [L]ender doctrine. But the fact-bound application of such a statute is certain to rest, at some level of review, with the courts—where the doctrine already exists.”).
\item \textsuperscript{90} This Note mentions the possibility that the Congressional Review Act (“CRA”) could potentially come into play for reversing either of the two \textit{Madden}-fix rule, however this seems unlikely. See infra Part V.
\item \textsuperscript{91} See, e.g., \textit{Brief of Prof. Adam J. Levitin as Amici Curiae in Support of Appellant}, supra note 66, at 35 (concluding that the Valid When Made doctrine is a work of fiction and not a facet of common law).
\item \textsuperscript{92} See Hannon, \textit{supra} note 89, at 1277 (“Several facets of the \textit{Madden} opinion suggest that the court was motivated, at least in part, by a desire to withhold the benefits of the exportation doctrine from nonbank entities.”).
\item \textsuperscript{93} See Peter Conti-Brown, \textit{Can Fintech Increase Lending? How Courts Are Undermining Financial Inclusion}, BROOKINGS INST. (Apr. 16, 2019), https://www.brookings.edu/research/can-fintech-increase-lending-how-courts-are-undermining-financial-inclusion/ [https://perma.cc/DDY5-Z6E4] (“The \textit{Madden} court reached the conclusion but without much relevant explanation: so long as the defendants weren’t agents of national banks (or national banks themselves), then the national law does not apply. Or, as the Court concluded with its awkward syntax, those institutions ‘acted solely on their own behalves, as owners of the debt.’”).
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interest rates from national and state banks. Marketplace lenders have long relied on the assumption of the Valid When Made doctrine in conducting their businesses. These companies can even be in the business of soliciting lending relationships with consumers while simultaneously transacting with banks to originate and immediately offload the loan to the marketplace lender themselves. For example, Sindeo, a fintech platform, provides low-interest and easily accessible first-time home loans as well as quick refinancing options to consumers, relying on the ability to work with banks to originate and sell off mortgages. Companies such as these can offer convenient new elements and access to the lending market for both consumers and banks, but they often exist because of these lending arrangements with state and national banks. Alone, a company like Sindeo could not use the statutory choices of either the NBA or Section 1831d to choose an interest rate for its loan, and instead is subject to each state’s usury laws.

In what has been characterized as a “win-win-win” scenario, fintechs can also provide banks with technology that is much more adept

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94. See id. (“[F]intech is also helpful in permitting new specializations to grow within the financial system such that not everyone must go to the banking juggernauts . . . for every financial service.”); see also Christopher K. Odinet, Securitizing Digital Debts, 52 Ariz. St. L.J. 477, 527–34 (2020) (discussing the pros and cons of the rise of financial technology companies and online lending).

95. See id. at 532–34 (analyzing the role of the Valid When Made and True Lender doctrines alongside fintech lending relationships and marketplace lending models).


97. Known collectively as the “Freedom Financial Network,” this collection of Fintechs, including Sindeo, provide services ranging from mortgage calculators, to full debt-restructuring programs. Many of these rely on the interplay of bank interest rate choice of law and the ability for the companies to assume various customers’ loans. See Our Companies, Freedom Fin. Network https://www.freedomfinancialnetwork.com/our_companies [https://perma.cc/442S-6L4L] (last visited Jan. 29, 2021) (offering examples of a wide range of debt and lending services from Sindeo’s parent company, Freedom Financial Network).


100. See Zac Robinson, True Integrated Receivables—A Win-Win-Win for Banks, Corporate Customers and FinTechs, Finti, https://www.finti.com/blog>true-integrated-
at dealing with small-dollar lending while banks can originate and offload loans to them. In fact, San Francisco-based fintech Aura received a $10 million investment to expand its offerings of small-dollar lending services and to increase its partnership(s) with banks. Companies such as Aura generally operate in what is often referred to as a “bank partnership model.” In the typical bank partnership model, a marketplace lender, such as FIA Card Services in Ms. Madden’s case, might act as an intermediary to facilitate a loan, referring it to a chartered financial institution to make with its choice of interest rate. While the financial institution is the one who generally disburses the funds to the borrower, it will almost immediately sell the loan to the marketplace lender. That marketplace lender might also receive some fee or incentive from the bank if they somehow helped originate the loan.


103. A very comprehensive analysis of the typical “bank partnership model” can be found from FDIC: Marketplace Lending, supra note 96, at 13–18 (offering a flowchart of how these lending relationships typically function, followed by a discussion of their role in the market).

104. It is important to note that, while FIA Card Services was a chartered institution, not all marketplace lenders are. See Madden v. Midland Funding, LLC, 786 F.3d 246, 248 (2d Cir. 2015) (noting that FIA card services or “FIA Card Services N.A.” is a National Association—a form of federal charter granted by the OCC). But see, e.g., Marc Franson & Peter Manbeck, The Regulation of Marketplace Lending: A Summary of the Principal Issues, Chapman at *25 (Apr. 2019) https://www.chapman.com/media/publication/926_Chapman_Regulation_of_Marketplace_Lending_2019.pdf [https://perma.cc/86GK-WSVM] (exploring ways that the OCC has sought to regulate fintechs and marketplace lenders, including the use of “special-purpose bank charters” but noting that no such practice currently exists).

105. See FDIC: Marketplace Lending, supra note 96, at 14 (“In these cases, the [marketplace lender] collects borrower applications, assigns the credit grade, and solicits investor interest. However, from that point the [marketplace lender] refers the completed loan application packages to the partner bank that makes the loan to the borrower.”).

106. See id. (“The partner bank typically holds the loan . . . . before selling it to the [marketplace lender]. Once the [marketplace lender] purchases the loan from the partner bank, it issues security notes up to the purchase amount to its retail investors who pledged to fund the loan.”).

107. See id. at 13 fig. 2 (showing one potential incentivized route to marketplace lending arrangements between banks affiliated with marketplace companies and marketplace lenders/investors).
They might even choose to sell the loan to another lender.\textsuperscript{108} These sort of fees and incentive payments are what many fintechs base their business models on and why the Valid When Made doctrine is seen as so crucial to their existence.\textsuperscript{109} Without any Valid When Made doctrine, non-bank marketplace lenders could not help facilitate and buy loans with higher interest rates, as they could not enjoy any applicable choice of usury law from either the NBA or 12 U.S.C. § 1831d.\textsuperscript{110}

Fintechs also provide accessible banking and lending interfaces for consumers, as well as easier access to credit.\textsuperscript{111} In addition to benefiting the customer, banks enjoy the rise in potential customers and diversified lending opportunities.\textsuperscript{112} According to one commentator, only 30% of users find traditional banking features “easy to use,” yet fintechs can streamline and enhance a quick-lending experience.\textsuperscript{113} In return for their services, these marketplace lenders may receive a fee or percentage from successfully cultivated loans.\textsuperscript{114} Some are even in the business of purchasing and managing the loans themselves.\textsuperscript{115}

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\textsuperscript{108} See id. (showing another common route of debt transformation through the re-selling of an acquired loan to another marketplace lending arrangement).
\textsuperscript{109} For a discussion on the valuable roles of fintechs in the U.S. economy, along with a discussion of how they have evolved and shifted their various business models, see Geoff Charles, \textit{The New Wave of FinTech Lending – 7 Essential Strategies}, MEDIUM (Dec. 3, 2019), https://medium.com/@geoffcharles/the-new-wave-of-fintech-lending-7-essential-strategies-cba5ac341910 [https://perma.cc/JB9V-SNEC] (offering examples of how Fintechs have shifted their lending models to increase their incentives, such as student loans and creating income sharing agreements instead of traditional loan arrangements).
\textsuperscript{110} See supra Part III.A (discussing the NBA and its sister interest rate choice of law statute, 12 U.S.C. § 1831d).
\textsuperscript{111} See Jackson, supra note 101 (observing that for many Americans, limited access to credit is “self-perpetuating” and that fintechs are uniquely poised to help address the issue).
\textsuperscript{112} See FDIC: Marketplace Lending, supra note 96, at 12 (“Attracted by opportunities for earnings growth, some banks have entered the marketplace lending business either as investors or through third-party arrangements.”)
\textsuperscript{113} See Laura Dreschler, \textit{Four Ways Fintech Has Changed the Lending Process and How Other Financial Institutions Can Keep Up}, EXPERIAN (Mar. 21, 2019), https://www.experian.com/blogs/insights/2019/03/4-ways-fintech-changed-lending/ [https://perma.cc/9NH4-RUCQ] (discussing the positive impact(s) that fintechs have had on the lending market and offering suggestions as to how other lending institutions can stay competitive).
\textsuperscript{114} See Jon Marino, \textit{Online Lenders Turned This Fee Into a Cash Cow}, CNBC (May 6, 2016), https://www.cnbc.com/2016/05/06/online-lenders-turned-this-fee-into-a-cash-cow-fintech-startups-lending.html [https://perma.cc/DVD9-6ZVU] (tracing how Fintech Lending Club created a “lucrative source of revenue” by collecting loan origination fees).
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Moreover, it is not just fintechs who relied upon the Valid When Made doctrine to grow and operate their businesses.116 Debt collection agencies and smaller lenders with less access to capital have utilized the doctrine for much longer.117 In fact, Midland Funding, LLC, the named defendant in Madden, is a secondary debt collection agency with a business focused on buying past-due loan accounts in bulk from banks and marketplace lenders.118 In total, marketplace lending accounts for an over $1 trillion dollar per-year industry.119 This is hardly a negligible impact, but it is all predicated on a single assumption: that the Valid When Made doctrine is indeed good law.120

The growth of fintechs within the secondary lending market has unquestionably helped both banks and their customers.121 However, one might notice that an unbridled embracing of the Valid When Made doctrine could allow much more unscrupulous lending arrangements to thrive.122 Entities such as “payday lenders”—who offer consumers quick access to capital in exchange for exorbitant interest rates—are generally what come to mind.123 If left without redress, these consumers could fall

Ass’n as Amici Curiae Supporting Petitioners, Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015), 136 S. Ct. 2505 (No. 15-610), cert. denied, (illustrating the size and breadth of the secondary lending market).
119. Lo, supra note 18, at 64 (“Commentators have observed that [Madden] could sink the trillion-dollar secondary credit market.”).
121. See, e.g., Robinson, supra note 100 (providing examples of how the growth of fintechs has helped banks and customers expand their markets and offerings).
123. See, e.g., Scott Andrew Schaaf, From Checks to Cash: The Regulation of the Payday Lending Industry, 5 N.C. BANKING INST. 339, 340 (2001) (discussing the development and role(s) of agency oversight and regulation over the payday lending industry, along with analyzing how effective said regulation(s) have been); see also Tasha L. Winebarger, The
victim to such lenders who take advantage of the Valid When Made doctrine to partner with a bank who can originate a predatory loan and immediately sell it to the secondary lender. To combat this, states and courts commonly employed the True Lender doctrine, aimed at thwarting these predatory schemes.

C. The True Lender Doctrine

While the Valid When Made doctrine finds its roots in decades of common law, the True Lender doctrine is a relatively new concept. The True Lender doctrine was first seen in both judge-made and legislative forms, and it was widely employed in the wake of the 2008 recession. To date, it has remained frequent in use, allowing courts and law enforcement to look deeper into a loan’s details in search of predatory practices. Despite its widespread usage post-2008, the True Lender doctrine can actually be traced to a much earlier rise in scrutiny.

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124. See What Is a Payday Loan?, CFPB (June 2, 2017), https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/ (defining a payday loan as one that is typically short-term with high cost/interest rate, and is generally due at one’s next payday).

125. See Munger, supra note 122, at 487 (‘‘True [L]ender’ claims were first asserted against payday lenders who used rent-a-bank arrangements to evade state usury limits, and similar claims have been successfully asserted more recently in rent-a-tribe schemes.’’).

126. See Hannon, supra note 89, at 1280 (‘‘The [T]rue [L]ender doctrine traces its origins to an effort by Georgia’s legislature to eliminate in-state payday lenders that were circumventing the state’s usury laws by entering into rent-a-charter arrangements with out-of-state banks.’’).


128. See Hannon, supra note 89, at 1264 (‘‘The [T]rue [L]ender test arose in the context of perhaps the most egregious extension of the ability to preempt state usury laws, wherein payday lenders and other nonbank entities have periodically obtained the benefits of the exportation doctrine by utilizing an arrangement commonly referred to as ‘rent-a-charter.’’

regarding certain forms of lending relationships. In what became popularly known as “Rent-A-Charter” or “Rent-A-Bank” arrangements, the United States as a whole started to become more aware of the ability for lenders to exploit an unqualified Valid When Made doctrine. Any time there is a dramatic rise in predatory lending targeting poor-credit and at-risk borrowers federal and state governments have needed to respond.

Prior to the OCC’s Madden-fix rules, the interplay of the True Lender and Valid When Made doctrines was a successful tool in protecting consumers.

The background of the True Lender doctrine began as many predatory lenders would partner with a nationally chartered bank in the aforementioned schemes. In such arrangements, a bank would originate a loan, enabling the interest rate preemption granted by the NBA or Section 1831d. The bank would then immediately offload the loan to a predatory lender who had typically arranged the transaction with the bank beforehand. The predatory lender could then charge the often exorbitant interest rate under the protection of the Valid When Made doctrine.

130. See, e.g., Winebarger, supra note 123, at 318 (citing Schaaf, supra note 123, at 340) (tracing the first rise of payday lenders to the 1980’s and an increased prevalence in consumers seeking short term loans); see also Scott A. Hefner, Payday Lending in North Carolina: Now You See It, Now You Don’t, 11 N.C. BANKING INST. 263, 271–74 (2007) (examining the history of payday lending in North Carolina during the mid 1990’s alongside the OCC’s response to regulation).

131. For a good discussion of the common features and history of these arrangements, see Munger, supra note 122, at 471–76.

132. See id. at 487–90 (noting the first application of “True Lender claims” against those entities that exploited the Valid When Made doctrine).


134. See Hannon, supra note 89, at 1264–65 (pinpointing the function and success(es) of the two doctrines).

135. See Munger, supra note 122, at 475–79 (surveying the history of “Rent-A-Bank” and “Rent-A-Charter” arrangements and various state responses to them).

136. See id. at 476 (outlining the development of the NBA and exportation of interest rates, along with the Federal Deposit Insurance Act and its impact on bank chartering and choosing headquarters locations).

137. See id. at 477 (“In these arrangements, the alternative lender takes care of all the marketing and advertising, and the bank’s name is placed on the loan documents. The bank subsequently sells the loan to the lender, sometimes within twenty-four hours.”).

In some instances, predatory lenders would charge interest rates in excess of hundreds or even thousands of percent. Some organizations even began to establish predatory lender watchlists to inform states and consumers before entering into a loan. However, the vast majority of banks have never engaged in predatory lending practices or arrangements. Indeed, both the OCC and the Federal Deposit Insurance Corporation (“FDIC”) have issued warnings against such relationships and their damaging impact(s) on the banking industry’s image. However, the mere existence of these lending arrangements and the potential problems they pose led many lenders to worry about the range of variability in the True Lender inquiries being applied across the country.

139. As recently as June 5, 2020, the District of Columbia Attorney General announced a lawsuit utilizing the True Lender Inquiry against an infamous payday lender, Elevate, who regularly partners with FinWiseBank, a federally chartered bank in Utah, to offload loans. See Press Release, Office of the Att’y Gen. for the Dist. of Columbia, AG Racine Sues Predatory Lender for Illegal High-Interest Loans to District Consumers (June, 2020), https://oag.dc.gov/release/ag-racine-sues-predatory-online-lender-illegal [https://perma.cc/Y77K-JTBZ] (pointing to how Elevate would regularly charge interest rates of up to 251-percent while “misrepresenting” its lending relationships).


141. See Levitin: Trump Administration and Subprime Lenders, supra note 8 (observing that most banks do not engage in Rent-A-Bank arrangements because of their implications on operations and practices).

142. The OCC has opined that predatory lending practices may involve “unfair and deceptive trade practices in violation of the Federal Trade Commission Act.” Similarly, the FDIC has said that predatory lending activities are “inconsistent with safe and sound lending and undermine individual, family, and community economic well-being.” OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC ADVISORY LETTER AL 2003-2, GUIDELINES FOR NATIONAL BANKS TO GUARD AGAINST PREDATORY AND ABUSIVE LENDING PRACTICES (2003); FED. DEPOSIT INS. CORP., FDIC INSTITUTION LETTERS FIL-6-2007, PREDATORY LENDING FDIC’S POLICY ON PREDATORY LENDING (2007).

143. See Levitin: Trump Administration and Subprime Lenders, supra note 8 (discussing the variations in approaches to the Valid When Made and True Lender doctrines across the country).
D. Applying the True Lender Doctrine

In response to these predatory lending arrangements, many courts began to look beyond the simple question of whether or not a loan’s interest rate was valid if made by a bank.\textsuperscript{144} Instead, both legislative directives and their own initiatives allowed courts to examine deeper into the nature of a suspect lending relationship.\textsuperscript{145} In their varying versions of the True Lender doctrine, courts often found themselves reviewing suspect loans or lending relationships by looking at factors\textsuperscript{146} such as: (1) how long the originator held the loan before assigning it to a third party;\textsuperscript{147} (2) whether the third party provided the original lender with the capital to make the loan;\textsuperscript{148} (3) if the third party and lender had a prearranged agreement to pay minimum fees to the lender\textsuperscript{149} or even indemnify it;\textsuperscript{150} and (4) how the loan was reported.\textsuperscript{151}

In practice, the Valid When Made and True Lender doctrines worked in tandem.\textsuperscript{152} The former granted a blanket acceptance for a state or national bank to choose the interest rates of their place of headquarters before offloading it.\textsuperscript{153} The latter allowed states to enforce such laws against clearly predatory lending relationships if it appeared that the predatory lender, rather than the bank, was the true lender.\textsuperscript{154} Up until \textit{Madden} and the OCC’s “\textit{Madden-fix},” these two doctrines appeared to be strongly accepted throughout the lending market.\textsuperscript{155}

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\item \textsuperscript{144} Hannon, supra note 89, at 1265 (“In contrast to the inflexible and overbroad approach of the \textit{Madden} court, the \textit{[T]rue [L]ender} doctrine looks past the superficial form of rent-a-charter arrangements to ascertain whether the bank that is entitled to the preemption of state laws is the real lender receiving such protection.”).
\item \textsuperscript{145} See Adam Rust, \textit{Federal Regulators Should Refrain From Making a True Lender Rule}, NAT’L COMTY REINVESTMENT COAL. (July 10, 2020) https://ncrc.org/ [https://perma.cc/VJ6L-HFSE] (pointing out examples of state enforcements of their usury laws via the use of the True Lender doctrine); see also Hannon, supra note 89, at 1280 (tracing the True Lender doctrine’s history in the US to a law in Georgia, GA. Code Ann. § 16-17-2(b)(4) (2011)).
\item \textsuperscript{146} The following references and factors have been taken directly from the OCC’s survey of the True Lender doctrine and can be found in: National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 44,224 (proposed July 20, 2020) (to be codified at 12 C.F.R. pt. 7) (proposing the new True Lender rule and tracing traditional approaches to the doctrine).
\item \textsuperscript{147} See, e.g., CFPB v. CashCall, Inc., No. CV 15– 7522– JFW, 2016 WL 4820635, at *5-6 (C.D. Cal. Aug. 31, 2016) (examining “‘which party or entity has the predominant economic interest in the transaction,’” including evaluating which party placed its money at risk).
\item \textsuperscript{148} See id. at *6 (concluding that the third party was the True Lender, including because “[a]lthough [the third party] waited a minimum of three days after the funding of each loan before purchasing it, it is undisputed that [the third party] purchased each and every loan before any payments on the loan had been made.’’); see also CashCall, Inc. v. Morrisey, No. 12– 1274, 2014 WL 2404300, at *1-7 (W.Va. May 30, 2014) (noting that the third party
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Between early June and the middle of October of 2020, the OCC issued and eventually published two rules in response to Madden. Similarly, the FDIC published its own Valid When Made rule, with calls for it to release a True Lender rule as well. Almost immediately after publication, several state attorney generals filed suit against both the purchased loans within three days of origination but not clearly indicating whether this fact was considered as part of the predominant economic interest analysis; see also Sawyer v. Bill Me Later, Inc., 23 F. Supp. 3d 1359, 1369 (D. Utah 2014) (noting that the named lender was the real party in interest, including because it “holds the credit receivables for two days”).

149. See, e.g., CFPB v. CashCall, Inc., No. CV 15–7522–JFW, 2016 WL 4820635, at *2,*6 (C.D. Cal. Aug. 31, 2016) (“[The third party] guaranteed [the named lender] a minimum payment of $100,000 per month, as well as a $10,000 monthly administrative fee.”) (“It is undisputed that [the third party] deposited enough money into a reserve account to fund two days of loans, calculated on the previous month’s daily average and that [the named lender] used this money to fund consumer loans.”).

150. Id. at *3 (“[The third party] agreed to ‘fully indemnify [the named lender] for all costs arising or resulting from any and all civil, criminal or administrative claims or actions . . . .’ ”); see also CashCall, Inc. v. Morrisey, No. 12–1274, 2014 WL 2404300, at *7 (W.Va. May 30, 2014) (noting that the Circuit Court found that the third party agreed to indemnify the named lender).

151. See CashCall, 2014 WL 2404300, at *1–7 (noting that loans were treated as if they were funded by the third party for financial reporting purposes).

152. Hannon, supra note 89, at 1275–76 n. 87 (“Stated another way, the [T]rue [L]ender doctrine seeks to identify whether loans truly were valid-when-made, and only an affirmative answer will even trigger application of the Madden fix law.”).

153. Munger, supra note 122, at 487 (“‘True lender’ claims were first asserted against payday lenders who used rent-a-bank arrangements to evade state usury limits, and similar claims have been successfully asserted more recently in rent-a-tribe schemes.”) (citing CFPB v. CashCall, Inc., No. CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *1–2 (C.D. Cal. Aug. 31, 2016)).

154. Supra Part II.A–B.

155. See Horn & Hall, supra note 24, at 7 (noting that the reliance of lenders on the doctrines and how, prior to Madden, there appeared to be no reason to question their application).


157. The FDIC version of the Valid When Made rule covers all state-chartered banks and insured branches of foreign banks. See Federal Interest Rate Authority, 85 Fed. Reg. 44,146 (July 22, 2020) (to be codified at 12 C.F.R. pt. 331). Note that the FDIC has not introduced a “True Lender” rule as of the writing of this Note.
OCC and FDIC opposing these rules. However, these suits all focused on potential violations of the Administrative Procedure Act. Outside advocacy groups have also threatened suit, largely focusing on the rules’ impact on vulnerable consumers in the context of the COVID-19 national pandemic. As one suit claims, in the midst of unemployment rates that have not been seen since the Great Depression, the OCC is “pushing hard and fast” for rules that will “embolden predatory lenders” to take advantage of struggling families. And for one to fully appreciate the opposition to these rules, it is first necessary to examine the Madden-fix itself.

A. The Valid When Made and True Lender Doctrines

The first of the two Madden-fix rules dealt with the Valid When Made doctrine. In its final rule, the OCC stated that a loan’s interest rate that originates with a bank stays with the loan regardless of sale,
transfer, or assignment. This rule simply took the Valid When Made doctrine and granted it a seat of official recognition as a complement to the NBA and Section 1831d’s choice of state usury laws. According to the OCC, Section 85 of the NBA was “conspicuous” in its silence on the impact of loan assignments on the loan’s interest rate, authorizing it to address the Valid When Made doctrine even when Madden did not.

Almost immediately, the OCC was criticized for failing to seize the moment and answer the question of how deeply courts should look to discover a loan’s true lender, and what they should look for. This criticism arose both from those who saw the opportunity to offer more consistency across the market post-Madden, but arguably more

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164. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (“[B]anks are generally authorized to sell, assign, or otherwise transfer loans and to enter into and assign loan contracts. ... [R]ecent developments have created legal uncertainty about the ongoing permissibility of the interest term after a bank transfers a loan. This rule clarifies that when a bank transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer.”) (emphasis added).

165. The OCC’s ruling spent a significant amount of time discussing questions of whether it had the authority under the NBA to issue such a pronouncement. While the OCC of course claimed that it did, this issue is also at the center of some of the aforementioned litigation by the states Attorneys General. See State of California v. OCC, No. 4:20-cv-05200 (N.D. Cal. July 29, 2020); see also Brian S. Korn, et al., OCC Affirms “Valid When Made” Doctrine, MANATT (June 3, 2020), https://www.manatt.com/insights/newsletters/client-alert/occ-affirms-valid-when-made-doctrine [https://perma.cc/Q5H6-ZWMY] (stating the Comptroller of the Currency, Brian Brooks’ stance on the OCC’s final Valid When Made rule).

166. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,531 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (“Therefore, section 85’s (NBA) silence in this regard is ‘conspicuous[ ],’ and the OCC may interpret section 85 to resolve this silence.”)

167. Id. at 33,530 (“Many supporting commenters also agreed that the OCC has the authority to address this issue by regulation and that the proposal reflected a permissible interpretation of relevant Federal banking law.”).

168. See, e.g., Comment Letter from the Conference of State Bank Supervisors to the OCC, (Jan. 21, 2020), https://www.csbs.org/policy/csbs-comment-letter-permissible-interest-loans-are-sold-assigned-or-otherwise-transferred [https://perma.cc/GG3F-HZ55] [hereinafter Conference of State Bank Supervisors Comment Letter] (requesting that the OCC “clarify and revise the proposed rule to ensure that its impact on state law rights and remedies—including the [T]true [L]ender doctrine and other state law requirements—does not exceed the stated intention of the proposed rule.”).

169. See id. (asking the OCC to clarify its Valid When Made rule to offer more market consistency and understanding); see also Rosenblum, supra note 44 (explaining the OCC’s claimed reasoning for not addressing the True Lender doctrine originally).
worrisome, also from the lobbying and pressuring efforts of payday lenders and other potentially predatory businesses.\textsuperscript{170}

In response, the OCC issued its interpretation of when and how to tell if the bank is the true lender in a loan.\textsuperscript{171} In the OCC’s view, whenever a bank makes a loan—which it must do for the NBA or Section 1831d’s choice of usury laws to even apply in the first place—it is the true lender if it is named as such or if it provides the financial resources for the loan.\textsuperscript{172} The OCC also stated that if one bank is named as the lender, but another party funds the loan, it is the named bank who is the true lender.\textsuperscript{173} According to the OCC, these rules were intended to offer clarity and certainty to the secondary lending market.\textsuperscript{174} While they very while might have created the desired certainty, these rules left some key questions unanswered.\textsuperscript{175} In response to over 4,000 comment letters—many of which expressed concern that this rule would allow for predatory lenders to circumvent state usury laws—the OCC rejected this fear, stating that its “robust supervisory framework” would prevent such occurrences.\textsuperscript{176}

\textsuperscript{170} See, e.g., California v. OCC, No. 4:20-cv-05200 (N.D. Cal. July 29, 2020) (explaining payday lender lobbying efforts in opposition of state usury laws); see also Munger, supra note 122, at 468–98 (discussing other lobbying efforts by the payday loan industry to fight consumer protection laws).


\textsuperscript{172} See id. (“Under this rule, a bank makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan.”).

\textsuperscript{173} See id. at 68,745 (“[W]here one bank is named as the lender in the loan agreement and another bank funds the loan, the bank named as the lender in the loan agreement makes the loan.”).

\textsuperscript{174} See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 44,223, 44,224 (proposed July 22, 2020) (to be codified at 12 C.F.R. pt. 7) (“To address this uncertainty, the OCC is proposing a clear test to determine when a bank makes a loan.”); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530–36 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (“Consistent with the proposal, this regulation addresses that legal uncertainty by clarifying and reaffirming the longstanding understanding that a bank may transfer a loan without affecting the permissible interest term.”).

\textsuperscript{175} Note that this blog post was written before the OCC’s True Lender doctrine rule. However, it provides good insight into an example of the types of questions that were typically asked and discussed by commentators to the OCC’s Madden-fix rules. See Curtin et al., supra note 17 (observing that the Madden-fix for the Valid When Made doctrine failed to address state-chartered banks and, at the time, the True Lender doctrine question).

This form-over-substance approach by the OCC has many practical issues, but it may well provide some of the answers that Madden’s observers sought. Undoubtedly, the Madden-fix garnered a collective sigh of relief for the multitude of marketplace lenders that relied upon these doctrines. As the OCC pointed out in its rulemaking commentary, the questions created by Madden left many banks wondering if they could still use the “risk management tool” of offloading risky debts and loans to free up capital. As support for both of its rules, the OCC pointed to the uncertainty that it perceived to be plaguing the lending market and used it as justification for its new rules.


178. Even many of the observers who support the Madden-fix rules have noted areas and questions that are still unanswered, such as an identical FDIC rule as well as related state litigation which is mentioned in Part IV of this Note. See Eric T. Mitzenmacher et al., The OCC Finalizes “Madden Fix” Regulation, Codifying the “Valid-when-Made” Doctrine as Applicable to Loans Made by National Banks and Federal Savings Associations, CONSUMER FIN. SERVICES REVIEW, (May 30, 2020) https://www.cfsreview.com/2020/05/the-occ-finalizes-madden-fix-regulation-codifying-the-valid-when-made-doctrine-as-applicable-to-loans-made-by-national-banks-and-federal-savings-associations/ (“The OCC’s rule is a positive development for those seeking regulatory certainty for the secondary market in bank-originated loans and defending Madden claims.”)

179. See Cumming et al., supra note 43 (stating that the Madden-fix rules provided much-needed clarity to the lending market.


181. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (“However, there is often uncertainty about how to determine which entity is making the loans and, therefore, the laws that apply to these loans.”); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (“Despite these authorities, recent developments have created legal uncertainty about the ongoing permissibility of the interest term after a bank transfers a loan.”).
arguable in their effectiveness, the positive intentions of the *Madden*-fix are clear.\(^{182}\)

Primarily, these rules will likely provide clarity to the businesses which were intended to benefit.\(^{183}\) The secondary lending market will be able to return to their business models of acquiring loans from state and national banks without worrying about the Saliha Maddens of the world challenging the applicability of their loan’s interest rate.\(^{184}\) Furthermore, as intended, these rules will very likely help banks continue to offload risky loans and debts to the aforementioned companies, thereby keeping the companies in business and freeing up necessary capital for the banks.\(^{185}\) From a consumer perspective, more free capital for banks means a higher potential access to credit for borrowers.\(^{186}\) For example, several months of the COVID-19 pandemic saw historically low interest

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\(^{183}\) See Cumming et al., *supra* note 43 (“[T]he OCC’s final rule has the potential to provide an additional arrow in the quiver for fintechs and others that purchase bank-made loans.”)

\(^{184}\) Scott Stewart, *Why Small Businesses Need Regulator’s Proposed “Madden-Fix,”* AM. BANKER (Nov. 26, 2019), https://www.americanbanker.com/opinion/why-small-businesses-need-regulators-proposed-madden-fix [https://perma.cc/E26E-TYQV] (“Just like every major corporation, small businesses need to have access to credit to hire more employees, expand or simply maintain in times of hardship. Most entrepreneurs rely on the lending market to grow.”).

\(^{185}\) See Cumming et al., *supra* note 43 (discussing some of the perceived benefits that the *Madden*-fix rules will have for the secondary lending market).

\(^{186}\) There is some debate over the actual dollar-impact of how much increased capital impacts consumer lending, but it is without a doubt that it has *some* positive impact(s). See Press Release, Treasury Dept. (TG-95), Treasury Sec’y Timothy Geithner, Opening Remarks as Prepared for Delivery to the Congressional Oversight Panel, (April 21, 2009) (stating that a one-dollar capital injection generates between eight and twelve-dollars of lending capacity); but see Fed. Reserve Bd.-DIV’s of Research & Statistics and Monetary Affairs, *The Effects of Bank Capital on Lending: What Do We Know, and What Does It Mean* (Aug. 17, 2010) (reviewing and concluding that the impact of capital for banks on increased lending capacity may be different than what was previously thought).
rates and an exponential growth in the housing market. In these situations, easier credit access can lead to rapid lending market growth. However, the OCC failed to provide for any sort of a stop-gap that would prevent predatory lenders from taking advantage of these opportunities in the future. At the outset, it appears as though the OCC sought to relegate Madden to nothing more than a blip on the otherwise stable history of the Valid When Made and True Lender doctrines. In their pursuit of “clarity” and “stability,” one need not look much deeper to realize the serious issues poised by the OCC’s Madden-fix rules.

C. Issues with the Madden-Fix (the Bad and the Ugly)

The major failure of the Madden-fix lies within its overbroad and overinclusive nature. The OCC had an invaluable opportunity to provide the clarity that many sought post-Madden, but it chose to issue two rules that were underwhelming in form and created considerable

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188. See Fed. Deposit Ins. Comm’n, Fintech Lending: Financial Inclusion, Risk Pricing, and Alternative Information, FDIC (June 16, 2017), fdic.gov/analysis/cfr/bank-research-conference/annual-17th/papers/14-jagtiani.pdf [https://perma.cc/FH4F-39BN] at 7 (discussing how increased information on consumers allows Fintechs to provide easier access to credit for business and consumers who might otherwise be limited in their access to traditional bank lenders).

189. Levitin: Trump Administration and Subprime Lenders, supra note 8 (“[The Madden-fix rules] will effectively allow[] subprime consumer lending that is not subject to any interest rate regulation, including by unlicensed lenders.”)

190. See Mitzenmacher et al., supra note 178 (discussing the OCC’s response to Madden and what the author believes is still left to be done and answered).

191. See Levitin: Trump Administration and Subprime Lenders, supra note 8 (discussing how the Madden-fix rules will potentially have seriously negative impacts on at-risk consumers); see also 21 States Urge OCC to Withdraw Proposed Madden Fix, L.AW360 (Jan. 22, 2020), https://www.law360.com/articles/1236552/21-states-urge-occ-to-withdraw-proposed-madden-fix [https://perma.cc/XAQ8-XRK3] (highlighting an example of the legal opposition to the OCC’s Madden-fix rules, including challenges based within the Administrative Procedure Act).


193. See, e.g., Michael Cumming et al., supra note 43 (discussing how the OCC’s Madden-fix Valid When Made rule could help offer clarity to a market left in limbo post-Madden).
potential for consumer harm in their function.\textsuperscript{194} Assuming that the OCC truly saw \textit{Madden} as an assault on these doctrines, it is strange that its response would be to craft two rules which effectively undermine decades of state usury laws.\textsuperscript{195}

Even more curious is why the OCC would not engage in a joint rulemaking with the FDIC in response to these questions.\textsuperscript{196} Both agencies cited the need for “clarity” yet published their own rules with their own comments and responses.\textsuperscript{197} The similarity in both intent and function of the NBA and Section 1831d might lead one to think that a bank’s national versus state charter should not be a concern when applying the Valid When Made and True Lender doctrines.\textsuperscript{198} While the

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  \item \textsuperscript{194} Wilmeth, Jr., \textit{supra} note 23 (“The proposed rule is contrary to the public interest because it would allow national banks and federal savings associations to establish ‘rent-a-charter’ schemes with payday lenders and other predatory nonbank lenders, thereby encouraging abusive practices that would inflict very serious injuries on consumers and small businesses.”)
  \item \textsuperscript{195} \textit{NCLC Press Release, supra} note 26 (“The OCC’s proposed rule would prevent courts from examining the real nature of a predatory rent-a-bank scheme, help predatory lenders conceal their schemes from judicial review, and turn state usury laws into the ‘dead letter’ that the Supreme Court predicted in 1835.”)
  \item \textsuperscript{196} Federal Agencies are free to engage in joint rulemaking measures. While each involved agency must propose and publish its own final rule(s), there is generally no limitation on multiple agencies working in concert during the process. It is worth noting that in function, both the OCC and FDIC’s Valid When Made rules are very similar. While the latter revised the text of the Federal Deposit Insurance Act (“FDIA”) text section 331.4(e) to align with the OCC’s rule more closely, the two results are generally the same. However, unlike the OCC’s rule, the FDIC’s Valid When Made rule explicitly states that it will unfavorably view entities who partner with banks to evade state usury laws. The OCC has made no such statement in as clear of terms. \textit{See} \textit{NOTICE-AND-COMMENT RULEMAKING, ADMIN. CONF. OF THE UNITED STATES} (2020) (outlining different methods of agency rulemaking, including joint rulemaking).
  \item \textsuperscript{197} Note that the FDIC has not issued a similar “True Lender” rule as of the writing of this Note. In fact, the FDIC has openly questioned its authority to issue such a rule despite calls for one. \textit{See} Alan S. Kaplinsky, \textit{FDIC Questions Its Authority to Issue “True Lender” Rule}, \textit{CONSUMER FIN. MONITOR} (Dec. 9, 2020), https://consumerfinancemonitor.com [https://perma.cc/2CBE-NW6H] (stating that the FDIC, unlike the OCC, does not believe it possesses the statutory authority to issue a True Lender rule, despite calls for it to do so).
  \item \textsuperscript{198} The NBA and 12 U.S.C. § 1831d operate concurrently, with the former providing the same choice of interest rate protections to nationally-chartered banks as the latter does for state-chartered banks. Indeed, even the Second Circuit in \textit{Madden} recognized that if a lender was a non-bank entity, that it could not alone enjoy the choice of interest rate law(s) granted by the NBA (and § 1831d). \textit{Madden v. Midland Funding, LLC}, 786 F.3d 246, 247 (2d Cir. 2015) (“Because neither defendant is a national bank nor a subsidiary or agent of a national bank . . . . we reverse the District Court’s holding that the NBA preempts Madden’s claims . . . .”).
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absence of a joint rulemaking might seem peculiar, it also leads to the potential that the rules could be overturned.\textsuperscript{199}

Prior to \textit{Madden}, state usury laws and a bank’s ability to choose which one it would apply existed in relative harmony.\textsuperscript{200} However, one of the most problematic themes from the \textit{Madden}-fix rules is their lack of qualifying instructions for states.\textsuperscript{201} Without any limits, these rules have no way of preventing predatory lenders from gaining just as much advantage as the legitimate businesses that the OCC intended to help.\textsuperscript{202} A vague reference to a “robust oversight framework” is likely of little comfort to the states and entities who now find their enforcement and consumer protection powers stripped away by federal agencies.\textsuperscript{203}

Regarding the True Lender doctrine, the OCC recognized variation in applications amongst courts.\textsuperscript{204} Still, the agency did not cite a single instance where these varying applications led to a wrong conclusion before \textit{Madden}.\textsuperscript{205} Instead, the OCC pointed to a need for clarity for lenders to know just what to expect when facing a court looking into the nature of its loan.\textsuperscript{206} With that comes the initial question of why the OCC found this rule necessary when it offered no instances of a wrongfully applied inquiry prior to \textit{Madden}.\textsuperscript{207} Did legitimate lenders truly have that much to worry about with this inquiry? The OCC’s

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\item[199] While arguably unlikely, this Note recognizes the role that the Congressional Review Act (“CRA”) could play in overturning either rule. As final rules, there is the potential that the CRA’s backstop could allow for Congress to review these rules. See 5 U.S.C. § 8 (1996); see also infra Part V.
\item[200] See Biaimonte, supra note 138, at 127 (2019) (challenging the Valid When Made doctrine but recognizing its role and existence).
\item[201] See Kim & Rosenblum, supra note 162 (discussing the lawsuit by three states Attorneys General on the OCC’s \textit{Madden}-fix, including the claim that “[T]he OCC did not give meaningful consideration to the rule’s facilitation of ‘rent-a-charter’ schemes by predatory lenders.”).
\item[202] \textit{Levitin: Trump Administration and Subprime Lenders,} supra note 8 (“[The \textit{Madden}-fix rules] will effectively allow[ ] subprime consumer lending that is not subject to any interest rate regulation, including by unlicensed lenders.”)
\item[203] See \textit{NCLC Press Release,} supra note 26 (claiming that states will be left powerless to enforce their usury laws, should the \textit{Madden}-fix rules be left as-is).
\item[205] \textit{See id.} (offering no explicit examples, beyond \textit{Madden}, of a faulty application of the True Lender inquiry).
\item[206] \textit{Id.} at 68,745 (“This approach will provide additional clarity and allow stakeholders, including borrowers, to easily identify the bank that makes the loan.”).
\item[207] \textit{See National Banks and Federal Savings Associations as Lenders,} 85 Fed. Reg. 44,224 (Proposed July 22, 2020) (to be codified at 12 C.F.R. pt. 7) (offering examples of varying applications and factors within the previous approach to the True Lender doctrine as stated by the OCC in its Notice of Proposed Rulemaking for the True Lender final rule).
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provided case law seems to indicate that they did not. Nevertheless, the OCC opines about Madden, leading to a potential discouragement of bank and third-party relationships and a “chilling of innovation” had it not answered the True Lender question.

In a grander sense, these two rules work together to render state usury laws null and void in the realm of stopping the Rent-A-Bank scheme. Without qualification or limitation, predatory lenders have practically been invited to come back into relevance with a new shield. Unlike past responses to rises in these predatory schemes, states will now be left watching on the sidelines. States will now be powerless to look any further than who originated the loan in form and whether that entity was allowed to choose a certain state’s usury laws when deciding on an interest rate.

In evaluating this hapless approach to clarity within the secondary lending market, one cannot help but think of a scene from the movie The Naked Gun. As Detective Frank Drebin stands in front of an exploding fireworks store, he tells onlookers to move along, saying, “there is nothing to see here,” as chaos ensues behind him. In their response to Madden, the OCC has assumed the role of Drebin, attempting to usher the lending market along for better or worse, no questions asked. But

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208. See id. (citing various factors and case law that the OCC claimed showed an inexcusable variance in True Lender approaches which it sought to clarify).

209. Id. (“This uncertainty may discourage banks and third parties from entering into relationships, limit competition, and chill the innovation that results from these [marketplace lending] partnerships.”).

210. See, e.g., NCLC Press Release, supra note 26 (claiming that the Madden-fix rules strip the states of their enforcement powers of usury laws and will leave consumers to suffer).

211. Levitin: Trump Administration and Subprime Lenders, supra note 8 (“The rulemaking green lights unregulated subprime lending nationwide.”).


215. See id.

216. Wilmarth, Jr., supra note 23 (“The proposed [True Lender] rule unlawfully seeks to override state ‘[T]rue [L]ender’ laws without congressional authorization and in contravention of applicable court decisions. The proposed rule ignores the substance-over-form analysis and the multifactor tests that have been applied in those decisions.”).
unlike Drebin, the OCC must turn around and face the reality of the
darker potential of its current actions, either revising them or risking their
overturn.\textsuperscript{217}

\section*{V. Potential Solutions To Protect Consumers}

The \textit{Madden}-fix needs fixing. The potential for limitless free
reign of predatory lenders partnering with nationally chartered banks to
extract exorbitant interest rates is a problem which should make the OCC
worried. There is no doubt that the lending market craves stability and
predictability.\textsuperscript{218} As a multitude of lawsuits and criticisms make clear,
the OCC is and will continue to be pressured to change these rules.\textsuperscript{219} In
a preemptive attempt to explore what a clearer response to \textit{Madden} might
entail, this Note presents three potential solutions to remedy the OCC’s
conundrum. The final option\textsuperscript{220} is offered as the preferred approach for
the OCC to truly provide clarity and stability while also precluding
predatory lending relationships.

Underlying all these solutions is the possibility that Congress may
utilize the Congressional Review Act (“CRA”) to overturn the \textit{Madden}-
fix rules. The CRA provides a mandatory sixty day review period for all
agency rules.\textsuperscript{221} While unlikely, due to the highly divided makeup of the
116th and 117th Congresses,\textsuperscript{222} the significant changes and potential

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\item \textsuperscript{217} As this Note posits, the two most likely ways that these rules would be overturned
would either be via that Congressional Review Act (5 U.S.C. §§ 801–808) or under a new
Presidential Administration and a new Comptroller of the Currency. See 12 U.S.C. § 2; see also infra Part V and Part V.A.
\item \textsuperscript{219} To review the two largest and most noteworthy lawsuits against the OCC and FDIC
for their Madden-fixes, see California v. OCC, No. 4:20-cv-05200 (N.D. Cal. July 29, 2020); see also California v. FDIC, No. 4:20-cv-05860 (N.D. Cal. Aug. 20, 2020).
\item \textsuperscript{220} See infra Part V.C.
\item \textsuperscript{221} See 5 U.S.C. § 801 (1996) (stating the mandatory 60-day review period for Congress
over Agency action(s)); see also 5 U.S.C. § 804(2) (1996) (defining a “major” rule).
\item \textsuperscript{222} The CRA requires a joint Congressional resolution signifying disapproval, along with either a signature from the President or an override of any veto. 5 U.S.C. § 801 (1996). The 116th Congress was comprised of mostly Democrats in the House and Republicans in the Senate, making joint resolution unlikely. \textit{Membership of the 116th Congress: A Profile}, Cong. Res. Serv. at 1 (Dec. 17, 2020) https://fas.org/sgp/crs/misc/R45583.pdf [https://perma.cc/8MD4-P6SJ]. While the 117th Congress does feature a Democrat majority in both the House and Senate, the Senate majority is courtesy of the tie-breaking vote of Vice President Kamala Harris. Therefore, a joint resolution would still be unlikely due to the
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impacts of these rules might subject them to legislative review and even overturn. The timing of their release and publications could very well preclude the CRA from being an effective tool for addressing the shortcomings of the Madden-fix rules. Additionally, any other typical method of affecting legislative change would be cumbersome and unlikely to succeed.

A. **Return to the Pre-Madden Days**

The first solution is the most drastic. The OCC should consider abandoning its Madden-fix rules and allow the market to return to its pre-Madden state. Embracing this solution would mean that one would have to agree that Madden was in fact narrow in its applicability and that the Valid When Made doctrine was set to remain effective. Supporters of this line of argument point to a variety of places to buttress this stance. From viewing the NBA and Section 1831d’s choice of state usury rates as more of an estoppel versus a preemption to stating that Madden was

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223. OIRA has determined that neither rules are “major rules” under 5 U.S.C. § 804(2). Even still, Congress would have sixty session days from the rule’s publication in the Federal Register to then file a joint resolution of opposition. 5 U.S.C. § 802.

224. The Valid When Made rule was promulgated by the OCC on June 2, 2020, which would mean that the sixty days of the CRA would have ran by the writing of this Note. However, the True Lender rule was promulgated on October 30, 2020, meaning that the sixty session days have not yet run. Also note that both rules are to be published in the Federal Register thirty days after their promulgation, further extending the likelihood that a new Congress could review and overturn the True Lender rule.

225. Consumers are always able to lobby for greater protections at the state level. For instance, a state that is generally friendly to higher interest rates such as Delaware or Nevada might enact consumer protection legislation and introduce new usury laws. However, this cumbersome process would leave many consumers exposed to predatory lending for indefinite periods of time in states that are known for their history of high interest rates.

226. See Baiamonte, supra note 138, at 149–52 (arguing that non-bank loan purchasers should not enjoy the NBA’s choice of state usury laws as it could lead to predatory lending but concluding that the Valid When Made doctrine, while stable, is suspect in its own right).

227. See Lo, supra note 18, at 67–71 (critiquing Madden and arguing that its impact over time will be limited); see also Horn & Hall, supra note 24, at 2 (“Although Madden is having an adverse short-term impact, we believe that ultimately it will be properly limited in its scope and impact, will not be embraced across the board by other state or federal courts, and will not result in significant changes to the law and principles of bank lending and usury.”).

228. See Levitin Predatory Lending, supra note 8 (“The National Bank Act does not render a loan non-usurious. Instead, it preempts application of the usury law against the National
simply wrong by ignoring the Valid When Made doctrine.229 The main theme with this solution is the idea that the lending world did not actually change much post-Madden.230

This option would undoubtedly be the most contentious. Just as there are those who believe that Madden had little impact on the lending market, there are others who think it represented significant change.231 As the OCC recognized in its recounting of why these rules were necessary, there was variation amongst the states and courts in how they approached the doctrines.232 In function, this solution would embrace that variability which the OCC saw as so problematic.233 This could be quite worrisome to industries whose entire business models depend on their newly assumed loan’s interest rate being valid when it was made along with wanting the originating bank to be the loan’s true lender.234 At its core, this solution would re-vest the states and courts with their power to inquire into these specifics while returning to the assumption of the Valid When Made doctrine’s legitimacy.

The reason why this solution may be less tenable resides in the fact that it would meet strong opposition from those who celebrated the Madden-fix, including the OCC.235 As the OCC assumed the role of providing the clarity it believed the market needed, it will likely take action from the new Biden administration and a new Comptroller of the

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229. See Horn & Hall, supra note 24, at 2 (claiming that the Second Circuit in Madden “misplaced” its focus and thus came to a holding that will be limited in its impact).

230. See id. ("[N]otwithstanding the Madden decision, the valid-when-made doctrine should remain alive and well.").

231. See Honigsberg, Jackson Jr. & Squire, supra note 59, at 36 (concluding that Madden did have an impact on the lending practices and credit-availability for consumers within the 2d. Cir. Ct. of Appeals).

232. See generally National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (claiming that the OCC’s True Lender rule is “necessary” to help banks partner “confidently” with marketplace lenders and insinuating that such confidence was not possible under the varied approaches used by states).

233. See id. at 68742 (claiming that there is often “uncertainty” amongst banks and marketplace lenders who seek to determine the True Lender on a loan); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (repeating that this Valid When Made rule is intended to introduce “certainty” into the marketplace lending arrangements of the present and future).

234. See supra Part II.B.

235. See Cumming et al., supra note 43 (showing an example of support for the Madden-fix rules).
Currency to make this solution possible. Specifically, the Trump administration repeatedly evinced a desire to promote deregulation amongst federal agencies. Some have observed that the Madden-fix rules are an extension of this goal. It is unlikely that the OCC would reintroduce a new regulation, especially when considered alongside President Trump’s executive directives. With the victory of Joseph Biden in the 2020 presidential election, it is possible that the new administration could reverse these rules by either implementing their own or revoking them altogether. Should the CRA fail to affect these rules, then this solution’s only real hope would reside with a new administration or the courts.

B. Revise the Madden-Fix Rules to Preclude Predatory Lending

If the OCC is willing to consider the negative potential that its Madden-fix could have, then a solution could be as simple as revisiting the rules and providing actual clarity to its position on predatory lenders. In such a scenario, the OCC would do well to consider a joint rulemaking

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236. Comptroller of the Currency; Appointment, 12 U.S.C. § 2 (1935) (offering the description of how one is appointed by the President to be Comptroller of the Currency).


238. See, e.g., Levitin: Trump Administration and Subprime Lenders, supra note 8 (calling the Madden-fix rules the “ultimate DC swamp move.”).


241. Challenges to the Madden-fix in court will likely prove to move slowly and take a long time. Indeed, the new rules are already being employed in cases such as one in Colorado. See Clem, supra note 182. Additionally, some commentators have observed that the Madden-fix could still be overturned by the courts in what is known as the “Chevron-doctrine.” See Pratin Vallabhaneni, et al., OCC Finalizes Madden-Fix Rule; New Acting Comptroller Lays Out Priorities, WHITE & CASE (June 5, 2020), https://www.whitecase.com/publications/alert/occ-finalizes-madden-fix-rule-new-acting-comptroller-lays-out-priorities [https://perma.cc/AE64-2VLX] (“The [Madden-fix] rule does not directly overturn Madden and, as a result, its significance may ultimately turn on how much deference courts are willing to give to agency interpretation of federal law under the Chevron doctrine.”); see also Chevron U.S.A., Inc. v. Nat. Res. Defense Council 467 U.S. 837 (1984).
alongside the FDIC who is facing similar criticism with its rule.\textsuperscript{242} The major issues with these rules relate to their broad umbrella of protection to all types of lenders.\textsuperscript{243} Aside from those who flatly disagree with the OCC’s perceived need for clarity post-\textit{Madden},\textsuperscript{244} it is hard to ignore the benefits that these rules can have for legitimate businesses such as Midland Funding, LLC and their debt-purchasing operations.\textsuperscript{245} This solution suggests the OCC should embrace these positives while working to eliminate the rule’s downsides.\textsuperscript{246}

In its rulemaking process, the OCC recognized the various approaches by states, especially with the True Lender doctrine.\textsuperscript{247} The notice of proposed rulemaking itself even listed many of the factors which courts across the country consider and the various identifiers for which they might look.\textsuperscript{248} The perplexing quality about these rules is that the OCC recognized and then proceeded to disregard this traditional deference to state authorities, all for the sake of “clarity.”\textsuperscript{249}

A possible alternative would be to incorporate these categories and factors into the True Lender rule itself.\textsuperscript{250} There are several key factors that practically all courts appear to use with some degree of variability.\textsuperscript{251} These common factors in their simplest forms are: (1) the substance of the agreement in light of the totality of the circumstances; (2) the incentives of the involved parties to make or assume the loan; and

\textsuperscript{242} See, e.g., State of California v. FDIC, No. 4:20-cv-05860 (N.D.Cal. Aug. 20, 2020) (showing a similar bout of opposition to the FDIC’s \textit{Madden}-fix from many of the same Attorneys General who oppose the OCC’s \textit{Madden}-fix).

\textsuperscript{243} See, e.g., Levitin: Trump Administration and Subprime Lenders, supra note 8 (arguing that the OCC’s post-\textit{Madden} rulemaking will give rise to predatory lending).

\textsuperscript{244} See, e.g., Levitin: Predatory Lending, supra note 8 (claiming that the \textit{Valid When Made} doctrine is based upon a “misreading” of case law and therefore is not what some believe it to be).

\textsuperscript{245} See supra Part IV.B.

\textsuperscript{246} See supra Part IV.C.

\textsuperscript{247} See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (tracing the variety of factors that were common across the True Lender doctrine).


\textsuperscript{249} See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,745 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (“This approach will provide additional clarity . . .”).

\textsuperscript{250} The OCC even recognizes a variety of factors and inquiries that underly the True Lender doctrine. National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 44,224 (proposed July 22, 2020) (to be codified at 12 C.F.R. pt. 7) (listing some of the most common approaches to True Lender inquiries).

\textsuperscript{251} See id. (stating major examples of the True Lender inquiry in action in different states and courts).
(3) who holds the predominant economic interest in the loan.\textsuperscript{252} Regardless of the specific forms they take, these three elements summarize the inquiries that even the OCC recognized as generally used.\textsuperscript{253} By allowing the states some leeway in looking beyond the mere form of the origination of the loan, the OCC can alleviate both the federalism\textsuperscript{254} and practicality concerns\textsuperscript{255} of its \textit{Madden}-fix. Virtually all states rely on some version of the True Lender doctrine.\textsuperscript{256} Thus, if the OCC believes that clarity in the market is necessary then it should not do so at the expense of a state’s ability to protect its consumers.\textsuperscript{257}

The other piece which this solution would entail is a narrow-tailoring or creation of an exception on the OCC’s stance on the Valid When Made doctrine. This change is envisioned as a complement to the proposed True Lender changes.\textsuperscript{258} Here, the OCC could probably not rely on a predefined prohibition on certain categories of lending, as predatory lenders can easily shift their approaches.\textsuperscript{259} Instead, the OCC might consider an addition to the rule which allows it to punish banks that are found to be repeatedly engaged in selling loans to predatory lenders. While many other consumer protection laws exist,\textsuperscript{260} this added penalty could preserve the Valid When Made doctrine for those marketplace lenders who legitimately rely upon it and disincentivize those who seek to take advantage of it.

\textsuperscript{252}See id. (dictating the factors which the OCC identified as common across the True Lender doctrine).

\textsuperscript{253}See id. (showing that even the OCC recognized that there were typical True Lender doctrine approach(s)/factors prior to and after \textit{Madden}).

\textsuperscript{254}See California v. OCC, No. 4:20-cv-05200 (N.D. Cal. July 29, 2020) (“This case is about federal overreach.”).

\textsuperscript{255}See supra Part IV.

\textsuperscript{256}See \textit{Gilmer}, supra note 16 (observing the utilization of the True Lender doctrine in litigation across multiple states).

\textsuperscript{257}See \textit{Baiamonte}, supra note 138, at 153 (concluding that “Allowing third-parties who purchase bank notes to benefit from the NBA . . . preemption of state usury laws is legally incorrect and harmful to consumers.”).

\textsuperscript{258}The OCC’s issuance of a follow-up rule to its Valid When Made decision highlights how these two doctrines work in tandem. Because of this fact, any \textit{Madden} solution must consider both doctrines and their interplay. \textit{See National Banks and Federal Savings Associations as Lenders}, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7); \textit{see also} Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160).

\textsuperscript{259}See \textit{Munger}, supra note 122, at 468 (examining all the ways that predatory lenders have shifted to usurp state laws and authorities).

While offering the potential to disincentivize relationships with predatory lenders, this solution would ultimately face a tough battle. As it currently operates, the OCC does not occupy an enforcement role against banks in the realm of secondary lending markets. Although creating a system of punishment for banks that engage in such arrangements may prevent or dissuade future actions by, giving the OCC penal powers to levy upon them would be a drastic increase of their abilities under the NBA. Furthermore, entities such as the Consumer Financial Protection Bureau (“CFPB”) currently operate within this general role of consumer protection and penalization. Creating a system which allows the OCC similar powers would likely create interagency tensions, as well as a potential for a violation of the non-delegation of adjudicatory or legislative powers depending on the form it takes. While the OCC and FDIC warn of the “reputational” risks that Rent-A-Charter or other predatory lending relationships can have for banks, they should also recognize that the few banks that engage in...

261. In the OCC’s own words, their role as an “independent branch of the U.S. Department of the Treasury” involves chartering, regulating, and supervising all national banks. To accomplish this, the OCC lists its various tasks, all of which involve monitoring of nationally chartered banks. The closest apparent role to a penalization is in their ability to issue “corrective orders,” a common practice amongst agencies. According to the OCC, these “corrective orders” are reserved for “necessary” instances in which OCC-governed banks do not comply with laws and regulations. Most the OCC’s daily tasks involve oversight and advisement, not penalization. See About Us—What We Do, OCC (2020) [https://www.occ.treas.gov/]. But see News Release 2020-132, OCC Assesses $400 Million Civil Money Penalty Against Citibank, OCC (Oct. 7, 2020) [https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-132.html] (offering an example of an OCC penalty for a bank violating a law, in this case, regarding cybersecurity and data protection).

262. See Enforcement Actions, OCC (2020) [https://occ.treas.gov/topics/laws-and-regulations/enforcement-actions/index-enforcement-actions.html] (outlining the OCC’s enforcement tools and providing a search function to review its past enforcement actions).


264. While non-delegation of adjudicatory powers is not here examined beyond conjecture, the leading case for any such challenge is CFTC v. Schor, 478 U.S. 833 (1986). Similarly, the leading case for non-delegation of legislative powers is Whitman v. Am’ Trucking Ass’n, Inc., 531 U.S. 457 (2001).

265. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (“The OCC agrees that rent-a-charter schemes have no place in the federal financial system . . . .”); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160) (“[The OCC] has consistently opposed predatory lending, including through relationships between banks and third parties.”); see also
such behavior choose to continue to do so in spite of these risks. \textsuperscript{266} Something more than an indeterminate warning is necessary to stop them.

This solution also falls short due to its inability to provide consumers any relief from predatory lending relationships, something which many of the pre-\textit{Madden} approaches did. \textsuperscript{267} While it could penalize banks and lenders, dissuading them from entering future predatory lending relationships, this option offers nothing to help those consumers currently stuck in them. Instead, the best approach would be for the OCC to combine these two solutions to create a lending “safe harbor”—offering accountability for banks while also returning methods of redress into the hands of the consumer.

C. The Preferred Solution—Creating a “Safe Harbor” for Banks to Take Loan Accountability While Offering Consumers Redress From Predatory Lenders

The two previous solutions have strong potential but come with some glaring flaws. A return to the pre-\textit{Madden} days is likely to be flatly opposed by the OCC and those who celebrated the rules. \textsuperscript{268} Similarly, the enactment of a system of punishment for banks that engage with predatory lenders may sound straightforward, but would actually be a dramatic change from the OCC’s current enforcement model of advisement over punishment. \textsuperscript{269} At the core of both of these solutions is the fact that the \textit{Madden}-fix rules are heavily skewed towards form over function. \textsuperscript{270} To create a functional model that protects consumers and offers them tools for redress against predatory lenders, the OCC should


\textsuperscript{268} See, e.g., Cumming et al., supra note 43 (showing that there were commentators who were pleased with the \textit{Madden}-fix rules and celebrated their potential to bring certainty and clarity to the lending market).

\textsuperscript{269} Enforcement Actions, supra note 262.

\textsuperscript{270} See Wilmarth “True Lender” Comment Letter, supra note 192 (arguing that the \textit{Madden}-fix True Lender rule will give too much of a shield to predatory lenders who would seek to exploit it).
consider returning the Valid When Made doctrine to its pre-Madden form while attempting to codify the True Lender doctrine.\textsuperscript{271}

This solution operates in two parts. It (1) embraces the argument that Madden did not question the Valid When Made doctrine;\textsuperscript{272} and (2) agrees that the True Lender doctrine did, as the OCC stated, need clarity.\textsuperscript{273} Together, these two understandings would allow the OCC to offer predictability and certainty to the lenders and businesses it sought to nurture while also giving consumers the protection they need.

The first consideration of this solution echoes the concerns that many observers of the lending market post-Madden felt: the case itself had very little impact on the lending market and practically no impact on the Valid When Made doctrine.\textsuperscript{274} Indeed, Madden never addressed or mentioned the doctrine by name.\textsuperscript{275} The Second Circuit even appeared to misinterpret the NBA’s choice of state usury laws as it failed to account for the Valid When Made doctrine.\textsuperscript{276} By accepting the premise that Madden was terminally flawed, and should be limited in its holding, the OCC would allow the Valid When Made doctrine to return to its status pre-Madden.\textsuperscript{277} However, legitimate marketplace lenders need not worry. The operation of the NBA and Section 1831d’s interest rate choice of law—along with the pre-Madden Valid When Made doctrine and this proposed True Lender doctrine—would help identify and eliminate predatory lending arrangements while preserving their legitimate loan relationships.

\textsuperscript{271} While the current True Lender final rule did arguably codify the doctrine, this Note argues that the current method focuses too much on form over function and that the OCC should revise it accordingly. See supra Part IV.C.

\textsuperscript{272} See Horn & Hall, supra note 24, at 22–23 (discussing the ways that lenders have restructured their practices to retain the benefit Valid When Made doctrine in the Second Circuit post-Madden).

\textsuperscript{273} See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (claiming that clarity in the lending market and with marketplace lender arrangements was necessary and led to the promulgation of the True Lender doctrine rule).

\textsuperscript{274} See Horn & Hall, supra note 24, at 22–25 (outlining the potential changes to the lending market post-Madden and stating that doctrines such as the Valid When Made, should remain relatively unaffected).

\textsuperscript{275} See id. at 1 (noting that the Second Circuit apparently ignored the existence of the Valid When Made doctrine).

\textsuperscript{276} See id. at 21 (noting that the Solicitor General and the OCC both petitioned the Supreme Court for certiorari in Madden, with both pointing to the 2nd Circuit’s failure to account for the Valid When Made doctrine).

\textsuperscript{277} See Franson, supra note 104, at 46–47 (noting the argument proffered by the U.S. Solicitor General in the petition for certiorari post-Madden, in which it was claimed that the Valid When Made doctrine was effectively already codified in the NBA and that the Madden court undermined it).
The second facet of this solution will require more creativity on the part of the OCC. While the proposed rule about the True Lender doctrine did arguably codify it, the current form leaves consumers exposed and without protection. Instead, the OCC should seek to create a much more functional system where banks may take some form of accountability and risk for the loans that they originate. In short, the OCC should create a “Safe Harbor” for banks in the form of a holding period for loans that, if satisfied, would preclude a finding that another entity is the true lender in a particular relationship.

A suggested concept could mimic the Securities and Exchange Commission (“SEC”) holding period for determining whether someone is actually taking on an investment risk themselves or is simply acting as an intermediary for the true purchaser. This rule by the SEC dictates a set period during which the holder of the security must take on the risk of a private placement investment prior to divestment. The OCC could easily create a similar system or risk-period in which banks assume the risk of all of their loans much like the holder of an investment security interest does with the SEC. In tandem with this holding period, states could maintain their various approaches to inquiring into a loan’s true lender.

While transferring a loan before the holding period had been completed would not automatically result in a lending relationship being deemed “predatory,” it could be an indicator in the factors that courts traditionally use to investigate. Furthermore, this safe harbor solution would allow a loan that is held by a bank for the pre-determined amount

278. See Levitin: Trump Administration and Subprime Lenders, supra note 8 (“The Trump administration’s [OCC] proposal would allow payday lenders to make loans in every state without regard to state usury laws (or state licensing requirements and thus enforcement of other state consumer protection laws)…just as long as those lenders partner with a bank.”).

279. See 17 C.F.R. § 230.144 (1972) (showcasing the SEC’s holding period statute which the OCC could seek to mimic).

280. See id. (outlining how the investment holding period operates with the SEC).

281. No specific timeframe or holding-window is suggested here. The goal of this option is to create accountability for banks and the loans that they issue, not to tie up capital and restrain their lending practices. See Hannon, supra note 89, at 1288 (2018) (“Quite intuitively, the longer and more substantive the role of the bank in the rent-a-charter arrangement, the more likely it is that the bank’s regulators will effectively detect and deter abusive or unsafe practices and encourage or mandate conformance with fundamental principles of safety and soundness and consumer protection.”).

282. For a thorough discussion on the history and development of the True Lender doctrine, see John Hannon’s comprehensive overview, id. at 1280–84.

283. To see a discussion of the pre-Madden-fix True Lender doctrine in action, along with some of the aforementioned factors subtly being applied, see Franson, supra note 104, at 1–3 (discussing True Lender litigation in Colorado in 2018 and showcasing how courts often look beyond the mere fact of who funds the loan when determining its “true lender”).
of time, to be protected from a finding of the bank not being the true lender in the relationship. If a bank were to decline the set holding period and still offload the loan to a predatory lender then consumers would be protected by this backstop, allowing them an avenue of redress for potential harms caused by any predatory relationships. In effect, this system would act as a two-part filter, aimed at catching and dissuading predatory lenders while also providing legitimate institutions a predictable and uniform system. States could retain their varying factors of consideration, with this being one potential indicator, and the OCC could ensure more predictability.

Instead of taking on a punitive role via the prior suggestion, this solution would allow the OCC to retain its observational and advisory position. This would let courts and consumers have some methods of relief from predatory lending relationships while also creating a predictable system for banks and lenders. Contrasted with an approach to the True Lender doctrine which refuses to look any deeper than who is

284. As some commentators have observed, the SEC’s holding period for certain securities is being expanded to new markets such as blockchain and cryptocurrency. See What to Expect in 2020, MANATT FINTECH (Jan. 10, 2020), https://www.jdsupra.com/legalnews/manatt-fintech-what-to-expect-in-2020-54942/ [https://perma.cc/5TKK-K6JY] (exploring the process of the SEC securities holding period as applied to “tokens and other items of value.”). Much as the SEC does for securities it determines to be held for noninvestment intent, the OCC could easily replicate this practice for bank loans. See 12 C.F.R. § 34.82 (2019) (showcasing an example of a holding period which the OCC already mandates for banks, here concerning the holding of “Other Real Estate Owned” (OREO)).

285. See Munger, supra note 122, at 500 (providing another potential solution for expanding consumer protection and enhancing state laws via three elements).

286. As one of its main reasons for its Madden-fix rules, the OCC cited “recent developments” (i.e., Madden) as the need to provide clarity to lenders and the market. However, much of the criticism of the Madden-fix rules claim that the OCC’s approach was much too broad and left states powerless to enforce their usury laws. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7); see also Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530–36 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 and 160); but see NCLC Press Release, supra note 26 (arguing that the OCC’s Madden-fix will strip state usury laws of their efficacy and power).

287. See Wilmarth, Jr., supra note 23 (criticizing the OCC for stripping states of their ability to examine suspect lending relationships via “multifactor tests”); see also National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,743 (Oct. 30, 2020), (stating that the OCC believes that a “simple” test is necessary to create predictability with the True Lender doctrine).

288. See supra Part V.B.

289. See About Us—What We Do, OCC (2020) https://www.occ.treas.gov/about/ [https://perma.cc/3RVG-6DYW] (noting that the OCC largely operates to supervise the banks and institutions that fall within its purview).
named on or originates the loan,\textsuperscript{290} this approach begins with a consistent pattern of the bank holding and taking on the risk of its loans. This would not only disincentivize banks from making risky loans but would also make it harder for predatory lenders to utilize the quick offloading of loans on which they typically rely.\textsuperscript{291} Unlike a reassurance that a “robust system of oversight”\textsuperscript{292} will catch future predatory lending, this solution would offer a tangible metric for banks, marketplace lenders, and consumers to have some much needed certainty.

Together, this solution would be the strongest approach for the OCC to consider. Allowing states and courts to regain some of their tools of consumer protectionism while simultaneously creating a uniform and predictable pattern within the lending market would achieve all the OCC’s stated Madden-fix goals.\textsuperscript{293} Furthermore, the OCC cited the need for consistency as its major basis for promulgating both rules.\textsuperscript{294} This proposal offers that consistency while also allowing for a functional method of rooting out predatory lenders.

VI. CONCLUSION

In responding to \textit{Madden v. Midland Funding, LLC}, the OCC believed that it was providing much needed clarity to the lending market.\textsuperscript{295} In crafting its Madden-fix, the OCC sought input and feedback in its typical fashion, but the final products were underwhelming and non-responsive to many of the concerns.\textsuperscript{296} The current Madden-fix rules lack

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\item[290.] See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7) (claiming that a bank will be the True Lender on a loan if it is either named on it or funds the loan).
\item[291.] See Hannan, supra note 89, at 1264–65 (outlining the normal process of a predatory “Rent-A-Charter” lending relationship).
\item[292.] See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,743 (Oct. 30, 2020) (“This test will provide legal certainty, and the OCC’s robust supervisory framework effectively targets predatory lending, achieving the same goal as a more complex [T]rue [L]ender test.”).
\item[293.] Supra Part IV.B.
\item[296.] See \textit{5 U.S.C. § 553} (1966) (offering the Administrative Procedure Act’s outline for agencies engaging in rulemaking procedures); \textit{see also} Wilmarth “True Lender” Comment
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sufficient guideposts to prevent predatory lending; instead, they seem to invite it. While they do provide several benefits to legitimate marketplace lenders, the risk of harm to consumers is much greater if the rules are left as is. The OCC should strongly consider creating a system of accountability for banks and their loans while also allowing their interest rates to remain valid when transferred to legitimate secondary lenders. Without such changes, consumers will be at an increased risk of becoming victims of predatory lending, the likes of which have been curtailed for well over a decade.297

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Letter, supra note 192, at 19 (showing many claims as to why the OCC Madden-fix is problematic and potentially impermissible).

297. See Gilmer, supra note 16 (mapping the rise in prevalence and efficacy of True Lender litigation in protecting consumers).

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