



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS.

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Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

**Re: National Banks and Federal Savings Associations as Lenders
([Docket ID OCC-2020-0026])**

To Whom it May Concern:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the notice of proposed rulemaking ("Proposal") issued by the Office of the Comptroller of the Currency (the "OCC") regarding national bank and federal savings association as lenders.¹

The Chamber commends the OCC's efforts to remove ambiguity pertaining to the legal framework applicable to bank-partnership models. First, by finalizing the "Madden-fix" rule earlier this year, the OCC removed uncertainty caused by the Second Circuit's decision in *Madden v. Midland Funding, LLC* and clarified that a loan is "valid when made" and cannot become usurious upon assignment to a third party. While the *Madden-fix* rule provides more clarity regarding the interest rates on a loan, it did not address a critical aspect of the partnership between banks and non-banks—when is a bank that partners with another party during the origination process the "true lender" of the loan?

¹ See National Bank and Federal Savings Associations as Lenders, 85 Fed. Reg. 44223 (July 22, 2020).

The Chamber supports the OCC’s proposed rulemaking establishing a clear test to determine when a national bank or Federal savings association makes a loan and is the “true lender” in the context of a partnership between a bank and a third party.

We accordingly write to emphasize three points:

- **The need for clarity regarding the legal framework for loans originated as part of a lending relationship between a bank and a third party**
- **Concern that the two-pronged test is too broad**
- **The positive impact of regulatory clarity on innovation and consumers.**

Discussion

I. The need for clarity regarding the legal framework for loans originated as part of a lending relationship between a bank and a third party.

Consumer credit enables countless Americans to achieve their dreams. Without it, many Americans would find the path to a better life out of reach: they would be unable to buy homes, pay for their cars, finance their educations, or cover surprise expenses. A diverse group of financial institutions and other stakeholders play important roles in the consumer credit marketplace.

The Chamber thus agrees with the OCC that “while national banks and Federal savings associations (banks) play a critical role in supplying this credit, the financial system is most efficient when banks work effectively with other market participants to meet customers’ credit needs. These relationships allow banks to manage their risks and leverage their balance sheets to increase the supply of available credit in ways they would not be able to if they were acting alone.”² Consumers likewise benefit from these relationships: as the OCC explains, banks are able to extend credit to additional consumers if they sell loans into securitization facilities or to other third parties.

Significant uncertainty has arisen, however, over which entity is the “true lender” in the event that a bank makes a loan and then sells the loan to a non-bank. Governing statutory language is ambiguous on this point and the OCC has not previously resolved this question. Courts have taken on the question in individual cases, but have not provided a uniform test. As a result, unnecessary uncertainty continues to surround “true lender” questions, meaning that it can be unclear what legal framework applies to loans. This regulatory uncertainty in turn can limit the

² See National Bank and Federal Savings Associations as Lenders, 85 Fed. Reg. 44223 (July 22, 2020).

benefits that these relationships can provide banks and to consumers. To effectively meet consumer credit demand, banks and their partners must lend in a manner that is consistent with their business objectives and required regulatory compliance.

The Chamber welcomes the OCC taking action to resolve this ambiguity and supports the OCC's reasonable interpretation of Section 5136 of the Revised Statutes (12 U.S.C. 24). That Section provides that a national bank may engage in the business of banking, including by "loaning money" and Section 24 of the Federal Reserve Act (12 U.S.C. 371) which states that a national bank may "make . . . loans," and section 5(c) (12 U.S.C. 1464(c)) of the Home Owners' Loan Act states that a Federal savings association may "invest in, sell, or otherwise deal in . . . loans."

II. Concern that the two-pronged test is too broad

While federal law thus clearly authorizes banks to make loans, there is still uncertainty regarding who is the "true lender" if a bank partners with a third party, usually a non-bank, to facilitate loans to customers. We welcome the OCC's decision to resolve this uncertainty regarding when the bank is the "true lender" in a bank partnership model. While we support the OCC's efforts, we are concerned that the two pronged test, "that a bank makes a loan whenever it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan," is overly broad.

We ask that, to avoid any confusion, the OCC confirm that the Proposal's references to "loan" apply solely to finance arrangements that involve a loan of money, such as have been the subject of the bank-nonbank partnership arrangements prompting the proposed rule, and not to time price sales entered into by retail sellers regulated under applicable state sales finance laws (e.g., retail installment contracts) or commercial warehouse lines to lenders or servicers. Without this confirmation, we are concerned that the OCC's test will remain overly broad and may unintentionally defeat the OCC's goal of providing legal clarity in the space. Conversely, explaining more fully what constitutes "fund[ing] the loan" – for example, that it does not include providing warehouse funding – will resolve ambiguity in governing law, resulting in clarity that will enable competition in the marketplace and spur innovation that benefits consumers.

III. The positive impact of regulatory clarity on innovation and consumers.

Technological innovation is a critical variable of success for any financial services company because it marries convenience with efficiency to better serve consumers and improve their everyday lives. According to recent PwC analysis, 82% of traditional financial organizations say they plan to increase collaboration with FinTech companies

in the next three to five years. Further, partnerships with FinTech companies are up from 32% in 2016 to 45% in 2019 on average.³

Consumers are the foundation of this growing trend of bank-partnership models, and in the case of this Proposal will continue to benefit from them—including through expanded access to affordable credit. Consumer benefits are accelerated and firms succeed when innovative products are efficiently brought to market with clear regulatory guidelines that protect consumers while allowing banks to appropriately meet consumer demand.

Further, if consumers are the foundation of these bank-partnership models, innovation is the heart of them. The financial services sector is changing rapidly, driven by new technology, emerging competition, and consumer demand for new and innovative services. This ongoing innovation, and the bank-partnership models forming because of it, are a critical way to maintain a competitive edge in our global economy.

In coordination with the *Madden-fix* rule, the clarity provided by the Proposal could increase loans originated through the bank-partnership model. This increase would benefit consumers and incentivize innovation in the U.S. financial system.

* * * * *

We thank you for your consideration of these comments and would be pleased to discuss these issues further.

Sincerely,

A handwritten signature in black ink that reads "Julie Stitzel". The signature is written in a cursive, flowing style.

Julie Stitzel

³ See PwC Global Fintech Report 2019:
<https://www.pwc.com/gx/en/industries/financialservices/assets/pwc-global-fintech-report-2019.pdf>
(Accessed 8.31.2020)