

Federal Banking Regulators Can and Should Resolve Madden and True Lender Developments

August 14, 2018 | Client Update | 2-minute read

The ability of banks to sell the loans they originate is a core element in the development and sustainability of a nationwide lending market. Recent legal developments threaten to undermine this ability, jeopardizing the foundation of a U.S. nationwide loan market and the core lending activities of banks.

A long-settled legal principle known as the “valid-when-made” doctrine has served for almost two centuries as the bedrock for bank lending. This doctrine has been threatened by a court case, *Madden v. Midland Funding, LLC*, which failed to acknowledge or address the doctrine.^[1] At the same time, in the face of extreme facts in the payday lending context, state legislatures and courts have also been seeking to restrict the ability of banks to assign or sell loans, applying a so-called “true lender” analysis in certain limited circumstances to deem an entity that does *not* extend a loan to be “the true lender.” These developments, while intended in many cases to address important consumer protection concerns arising in payday lending, threaten to interfere with the core powers afforded to banks under federal law and undermine the smooth functioning of our financial system.

Our white paper argues that federal banking regulators should take action to protect the existence of a national consumer and small business lending market and clarifying uniform standards for consumer protection. We believe that balancing the important goals of consumer protection, availability of credit through a national lending market, and safe and sound bank lending—especially at a time of rapid technological change and innovation—is better achieved by federal banking regulators, who can establish standards across banks rather than through piecemeal efforts by courts deciding on individual cases that often present extreme facts. A national lending market, where consumers and businesses are able to access credit from many potential bank lenders through online services, will flourish best under uniform nationwide lending and consumer protection standards rather than a state-by-state patchwork of requirements.

[Read the Full White Paper >](#)

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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