Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred

COMMENT LETTER

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January 21st, 2020

Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, NW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2019-0027

Re: Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred.

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")[1] appreciates the opportunity to comment on the Notice of proposed rulemaking issued by the Office of the Comptroller of the Currency (the "OCC") titled "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred". The proposed rule is intended to clarify that when a national bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. CSBS appreciates the objective of providing greater clarity and certainty to assignees of loans made by national banks. However, we believe that the proposed rule should provide this certainty in a manner that comports with federal law and should not interfere with state law rights and remedies to a greater extent than necessary to achieve this intended policy objective.

As explained below, CSBS believes the proposed rule would ultimately provide greater certainty for industry as well as consumers and regulators by complying with the substantive and procedural requirements applicable to preemption determinations and by more fully considering and addressing the legal implications of the proposal with respect to rights and remedies afforded under state law. Specifically, CSBS recommends that the OCC:

1. clarify and revise the proposed rule to ensure that its impact on state law rights and remedies—including the true lender doctrine and other state law requirements—does not exceed the stated intention of the proposed rule; and

2. establish the validity of the proposed rule by, among other things, conducting the analysis required by section 25b of the National Bank Act in order to preempt state consumer protection laws.

CSBS believes that these recommendations, if adopted, will not only ensure that the proposed rule provides the clarity and certainty intended by reducing the risk of legal challenge, but also will ensure that the proposed rule does not interfere with important consumer protections traditionally afforded under state law.

Introduction

The National Bank Act (NBA) provides in 12 U.S.C. 85 that a national bank may "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located." The Home Owners Loan Act (HOLA) in 12 U.S.C. 1463(g) contains a similar provision that applies to loans made by federal savings associations. Currently, sections 85 and 1463(g) are implemented through the OCC's preemption regulations applicable to national banks and federal savings associations in 12 CFR 7.4001 and 12 CFR 160.110, respectively. The proposed rule would amend the 12 CFR 7.4001 and 12 CFR 160.110 by adding a new paragraph, which would provide that interest on a loan that is permissible under sections 85 and 1463(g)(1), respectively, shall not be affected by the sale, assignment, or other transfer of the loan.

The proposal explains that "this rule would expressly codify what the OCC and the banking industry have always believed and address recent confusion about the impact of an assignment on the permissible interest." This recent confusion and uncertainty that the proposed rule seeks to end is attributed by the preamble to the decision from the United States Court of Appeals for the Second Circuit in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015). In *Madden*, the court concluded that the preemption afforded by section 85 does not apply to third-party nonbank assignees of loans made by national banks because application of state usury law to the nonbank assignee "would not significantly interfere with any national bank's ability to exercise its powers under the [NBA]."[2]

The proposed rule states that the *Madden* decision has called into question the power of national banks to make and assign loans and that these powers would be "unduly curtailed" to the extent the *Madden* ruling has created uncertainty that interest permissible prior to assignment of national bank loans will remain permissible after assignment. Thus, to provide certainty regarding loan assignment, the OCC has issued the proposed interpretation to essentially overturn the *Madden* decision by providing that "as a matter of Federal law, banks may assign their loans without impacting the validity or enforceability of the interest."

CSBS appreciates the intention to provide greater certainty as to the ability assignees to enforce interest rate provisions of loans originated by national banks. We agree that the ability of banks to assign loans is an important tool to manage liquidity and ensure safety and soundness. Additionally, there are many legitimate and beneficial financial arrangements that involve loan assignment, such as securitization and debt collection. To the extent that the *Madden* ruling has created uncertainty as to the ability of banks to engage in these legitimate arrangements, CSBS believes that that uncertainty should be addressed.

However, we also believe that the OCC should not address concerns regarding uncertainty in a manner which will either ultimately only expound the uncertainty faced by the industry or interfere with consumer protection to a greater extent than necessary to provide the certainty intended. As explained in Part I, we are concerned that, absent further revision, the proposed rule may be used to interfere with the state law rights and remedies in a manner which is neither intended by the proposal or necessary to achieve greater certainty. Moreover, as detailed in Part II, CSBS is concerned that, by failing to comply with the requirements applicable to preemption determinations, the proposed rule may fail to provide the certainty intended.

I. The proposed rule should preserve, not preempt, rights and remedies afforded under state consumer protection laws, including the true lender doctrine.

While the proposed rule is intended to address concerns regarding uncertainty arising from the Madden decision, it states that it is not intended to impact other recent litigation which deals with the related, but distinct legal question regarding the so-called true lender doctrine. Specifically, the proposed rule states that "[t]his rule would not address which entity is the true lender when a bank makes a loan and assigns it to a third party. The true lender issue, which has been considered by courts recently, is outside the scope of this rulemaking."

A. The true lender doctrine should be preserved as a state law remedy in light of consumer protection and federalism principles.

CSBS appreciates the intent to preserve the true lender doctrine because it is an important remedial tool afforded by state law. The doctrine is utilized in cases in which a nonbank enters into a lending arrangement with a bank to obtain the benefits of interest rate exportation and evade otherwise applicable state consumer protection laws. In these arrangements, the nonbank typically markets the loan, makes all the credit decisions and directs its bank-partner to originate its loans only to purchase them from the bank within days. In challenging these arrangements, consumers and state officials have brought claims against the nonbank partner asserting that, although the bank is the nominal lender, the nonbank is the true lender and cannot evade applicable state usury and consumer protection laws.

In reviewing these claims, courts have applied the true lender doctrine by reviewing the substance of the arrangement in light of the totality of the circumstances to determine whether the nonbank has the predominant economic interest in the loan. The essential feature of the doctrine is its heavy reliance on a fact-intensive, totality-of-the-circumstances analysis conducted by courts. The role of courts in reviewing the substance, rather than the form, of these nonbank lending arrangements is essential because courts are uniquely capable of identifying, *ex post*, the real incentives of the parties without regard to the obfuscating names or forms and molding the shape of the doctrine to forestall attempted circumvention.

Unlike the FDIC's proposal, the OCC's proposal does not state whether or not it will view unfavorably entities that partner with a national bank with the sole goal of evading a lower interest rate established under otherwise applicable state law. Regardless of the OCC's views, the OCC's supervisory role in reviewing third party lending arrangements to prevent unsafe and unsound practices on an *ex ante* basis should not displace the role of courts and state officials in relying on the true lender doctrine to remediate harm on an *ex post* basis. Rather, these regulatory and judicial authorities should be exercised concurrently and independently—just as they were before and after the *Madden* decision.

Lastly, CSBS believes the true lender doctrine should be preserved as a state law remedy in light of federalism principles. Issues of credit affordability and access are inherently local concerns which are best balanced at the state and local level given the wide variation in the financial circumstances across the country. For this reason, it is important for consumers to maintain control over the rates, terms and conditions at which credit is offered in their state.

Allowing a nonbank to evade otherwise applicable interest rate caps interferes with the ability of consumers, as citizens, to strike the desired balance between credit access and affordability. The true lender doctrine is an important tool that consumers can rely on to prevent such interference. Thus, CSBS would not support the proposed rule to the extent it results in the preemption of true lender claims and prevents consumers, as citizens, from maintaining control over their economic lives through the medium of state regulation.

B. The OCC should clarify and revise the proposed rule to preserve rights and remedies afforded under state law, including the true lender doctrine.

While we appreciate the OCC clarifying its intention not to preempt true lender claims, CSBS believes it would be preferable for this intention to be reflected in the text of the proposed regulation itself. This is particularly important to ensure that the rule is not used in a manner that exceeds the OCC's stated intent, (i.e. to circumvent the state law true lender doctrine). Just because the OCC does not intend for the proposed rule to provide which entity is the true lender, this intention does not foreclose a nonbank third party from using the proposed rule in an attempt to nullify a true lender claim brought by a consumer or state official.

Accordingly, we request that the OCC insert into the proposed regulation a proviso to preserve the remedies afforded consumers and state officials under the true lender doctrine. For instance, the proposed regulation could be revised to provide that interest on a loan that is permissible under 12 U.S.C. 85 shall not be affected by the sale, assignment, or other transfer of the loan "provided that the entire circumstances of the transaction show that the purchaser, assignee, or transferee is not the true lender of the loan under the law of the state in which the borrower resides."

Adding this proviso should ensure that the continued enforceability of the interest term by nonbank assignees does not apply in those arrangements in which the nonbank, rather than the bank, has the predominant economic interest in the loan and thus is the true lender. Additionally, providing that the relevant state law is the law of the state in which the borrower resides should preserve the ability of consumers, as state citizens, to some control over the provision of credit in their state.

Ultimately, CSBS seeks to ensure that the rule limits the application of the valid-when-made principle to circumstances in which the bank is, in fact, the true lender so that (1) state law true lender claims remain viable, (2) the relevant state law remains the law of the state in which consumer resides and (3) the traditional role of courts in making this determination is preserved. Since different language could be employed to achieve these goals, state regulators are willing to consult with the OCC, as well as the FDIC, regarding any amendments and revisions to the proposed rule intended to achieve these goals.

It is worth noting that adopting the recommended proviso would not interfere with the objective of restoring certainty and returning to the pre-*Madden* status quo. As the OCC has previously noted, the valid when made principle is a common law doctrine and thus, if it existed pre-*Madden*, it had to be incorporated into state law.[3] Moreover, the origins of the true lender doctrine predate the *Madden* decision, so any uncertainty created thereby was very much a part of the pre-*Madden* status quo.[4] Thus, CSBS urges the OCC to revise the proposed rule text in line with the recommended proviso in order to solidify its intention to preserve the rights and remedies afforded under the true lender doctrine.

Finally, in addition to revising the proposed rule, CSBS requests that the OCC clarify that the proposed rule does not impact other state law requirements applicable to nonbank assignees. In particular, the OCC should clarify that the ability of a nonbank assignee of bank loans to enforce the loan's interest rate terms does not relieve the nonbank assignee of its obligation to obtain applicable license(s) in the state in which the consumer resides.

Along with seeking to evade state usury laws, nonbanks have relied on partnerships with banks in an attempt to avoid applicable state licensing requirements. State regulators devote significant resources to policing unlicensed activity and we believe the federal agencies should avoid taking action which may create confusion as to the continued applicability of state licensing requirements. For this reason, CSBS urges the OCC to clarify that the proposed rule does not affect the applicability of state licensing requirements to nonbank assignees of national bank loans.

II. The proposed rule interprets the NBA to preempt state consumer protection laws without complying with the requirements applicable to preemption determinations under the NBA.

The proposed rule codifies an interpretation which is intended to preempt state usury laws as applied to nonbanks in certain circumstances. Specifically, the proposed rule will preempt the application of state usury laws to third-party nonbank assignees of national bank loans in circumstances where the nonbank assignee is subject to lower usury caps than those relied upon by the national bank assignor in making the loans. As a result, under the proposed rule, a nonbank purchasers of national bank loans may charge interest on those loans that would otherwise be usurious had the nonbank itself originated the loans provided that the interest charged by the national bank was permissible under the NBA.

Given that the proposed rule codifies an interpretation of the NBA which presents a conflict with and thereby preempts state usury laws, it is striking that the proposal not only does not even refer to preemption or discuss its preemptive effect with respect to nonbanks, but also fails to address its compliance with the substantive and procedural requirements applicable to preemption determinations under section 25b of the NBA. This omission is concerning because failing to address whether the proposed rule satisfies the requirements that must be met for the OCC to issue preemption determinations under the NBA may prove to be a fatal flaw that will be detrimental to the proposal's intended objective.

As explained in this Part, the proposed rule is a preemption determination which is not exempt from coverage of section 25b and thus must comply with the limits and requirements therein. Further, the proposal's failure to acknowledge and comply with these limitations in multiple respects has unnecessarily left the proposal susceptible to legal challenge. For this reason, we encourage the OCC to comply with the limits and requirements of section 25b in this rulemaking.

A. The proposed rule is a preemption determination subject to the limits and requirements of section 25b.

Section 25b was enacted through the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the aggressive preemption campaign led by the OCC in prior years.[5] Through section 25b, Congress sought to reverse OCC's actions that "created an environment where abusive mortgage lending could flourish without State controls".[6] Section 25b also placed guardrails around the OCC's future extension of NBA preemption by imposing various substantive and procedural requirements on preemption determinations. As explained below, the proposed rulemaking does not comply with these section 25b requirements.[7]

Section 25b imposes requirements on interpretations of the NBA that preempt "state consumer financial laws". As outlined above, the state laws that are preempted by the proposed rule are state usury laws; these laws clearly qualify as state consumer financial laws as they regulate the terms and conditions of national bank lending to consumers.[8] Section 25b(b)(1)(B) sets forth the applicable preemption standard[9] in providing that:

"state consumer financial laws are preempted only if . . . in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; . . ." (emphasis added).[10]

Determinations that state consumer financial laws are preempted under this section 25b(b)(1)(B) standard are referred to as "preemption determinations".

The proposed rule is undoubtedly a preemption determination subject to section 25b because it would preempt the application of state usury laws to nonbank assignees of national bank loans, and thereby render non-usurious

pursuant to the NBA transactions that would otherwise be usurious under state law. As a result, unless otherwise excluded from coverage, the proposed rule is subject to the substantive limitations and procedural requirements of section 25b.

B. The proposed rule is not exempt from the limits and requirements of section 25b.

The proposed rule is not excluded from the coverage of section 25b. Presumably, by citing section 25b(f) and reasoning that Congress "expressly preserved national banks authority under section 85", the OCC believes that the proposed rule is not subject to the requirements of section 25b. But such a conclusion is plainly incorrect. While section 25b(f) provides that no provision of the NBA shall be construed as affecting or altering the authority conferred by section 85 for the charging of interest by a national bank, this provision does not exempt the proposed rule from section 25b based on its plain language and the legal basis for the proposed rule.

First, section 25b(f) is an exception covering "the authority conferred by section 85 . . . for the charging of interest *by a national bank*" (emphasis added). But the proposed interpretation will preempt the application of state usury laws to certain non-national bank entities, namely, third-party nonbank assignees of national bank loans that are subject to lower usury caps than those relied upon by the national bank assignor in making the loans. Since the proposed preemption determination applies to the charging of interest by a non-national bank entity, it does not fall within the section 25b(f) exception for the charging of interest by a national bank. To read section 25b(f) as covering the proposed interpretation would amount to treating state usury laws as exempt from the definition of state consumer financial laws which Congress chose not to do.

Second, the proposed rule does not fall within the section 25b(f) exemption because the legal basis for the proposed rule is not the limitation placed on interest rates by section 85, but rather the power of national banks to make and assign loans. The conflict with state law that serves as the basis for the proposed preemption determination manifests only as a result of the exercise of the enumerated power of national banks to lend money and the incidental power of national banks to assign loans. Without the exercise of these powers, no conflict can arise, and no preemption can result. It is these powers, not the limitations placed on interest rates in section 85, which are said to be "unduly curtailed" and "significantly weakened" by the application of state usury laws to nonbank assignees of national bank loans.

The lending and assignment powers of national banks do not derive from section 85. As the OCC has long recognized, the lending and assignment powers derive solely from the grant of power to "loan[] money" in 12 U.S.C. 24(Seventh) and to "make contracts" in 12 U.S.C. 24(Third).[11] Unlike interpretations of section 85, interpretations of section 24 and the powers granted therein are not excluded from the coverage of section 25b by subsection (f), so any determination that state law is preempted due to a conflict with section 24 powers is a preemption determination subject to section 25b. Accordingly, by relying on the lending and assignment authority as the basis for the conflict that gives rise to the preemption of state law, the proposed rule has been brought squarely into the coverage of section 25b.

In sum, because the proposed rule interprets the lending and assignment powers of national banks in a manner that conflicts with and thereby preempts the application of state usury law to non-national bank entities, the proposed rule does not fall within the section 25b(f) exemption but, instead, is subject to the requirements of section 25b.

C. The proposed rule fails to comply with the limits and requirements of section 25b which is detrimental to its intended objective.

Just as the proposed rule fails to acknowledge that it is a preemption determination governed by section 25b, so too the proposal fails to comply with several requirements imposed by section 25b in order to preempt state consumer financial laws, including the applicable preemption standard and other requirements in making preemption determinations. To ensure the proposal provides the certainty intended, CSBS urges the OCC to comply with section 25b by applying the *Barnett Bank* preemption standard on a case-by-case basis with substantial evidence to support a finding of significant interference.

1. The proposed rule fails to apply the Barnett Bank prevent or significantly interfere preemption standard mandated by section 25b.

First, the proposed rule does not apply the conflict preemption standard mandated by section 25b. Instead of applying the *Barnett Bank* "prevent or significantly interfere" standard applicable to preemption determinations, the OCC does not even refer to or cite *Barnett Bank* and seems to set out the applicable standard as undue curtailment of national bank powers. Again, per section 25b, state consumer financial laws are preempted *only if* they prevent or significantly interfere with the exercise of national bank powers. Because the proposed rule has not shown or even attempted to show that the application of state usury laws to nonbank assignees of national bank loans significantly interferes with national bank powers, serious questions as to the validity of the rule may persist which could be detrimental to its intended purpose.

The failure of the proposed rule to make a determination whether the application of state usury laws to nonbank assignees of national bank loans significantly interferes with national bank powers is striking given that, in *Madden*, the court held that the *Barnett Bank* prevent or significantly interfere standard applied to the this question.[12] What's more, in its amicus in *Madden*, the OCC seemingly agreed that the *Barnett Bank* standard applied but disagreed as to whether the application of state usury law to nonbank assignees significantly interfered with national bank powers.[13] Yet, in the proposed rulemaking, the *Barnett Bank* prevent or significantly interfere standard is treated as irrelevant.

2. The proposed rule does not make the proposed preemption determination on a case-by-case basis and does not provide substantial evidence for the determination.

In addition to failing to apply to the section 25b preemption standard, the proposed rule also fails to comply with other substantive and procedural requirements in section 25b, in particular the substantial evidence and case-by-case determination requirements. Section 25b(b)(1)(B) requires that preemption determinations be made on a "case-by-case basis" which refers to "a determination . . . made by the Comptroller concerning the impact of a *particular State consumer financial law* on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms."[14] The case-by-case determination requirement, coupled with the rule that that NBA does not occupy the field in any area of state law[15], is intended to preclude the OCC from making broad, anticipatory preemption determinations without any assessment of conflict with state law. Yet, the proposed rule does not cite or address any particular state usury law or even the laws of the states involved in *Madden*.[16]

Additionally, section 25b(c) provides that the OCC may not make a preemption determination unless it puts forth "substantial evidence" that "supports the specific finding regarding the preemption of such provision in accordance with" the *Barnett Bank* preemption standard.[17] Here, the proposed rule does not provide any concrete evidence, let alone substantial evidence to support the preemption of state usury law as applied to nonbank assignees of national bank loans. Providing substantial evidence to support the proposed rulemaking is particularly important in this case given the limited class of loans affected by the proposal, namely, bank-originated high-rate consumer loans which rely on interest rate exportation for their validity and are routinely assigned to nonbanks. Yet no concrete evidence is provided regarding any deleterious effects on secondary

markets for this class of loans.

As with the failure to apply the section 25b preemption standard, the failure to provide substantial evidence and make the proposed preemption determination on a case-by-case basis raises serious questions as to the validity and sustainability of the proposed rule. The seriousness of these questions is elevated given the heightened scrutiny applicable to the proposed rule.

3. The proposed preemption determination should comply with section 25b because non-compliance will likely be detrimental to providing the certainty intended by the proposal.

As a preemption determination, the rule is subject to review under the *Skidmore* standard which imposes more exacting requirements for the rulemaking to be afforded deference.[18] It is difficult to imagine that a court would consider the OCC's reasoning to be persuasive, thorough and consistent when the proposed rule not only fails to comply with multiple section 25b requirements, but does not even articulate an argument as to why the rulemaking is not subject to these requirements. Furthermore, the proposed interpretation will likely fail to meet the *Skidmore* standard given its near-exclusive reliance on and abstract application of common law doctrines which are seemingly not established in any judicial or administrative precedent interpreting the NBA.

The "well-established and heretofore well-understood authorities" the proposed rule is said to codify are derived by the proposal's application of certain precepts of the common law to the lending and assignment powers of national banks in the abstract (i.e. outside of any particular adjudication or factual context). The common law doctrines applied by the proposed rule are the so-called valid when made principle that if a loan is non-usurious at origination, the loan does not subsequently become usurious when assigned as well as the so-called stands-in-the-shoe rule that an assignee succeeds to all the assignor's rights in a contract, standing in the shoes of the assignor.

But, since the valid-when-made and stands-in-the-shoe principles are common law doctrines, they must necessarily derive from state law, not federal law, given the absence of federal common law outside of certain enclaves not relevant here. Because these doctrines must be incorporated, if anywhere, in state law, a case-by-case review of the laws of particular states is necessary here not only (1) to establish that their application to national bank lending and assignment powers is as "well-established" as is claimed, but also (2) to discern whether the common law of any state has failed to incorporate these doctrines in order to establish the significant interference required to establish NBA preemption. Yet, again, no particular state law nor any NBA precedent involving these doctrines is cited to establish the basis and necessity for the proposed preemption determination which casts doubt as to its thoroughness and consistency.

So too, the proposal's near exclusive reliance on common law doctrines raises concerns regarding its persuasiveness. The proposed rule states that "a bank's well-established authority to assign a loan may be unduly curtailed if the bank cannot be certain that interest permissible prior to the assignment will remain permissible afterwards." However, because these doctrines must be incorporated, if anywhere, in state law and applied, if at all, by a court on an ex post basis, the application of these doctrines has presumably never been an absolute certainty either before or after the Madden decision. The proposal's reliance on uncertainty interfering with national bank lending makes it all the more critical that the proposed rule provide some persuasive evidence to rebut this inference. Yet, the proposed rule fails to provide any evidence as to the uncertain application of these doctrines and the impact of this uncertainty on national bank lending.

The proposals failure to comply with section 25b requirements as well as the dearth of persuasiveness, consistency and thoroughness in its reasoning will ultimately only undermine the intended policy objective of the proposed rule, namely, to provide certainty to national banks regarding the enforceability of the interest term

in their loans after assignment to a nonbank. This certainty cannot be provided if the proposal is mired in litigation for many years with the result being that the OCC must reissue a proposed rule that complies with section 25b. As relevant litigation is currently ongoing between private parties, the validity of the proposed rule will almost certainly come into question. For this reason, CSBS requests that, in this rulemaking, the OCC comply with section 25b by applying the Barnett Bank preemption standard on a case-by-case basis with substantial evidence to support a finding of significant interference.

Conclusion

CSBS appreciates the opportunity to comment on the proposed rule. Given the importance of loan assignment for safety and soundness and certain legitimate financial arrangements, we appreciate the intention to provide greater clarity and certainty to assignees of national bank loans regarding the permissibility of the interest rates. However, as explained above, we believe that complying with the requirements applicable to preemption determinations is essential to providing the certainty intended and so urge the OCC to comply with such requirements. Additionally, while we appreciate the stated intention not to interfere with the true lender doctrine, we believe this intention should be reflected in the proposed regulation itself and also that clarity should be provided regarding the impact on other state consumer protection laws. CSBS and state regulators are willing to consult further with the OCC as well as the FDIC as the agencies consider how to proceed with the proposed rulemaking.

Sincerely,

John Ryan

Footnotes

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.
[2] *Madden v. Midland Funding, LLC*, 786 F.3d 246, 249 (2nd Cir. 2015).
[3] *See* Brief for United States as amicus curiae, *Midland Funding, LLC v. Madden* (No. 15-610), at 20 ("More generally, the practical importance of the preemption issue presented in this case depends significantly on the extent to which individual States decline to incorporate the valid-when-made rule into their own usury laws. Petitioners have made no effort to demonstrate that state-law departures from the valid when-made rule have been widespread. For this reason as well, the Court's review is not warranted at the present time.").
[4] *See generally* John Hannon, *The True Lender Doctrine: Function Over Form as a Reasonable Constraint on the Exportation of Interest Rates*, 67 Duke L.J. 1261 (2018).
[5] Section 1044(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (July 21, 2010).
[6] S. Rep. No. 111-176, at 16-17 (2010)
[7] For context, it is worth noting that, since its enactment, the OCC's record of compliance with section 25b has been far from exemplary. Even seemingly uncontroversial requirements—such as the requirement to periodically review, solicit public input on, and report to Congress on existing preemption determinations and determine whether to rescind or continue the determinations—have been entirely ignored. *See* 12 U.S.C. 25b(d). Thus, the

failure of the proposed rule to comply with section 25b represents yet another instance in a long line of instances of noncompliance with the limits placed by Congress on NBA preemption through the DFA.

[8] A state consumer financial law is defined to mean "a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. 25b(a)(2).

[9] While section 25b also provides that state consumer financial laws may be preempted in circumstances when the state law discriminates against national banks, 12 U.S.C. 25b(b)(1)(A), or is preempted by a federal law other than the NBA, 12 U.S.C. 25b(b)(1)(C), these provisions are not relevant here because the proposed rule makes no claim of discrimination and does not rely on federal laws other than the NBA.

[10] 12 U.S.C. 25b(b)(1)(B).

[11] *See* Annual Report 1965-1966, Office of the Comptroller of the Currency, 237 ("The making of loans is a lawful exercise of a power of a National bank specifically granted by Congress in paragraph seventh of 12 U.S.C. 24. *National banks make loans under that authority alone*, and the only limitations with respect to the interest charged on such loans are contained in the provisions of 12 U.S.C. 85, which to some extent, incorporate State law as a measuring rod in determining maximum interest rates.") (emphasis added).

[12] *See Madden v. Midland Funding, LLC,* 786 F.3d 246, 250 (2d Cir. 2015)("To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA. *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996); *Pac. Capital Bank*, 542 F.3d at 353.").

Note that, even if the OCC maintains that the proposed rule is exempt from section 25b by virtue of subsection (f), the proposed rule must be subject to some conflict preemption standard because field preemption does not apply under the NBA and, as explained above, the OCC is not simply interpreting the express preemption language in section 85. That this conflict preemption standard would be the Barnett Bank prevent or significantly interfere standard is underscored by the decision in Madden.

[13] *See* Brief for United States as amicus curiae, *Midland Funding, LLC v. Madden* (No. 15-610), at 11 ("Application of state usury law here would "prevent or significantly interfere with the national bank's exercise of [those] powers," *Barnett Bank*, 517 U.S. at 33, and it therefore is preempted.").

[14] *See* 12 U.S.C. 25b(b)(3)(A).

[15] *See* 12 U.S.C. 25b(b)(4) ("Title 62 of the Revised Statutes does not occupy the field in any area of State law.").

[16] While section 25b permits the OCC to make determinations regarding categories of state consumer financial laws with substantively equivalent terms, to do so the OCC must first consult with CFPB regarding whether state consumer financial laws have substantively equivalent terms and account for the views of the CFPB in making the determination. *See* 12 U.S.C. 25b(b)(3)(B). In the proposed rule, however, there is no determination that the state usury laws at issue have substantively equivalent terms, nor is there is any indication that the OCC consulted with CFPB on this question or an accounting for the views of the CFPB. Thus, the proposed rule fails to comply with the section 25b case-by-case determination requirement.

[17] *See* 12 U.S.C. 25b(c) ("No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless *substantial evidence*, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996).").

[18] *See* 12 U.S.C. 25b(b)(5)(A) ("A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.").

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