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ALERT

Resolving *Madden*: OCC and FDIC Proposed Regulations Should Be Entitled to Judicial Deference in All Courts if the Agencies Clarify How the Proposed Regulations Interpret Ambiguous Statutory Language

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On November 18 and 19, 2019, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) issued notices of proposed rulemaking designed to address the so-called "*Madden* issue" created by the U.S. Court of Appeals for the Second Circuit decision of *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). *See* OCC Proposed Rules, 84 Fed. Reg. 64229 (Nov. 21, 2019); FDIC Proposed Rules, 84 Fed. Reg. 66845 (Dec. 6, 2019). The comment periods for the proposed rules close on January 21, and February 4, 2020, respectively.

The proposed rules should go a long way to resolve the *Madden* issue. However, to maximize judicial deference, the OCC and FDIC should clarify the final rules in two ways. First, the agencies should clearly identify the ambiguous statutory language that the proposed rules seek to interpret. And second, the OCC and FDIC should expressly explain why the agencies' interpretations of the ambiguous statutory language are reasonable. Doing so will ensure that all courts—including the Second Circuit—are required to defer to the regulations.

BACKGROUND

Authors

Stephen J. Obermeier
Partner
202.719.7465
sobermeier@wiley.law

Jeremy J. Broggi
Partner
202.719.3747
jbroggi@wiley.law

Krystal B. Swendsboe
Associate
202.719.4197
kswendsboe@wiley.law

Practice Areas

Litigation

In *Madden*, the Second Circuit allowed a lawsuit to proceed against a third-party debt purchaser, based on allegations that the debt purchaser violated New York usury law. The third-party debt purchaser sought to enforce the interest rate on a debt instrument purchased from a national bank located in a different State that permitted higher interest rates. The Second Circuit held that the National Bank Act (NBA)—which provides 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"—did not preempt New York's usuary law because the NBA does not apply to certain third-party lenders.

The *Madden* decision upset more than a century of precedent applying the long-settled "valid when made" doctrine. That doctrine states that a non-usurious loan—that is, a loan that is valid at the time of making—does not become usurious simply because it was sold or assigned to another party. *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833) (''[A] contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.''); *see Gaither v. Farmers & Mechs. Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828). This principle is a "cardinal rule[] in the doctrine of usury," *Nichols*, 32 U.S. (7 Pet.) at 109, and has been employed by the banking industry, and the OCC in administering the NBA, for decades. As a result, *Madden* introduced substantial uncertainty regarding the interpretation and applicability of the NBA, as well as the similarly worded Federal Deposit Insurance Act (FDIA).

PROPOSED RULES

To resolve the uncertainty created by *Madden*'s novel interpretation of the NBA, the OCC and FDIC, pursuant to their respective authority to administer the NBA and FDIA, have proposed regulations to explicitly confirm that under the NBA and FDIA, a permissible loan interest rate does not become impermissible if the loan is subsequently sold, assigned, or otherwise transferred.

- The OCC would amend 12 C.F.R. § 7.4001 and 12 C.F.R. § 160.110 by adding language to provide that interest on a loan that is permissible under NBA sections 85 and 1463(g)(1), respectively, is not affected by later sale, assignment, or other transfer of the loan. *See* 84 Fed. Reg. 64231.
- The FDIC would add to 12 C.F.R. a new section (331) to implement FDIA section 24(j)(1) and 27, to provide parity between State banks and national banks regarding the application of State law to interstate branches and the applicability of State law interest-rate restrictions. *See* 84 Fed. Reg. 66849.

In short, the proposed rulemakings seek to clarify that the NBA and FDIA incorporate the valid-when-made doctrine as applied to loans issued by federal and State banks.

LEGAL FRAMEWORK

In finalizing the proposed regulations, the agencies should now take steps to ensure that the final regulations will merit judicial deference. The Supreme Court has held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Thus, if (1) the agency has jurisdiction to administer the statute at issue, (2) the "statute is ambiguous," and (3) "the implementing agency's construction is reasonable," administrative law precedent "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

Of particular importance, agency rules are entitled to deference even in the face of prior judicial statutory construction, provided that such judicial construction does not follow from the unambiguous terms of the statute. *See Brand X*, 545 U.S. at 982. This is so because an administrative law framework presumes that when Congress left an ambiguity in a statute meant for agency implementation, it presumed that "the ambiguity would be resolved, first and foremost, by the agency, and [Congress] desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.*; *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("[T]hat practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws."). "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Brand X*, 545 U.S. at 982-83.

The OCC's and FDIC's proposed rules are well-positioned to be entitled to maximum deference under these administrative law principles.

I. AGENCY JURISDICTION

Congress granted the OCC and FDIC express authority to administer the NBA and FDIA by promulgating rules and regulations.

Under the NBA, the OCC is "charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction." 12 U.S.C. § 1. The OCC is likewise assigned "all rulemaking authority . . . relating to savings associations" that previously belonged to the Office of Thrift Supervision and the Director of the Office of Thrift Supervision. 12 U.S.C. § 5412.

The FDIC is authorized by the FDIA to prescribe "such rules and regulations as it may deem necessary to carry out the provisions of [the FDIA] or of any other law which it has the responsibility of administering or enforcing." 12 U.S.C. § 1819; *see also* 12 U.S.C. § 1820(g) (authorizing FDIC to "prescribe regulations to carry out [the FDIA]" and "by regulation define terms as necessary to carry out [the FDIA]").

The Supreme Court has frequently explained that delegations of rulemaking authority to an agency are implicit authorizations to fill out the statutory scheme through reasonable interpretation. *See, e.g., City of Arlington v. FCC*, 569 U.S. 290, 293, 306-07 (2013). As such, the OCC and FDIC are authorized to "fill [] statutory gap[s]" in the NBA and FDIA. *See Brand X*, 545 U.S. at 980.

II. STATUTORY AMBIGUITY

Although it is contrary to decades of precedent, *Madden*'s novel interpretation of the NBA raises an ambiguity in the statutory language. That is, in holding that a third-party debt purchaser cannot charge the interest rate on a loan purchased from a national bank, the Second Circuit effectively found that a national bank's authority to "take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located," 12 U.S.C. § 85, does not include the authority to assign such a loan.

Such a result, however, is not unambiguously required by Section 85. The "take, receive, reserve, and charge" language does not foreclose assignment of such a loan, particularly the "charg[ing]" of a particular interest rate on a loan that is sold. And the Second Circuit's interpretation fails to take into account that the NBA authorizes banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking," including "negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." 12 U.S.C. § 24 (Seventh). These rights necessarily include the power to convey, transfer, or assign a loan, including the agreed upon interest rate, to an entity other than the originating bank. *See Planters' Bank of Miss. v. Sharp*, 47 U.S. (6 How.) 301, 322 (1848) (holding that the ability to sell loans was a "necessarily implied" corollary to the power to originate loans and that barring State banks from transferring loans violates the Contracts Clause). As such, Section 24 raises additional ambiguity regarding how Section 85 must be interpreted. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *cf., e.g.*, *Cmty. Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) ("[W]e will uphold the FCC's harmonization of the relevant provisions so long as it is reasonable.").

A similar ambiguity exists in the FDIA. The FDIA authorizes State banks to "take, receive, reserve, and charge" interest on any loan up to the maximum permitted in the bank's home State and preempts any State constitution or statute that provides to the contrary. 12 U.S.C. § 1831d(a). As with the NBA, the FDIA authorizes State banks to originate loans at the maximum interest rate allowed by a bank's home State, as well as the corollary right to use—including to convey, transfer, or assign—the loan to accomplish its usual commercial purposes.

III. REASONABLE INTERPRETATION

The OCC and FDIC's proposed rules are clearly reasonable in these circumstances. As an initial matter, the proposed rules seek to enforce the valid-when-made doctrine. As noted above, the valid-when-made doctrine has been the accepted practice in analyzing loan assignments for almost 200 years. Thus, for the reasons stated by the OCC and FDIC in the proposed rules, the proposed rules are reasonable.

More importantly, the agencies' proposed rules are a reasonable interpretation of the ambiguous statutory language. The Second Circuit effectively held that at the same time Section 85 of the NBA authorizes banks to originate loans with the maximum interest rate allowed by the bank's home State, it also impairs the bank's ability to fully use or transfer those loans because a loan assignee cannot enforce, or is subject to state-law suit based on, the terms (including the interest rate) of the loan. In other words, under the Second Circuit's reasoning, a national bank can "charge" interest on a loan but cannot necessarily transfer the loan at that rate. Even if that is a permissible construction of the NBA, the Second Circuit did not hold that it was unambiguously required. Accordingly, the OCC retains its discretion to interpret the NBA in a reasonable manner. And the OCC's proposed rejection of the Second Circuit's construction is reasonable because it interprets the powers conferred on banks by the NBA to incorporate a fundamental tenant of banking law that was well-established when the NBA was enacted: the valid-when-made doctrine. It is also consistent with the NBA's purpose to permit a bank to manage its loans nationally. *See NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 259, (1995) (finding OCC's interpretation to be reasonable because it accorded with Congress's intent that the OCC "carry on the business of banking"); *cf. Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 442 (D.C. Cir. 2018) (finding, in the alternative, that EPA's interpretation was "eminently reasonable" because it "directly advance[d]" the statute's "stated regulatory purpose").

RECOMMENDATION

While the proposed rules cannot directly overrule *Madden*, they should go a long way to resolve the turmoil created by that decision. To ensure that a favorable administrative law analysis is applied in future cases, it is imperative for the OCC and FDIC to explain their exercise of rulemaking authority with the principles of agency deference in mind.

First, the OCC and FDIC should be explicit in identifying the specific statutory provisions that they seek to interpret and in explaining why those provisions are ambiguous. The agencies' proposed regulations make clear that the agencies seek to implement the valid-when-made doctrine through exercise of their rulemaking authority, and they should clearly identify the specific language within the NBA and FDIA that the agencies believe is ambiguous, including how the various relevant statutory provisions should be read together. Because *Chevron* deference is only afforded to agency interpretations of ambiguous statutes, the agencies would be well-served to clearly explain the precise statutory ambiguities their proposed rules are intended to clarify.

Second, the OCC and FDIC should explain why their proposed rules are reasonable constructions of the ambiguities they identify in the statutes. The proposed rules include a strong discussion of the policy reasons favoring the agencies' interpretations. The agencies should further explain why their favored constructions—which, in effect, clarify that the NBA and FDIA incorporate the valid-when-made doctrine—are reasonable interpretations of the specific ambiguous language at issue.

By following these recommendations—*i.e.*, by characterizing the proposed rules as reasonable exercises of agency discretion to resolve statutory ambiguities through legislative rulemaking—the agencies can maximize the likelihood that the proposed regulations will withstand judicial scrutiny. As explained above, only if a statute is ambiguous will courts defer to an agency's "revising [of] unwise judicial constructions." *Brand X*, 545 U.S. at 983. If a statutory ambiguity is not made evident by the OCC or FDIC, a future court (like *Madden*) may miss the issue entirely. Or, more concerning, without guidance from the OCC or FDIC, a court may undertake its own ambiguity analysis and find that the statute is unambiguous.

The agencies are well-positioned to promulgate the proposed regulations in a way that maximizes agency deference, and if they apply the administrative law principles described herein, courts throughout the country (including the Second Circuit) would be required to defer to the OCC and FDIC's interpretation of "take, receive, reserve, and charge" as used in section 85 of the NBA (12 U.S.C. § 85) and section 27 of the FDIA (12 U.S.C. § 1831d(a)).