Federal Bill Introduced to Codify "Valid When Made" Doctrine

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On July 11, 2016, Chief Deputy Whip Patrick McHenry, the Vice Chairman of the House Financial Services Committee, introduced H.R. 5724, the Protecting Consumers' Access to Credit Act of 2016, to Congress. The bill, as proposed, makes amendments to the National Bank Act and the Federal Deposit Insurance Act to provide that federal interest rate preemption applies "regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party." Protecting Consumers' Access to Credit Act of 2016, H.R. 5724, 114th Cong. § 2(d) (proposed July 11, 2016). The bill was sponsored as a reaction to the Supreme Court's recent refusal to address the Second Circuit's decision in *Madden v Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015). In *Madden v. Midland Funding, LLC*, the Second Circuit concluded that National Bank Act interest rate preemption did not apply to a non-bank purchaser of a loan originated by a national bank under its interest rate preemption authority. The Second Circuit's decision has created a great deal of uncertainty for third-party loan purchasers ranging from debt buyers to marketplace lenders.

The likelihood that H.R. 5724 will be enacted into law is unknown, but is most likely low given the limited number of days that Congress will be in session for the rest of 2016. However, its introduction reflects an acknowledgement of *Madden v. Midland Funding, LLC's* negative impact on credit markets. The enactment of H.R. 5724 would codify the "valid when made" doctrine by clarifying that third-party loan purchasers can collect the interest rate originally contracted for between the borrower and the depository institution. However, it is important to note that H.R. 5724 would not, on its face, restrict the ability of state legislatures or consumer financial services regulators to enact new, or enforce existing, statutes or regulations applicable to loan purchasers. Such statutes would include those that substantively regulate or require licensure for non-bank entities arranging or purchasing loans from depository institutions. Whether federal preemption of such statutes could be inferred if H.R. 5724 became law, however, ultimately would be decided by the courts.

We will monitor the status of H.R. 5724 and issue a subsequent alert if it is enacted into law.

We also note that H.R. 5724 was one of two bills introduced by Rep. McHenry that are friendly to Financial Technology (FinTech) companies. The other bill, H.R. 5725, is the IRS Data Verification Modernization Act of 2016. H.R. 5725 would streamline the process by which lenders obtain a credit applicant's tax return information from the Internal Revenue Service for use in credit underwriting and data verification. H.R. 5725 is designed to replace the manual process, which currently takes several days, with an automated system.

If you have any questions about this client alert, please contact one of the authors, or a member of McGlinchey Stafford's Consumer Financial Services Group.

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Robert W. Savoie