

# New OCC Regulations Clarifying The Enforceability Of Interest Terms Should Be Entitled To Judicial Deference

---

June 4, 2020

On June 2, 2020, the Office of the Comptroller of the Currency (OCC) published a Final Rule to clarify that a bank may transfer a loan without impacting the permissibility or enforceability of the interest term in the loan contract, thereby resolving the legal uncertainty created by the Second Circuit in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). See OCC Final Rule, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. pt. 7 & 160). A companion rulemaking by the Federal Deposit Insurance Corporation remains pending and is expected soon.

In *Madden*, the Second Circuit allowed a lawsuit to proceed against a third-party debt purchaser based on allegations that the debt purchaser had violated New York usury law. The decision created uncertainty about the long-settled “valid when made” doctrine, which holds that a loan deemed non-usurious when made does not become usurious when it is sold or assigned. The decision also created uncertainty about the authority of banks regulated by the National Bank Act (NBA) to sell or assign loans they originate.

The Final Rule clarifies the meaning of the NBA consistent with the OCC’s notice of proposed rulemaking. The NBA expressly identifies the powers of a national bank as including the power to lend money, transfer loans, make contracts, assign contracts, and perform all acts necessary to carry on the business of banking. See 12 U.S.C. §§ 24, 85. As the OCC explains, however, the NBA is silent about how a national bank’s exercise of its enumerated powers affects the interest term in a loan contract. Relying on its Congressionally delegated authority to administer the NBA through rulemaking and to resolve

## Authors

---

Stephen J. Obermeier  
Partner  
202.719.7465  
sobermeier@wiley.law

Jeremy J. Broggi  
Partner  
202.719.3747  
jbroggi@wiley.law

Krystal B. Swendsboe  
Of Counsel  
202.719.4197  
kswendsboe@wiley.law

## Practice Areas

---

Litigation

statutory ambiguities through reasonable interpretation, the OCC interprets the NBA to establish that a bank may—contrary to the result in *Madden*—transfer a loan without rendering the interest term unlawful under state law.

The OCC goes on to explain how interpreting the NBA to guarantee the validity of transferred loans is consistent with the NBA. Specifically, the OCC explains that Congress understood when enacting the NBA that loan transfers are a fundamental aspect of banking. The OCC reasons that because Congress did not expressly address interest terms, this “conspicuous” silence was a delegation of authority to the agency. In support of the argument, the Final Rule collects cases equating statutory silence with a delegation of interpretive discretion.

The OCC then explains why the Final Rule is a reasonable interpretation of the NBA. It relies upon the policies animating the common law valid-when-made doctrine, and explains how OCC’s interpretation of the NBA “would generally produce an outcome consistent with” that doctrine. The agency cites the courts’ almost two hundred years’ experience with the valid-when-made doctrine as further evidence that its interpretation is reasonable.

In addition, the OCC relies on its supervisory experience over the banking industry and studies in the record to support its policy judgment about the desirability of the Final Rule. The Final Rule explains that “unresolved legal uncertainty about” the permissibility or enforceability of the interest term following transfer “may disrupt banks’ ability to serve consumers, businesses, and the broader economy efficiently and effectively, particularly in times of economic stress,” and that “enhanced legal certainty may facilitate responsible lending by banks, including in circumstances when access to credit is especially critical.” These considerations, the OCC says, are relevant to the power of national banks to carry out the “business of banking” as authorized by the NBA.

Finally, the OCC addresses objections raised by some commenters, including the argument that *Madden* foreclosed the OCC from adopting its interpretation of the NBA. In response to that argument, the Final Rule observes that the Supreme Court in *National Cable Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), confirmed the power of administrative agencies to authoritatively interpret ambiguous statutes even after a prior judicial statutory construction. And the agency observes that *Madden* “made no finding that Section 85’s language unambiguously forecloses the OCC’s interpretation” and thus “does not limit the OCC’s ability to issue” the Final Rule.

The OCC’s approach should put it in a strong position to receive judicial deference when faced with inevitable litigation to overturn the Final Rule. The OCC’s reasoning tracks judicial precedent and carefully explains how the Final Rule reasonably interprets statutory silence consistent with its delegated authority from Congress and administrative law principles. Meanwhile, for much of the banking industry, the Final Rule helps to address the problems created by the *Madden* decision. Not only does the Final Rule resolve the uncertainty highlighted by *Madden*, it prevents future courts from making the same misstep.

Although the Supreme Court recently declined to reconsider its decision in *Brand X*, see *Baldwin v. United States*, 140 S. Ct. 690 (2020) (denying certiorari), parties opposed to the Final Rule can be expected to continue before the courts their arguments that *Madden* somehow foreclosed the OCC's authority to authoritatively interpret the NBA, and that the OCC's endorsement of valid-when-made principles is unreasonable. Encouragingly, the OCC's careful adherence to administrative law principles has placed it in a good position to defeat these challenges by obtaining judicial deference for its interpretation of the NBA.