

Congress of the United States
Washington, DC 20515

September 19, 2019

The Honorable Joseph Otting
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, NW
Washington, D.C. 20219

Dear Comptroller Otting,

We write regarding the legal doctrine of “valid when made” and the ability of financial institutions to partner with non-bank financial technology (fintech) firms to provide credit to consumers and businesses throughout our nation.

As you know, in 2015, the Second Circuit Court of Appeals held in *Madden v. Midland Funding (Madden)* that the National Bank Act allows federally chartered banks to charge interest according to the laws of their home state on loans that they make nationwide. However, the court also ruled that when non-banks purchase loans from federally chartered banks on the secondary market, the usury laws of other states can apply.

The *Madden* decision deviated from the legal precedent of “valid when made,” which provides that if a loan’s interest rate is valid in the state where it is originated, the loan continues to be valid when transferred to a third party in another state. The “valid when made” doctrine has been central to U.S. banking law for more than a century, and by abandoning that principle, *Madden* has caused significant uncertainty and disruption in many types of lending programs.

The *Madden* decision has resulted in a fragmented interpretation of banking law in our country, which threatens bank-fintech partnerships that can often provide small businesses and consumers with better access to capital and financing alternatives. This outcome has the potential to affect all types of securitized debt, which impacts access to credit and lenders’ risk and liquidity management activities.

Some evidence shows that credit availability has declined in states directly impacted by the *Madden* decision, with a particularly severe reduction in credit to borrowers with lower credit scores who may lack access to traditional lending sources.¹ Additionally, bank-fintech partnerships have since been challenged in courts in other jurisdictions, which presents the possibility that other federal circuits could adopt a similar ruling.

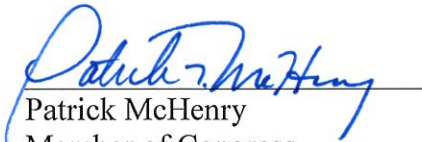
¹ Colleen Honigsberg, Robert Jackson, and Richard Squire, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, THE JOURNAL OF LAW AND ECONOMICS, October 2017, available at https://ccl.yale.edu/sites/default/files/files/LEO18_Honigsberg.pdf.

This uncertainty hinders the efficient and effective operation of credit markets and impedes fintech innovation, because non-bank third parties, such as marketplace lenders, may be discouraged from purchasing, servicing, or securitizing loans originated by banks and credit unions because of the risk of litigation. At a time when policymakers are working to sustain economic growth and prosperity over the long term, we believe it is unwise to artificially limit access to credit in this manner.

Fortunately, we believe administrative solutions to mitigate the consequences of the *Madden* decision are available and achievable. Specifically, the OCC has the authority to update its interpretation of the definition of “interest” under the National Bank Act to ensure that our nation’s policies governing usury laws are applied on a clear, consistent basis nationwide. We appreciate the OCC’s and the FDIC’s expression of support for the “valid when made” doctrine in the agencies’ recent amicus brief filed to the U.S. District Court for the District of Colorado in *Rent-Rite Super Kegs Ltd. v. World Business Lenders, LLC*. We also note that the Treasury Department’s July 2018 report on fintech recommended that the federal banking regulators use their available authorities to address the impacts of the *Madden* decision. We request that this issue be made a priority on the OCC’s rulemaking agenda.

We appreciate your attention to this matter and look forward to finding a workable solution that will benefit American consumers and small businesses. Please do not hesitate to reach out if we can be of assistance.

Sincerely,

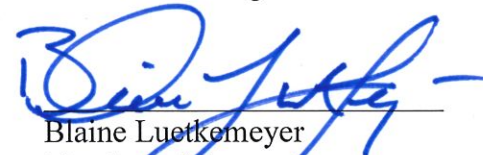

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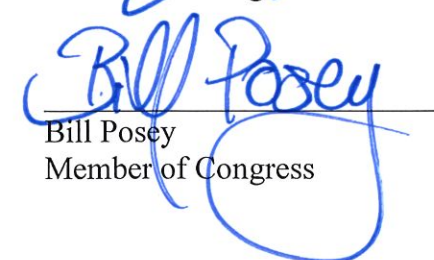

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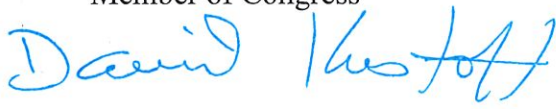

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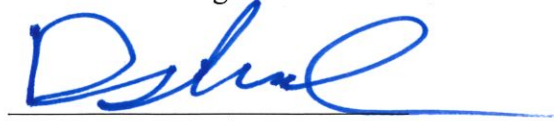

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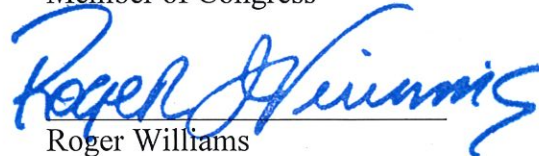

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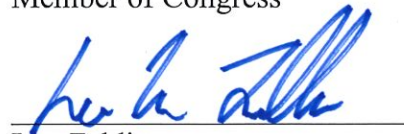

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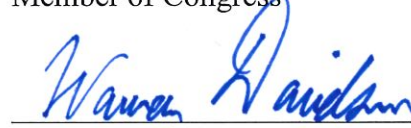

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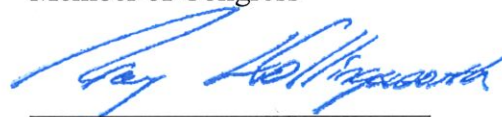

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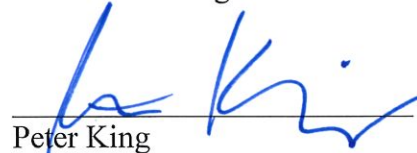

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