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Bills Introduced to Senate and House Aim to Defeat Madden v. Midland

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A 2015 Second Circuit decision that upended the longstanding "valid when made" doctrine may face repeal by Congress if a recently introduced bill passes. In *Madden v. Midland*, the U.S. Court of Appeals for the Second Circuit found that a national bank's origination of loans with rates permitted under Section 85 of the National Bank Act did not protect a non-bank purchaser of the loans from state usury claims, if the non-bank purchaser did not have independent authority to charge such rates. Critics from the credit industry pointed out that the holding directly contradicted the long-standing and widely accepted "valid-when-made" doctrine. Under this doctrine, a debt that is valid when created does not become usurious because of subsequent events, such as an assignment.

The Protecting Consumers' Access to Credit Act of 2017 ("Act"), introduced with bipartisan support to the Senate and the House in July, seeks to codify the valid-when-made doctrine. On July 19, Rep. Patrick McHenry (R-N.C.) introduced the Act to the House. (H.R. 3299). On July 27, 2017, Sen. Mark Warner (D-Va.), introduced the companion bill (S. 1642) to the Senate.

The Act would amend the Section 85 of the National Bank Act to provide as follows:

> A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary.

The Act would similarly amend the Home Owners' Loan Act, the Federal Credit Union Act, and the Federal Deposit Insurance Act.

Two other bills introduced earlier this year also target *Madden*. The Financial Services and General Government Appropriations Act, 2018 (H.R. 3280) (introduced June 18, 2017) and the Financial CHOICE Act of 2017 (H.R. 10) (introduced April 26, 2017), provide for the same amendments described above. However, unlike the Act, these bills, with largely Republican support and sponsorship, would also drastically reform the CFPB, including stripping the Bureau of supervisory and UDAAP enforcement authority. (Section 927 and 929 of the Appropriations Act, Section 727 and 736 of the CHOICE Act).

In contrast, the Act expressly provides:

> Nothing in this Act may be construed as limiting the authority or jurisdiction of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors

> of the Federal Reserve System, the Bureau of Consumer Financial Protection, or the National Credit Union Administration.

The Congressional Findings section of the Act seeks to contextualize *Madden* as anomalous and justify the valid when made doctrine on public policy grounds. Specifically, the Congressional Findings section highlights that the doctrine "bring(s) certainty to the legal treatment of all valid loans that are transferred, greatly enhances liquidity in the credit markets by widening the potential pool of loan buyers and reduc(es) the cost of credit to borrowers at the time of origination…"

The Congressional Findings section also cites studies that claim that *Madden v. Midland* "has already disproportionately affected low- and moderate-income individuals in the United States with lower FICO scores."

The Congressional Findings section finally warns that if the "doctrine is not reaffirmed soon by Congress, the lack of access to safe and affordable financial services will force the households in the United States with the fewest resources to seek financial products that are nontransparent, fail to inform consumers about the terms of credit available, and do not comply with State and Federal laws, including regulations."

In addition to having sponsors on both sides of the aisle, the Act is more narrowly tailored to address *Madden* specifically, including its effects on the market for non-prime credit. As a result, the Act could attract more bipartisan support than the two earlier bills that provide for the same substantive amendments but also target the CFPB and other Obama-era financial reforms.

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