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Acting Comptroller Noreika Comments On Madden "Fix," Other OCC Initiatives

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In *Madden*, the Second Circuit ruled that a nonbank that purchases loans from a national bank could not charge the same rate of interest on the loan that Section 85 of the National Bank Act allows the national bank to charge. Yesterday, at the Online Lending Policy Summit in Washington, D.C., Acting OCC Comptroller Keith Noreika advocated a *Madden* "fix" as an example of an action Congress could take "to reduce burden and promote economic growth." Mr. Noreika stated that the OCC supports proposed legislation that would codify the "valid when made rule" and provide that a loan that is made at a valid interest rate remains valid at that rate after it is transferred.

During the Q&A following Mr. Noreika's remarks, I asked whether the OCC would consider issuing an interpretive opinion to address *Madden* should Congress fail to act. Unlike former Comptroller Curry, who we criticized for his reluctance to weigh in on the issue, Mr. Noreika responded that the OCC would "not be hesitant" to formally address the "valid when made" rule.

Mr. Noreika also was asked whether, as we have previously suggested, the OCC would address the risk posed by the theory that a bank making loans is not the "true lender" if a nonbank marketing and servicing agent acquires the "predominant economic interest" in the loans. Unfortunately, Mr. Noreika stated that "true lender" guidance might be unnecessary at this time due to prior guidance issued during the tenures of former Comptrollers Hawke and Duggan. Mr. Noreika acknowledged that the OCC's views were not being followed uniformly by the courts, and we do not think the OCC has been sufficiently clear on the issue. Accordingly, we remain hopeful that the OCC will involve itself here, as well, and will make it clear that Section 85 fully applies to loans made by national banks, even if a nonbank agent of the bank has the predominant economic interest in the loans.

With regard to the OCC's special purpose national bank (SPNB) charter proposal, Acting Comptroller Noreika stated that the OCC is continuing to consider the proposal and intends to defend its authority to grant an SNPB charter to a nondepository company in the lawsuits filed by the NY Department of Financial Services and the Conference of State Bank Supervisors. Remarking that "we will keep you posted," however, he remained noncommittal about what the OCC's ultimate position would be on implementing the proposal and again suggested that fintech companies consider seeking a national bank charter by using more established OCC authority such as trust banks and bankers' banks. For a fintech company that is not part of a corporate group engaged in nonfinancial activities prohibited by the Bank Holding Company Act, a standard national bank charter

may remain a better option.

Indeed, we have previously suggested that a non-bank marketplace lender should consider conversion to a standard national bank. Many years ago, two of my Ballard partners successfully converted a consumer finance company to a standard national bank with the right to export throughout the country "interest" (as broadly defined under the OCC's regulations) as permitted by its home state and to accept FDIC-insured deposits.

Mr. Noreika also indicated that the OCC intends to revisit its guidance on deposit advance products, observing that its views on such products are not necessarily consistent with those of the CFPB. In November 2013, the OCC issued final guidance that made it impractical for many banks to provide or continue to provide deposit advance services. Since the CFPB's final payday loan rule is expected to cover deposit advance loans, there will be a need to reconcile any new OCC guidance with the CFPB's rule.

Finally, Acting Comptroller Noreika referenced his letter sent last month to House Financial Services Committee Chairman Jeb Hensarling in which he "added [his] voice to that chorus in letters to Congress denouncing Operation Chokepoint." "Operation Chokepoint" was a federal enforcement initiative allegedly involving both the DOJ and the federal banking agencies, that targeted banks serving online payday lenders and other lawful companies that have raised regulatory or "reputational" concerns. A lawsuit brought by the payday lending industry, challenging Operation Chokepoint, is ongoing. In a tone that conveyed strong conviction, Mr. Noreika indicated that it was not the OCC's policy to direct banks to close entire categories of accounts without assessing the risks presented by individual customers or the bank's ability to manage such risks. Mr. Noreika observed that "banks make the decisions to retain or terminate customer relationships, not the regulators, and not the OCC."

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