Tucker Ellis LLP

CLIENT UPDATE

STATE ATTORNEYS GENERAL SUE FDIC TO INVALIDATE "VALID-WHEN-MADE" RULE

AUGUST 2020

In a July 2020 Tucker Ellis Client Update, we reported that the attorneys general of California, Illinois, and New York had sued the Office of the Comptroller of the Currency ("OCC") in an effort to invalidate the OCC's recently adopted "valid-when-made" rule. On August 20, 2020, the attorneys general of those states and Massachusetts, Minnesota, New Jersey, and North Carolina, as well as the District of Columbia sued the Federal Deposit Insurance Corporation ("FDIC") to invalidate the FDIC's new rule that mirrors the OCC rule. Both rules attempt to resolve a national dispute about the legality of interest rates on loans after the loans are sold by certain financial institutions.

The OCC rule applies to loans made by national banks and federally chartered savings associations, while the FDIC rule applies to loans made by state-chartered banks and U.S. branches of foreign banks with FDIC-insured accounts. Both rules provide that a loan made by one of those institutions at an interest rate that is legal for that institution to charge cannot be rendered unlawful by being sold to another person who is not legally allowed to charge that same rate.

The OCC and FDIC argue that the rules are necessary to avoid curtailing the market for sales of loans made by these federal institutions and that the regulators are only preserving the so-called "valid-when-made" doctrine that they have historically recognized. That concept was rejected by the Court of Appeals for the Second Circuit in 2015 in the case *Madden v. Midland Funding*, resulting in widespread efforts in the lending community to establish the validity of the "valid-when-made" doctrine.

Critics of the rules object in particular to the possibility that the rules will allow predatory lenders to participate in "rent-a-bank" schemes where a federal institution fronts loans that are in effect being made by a predatory lender.

ADDITIONAL INFORMATION

For more information, please contact:

- **Kristen A. Baracy** | 213.430.3603 | kristen.baracy@tuckerellis.com
- **Michael E. Elliott** | 216.696.2877 | michael.elliott@tuckerellis.com
- **Natalie L. Fine** | 312.256.9411 | natalie.fine@tuckerellis.com
- **Jayne E. Juvan** | 216.696.5677 | jayne.juvan@tuckerellis.com
- **Adam J. Kase** | 312.256.9409 | adam.kase@tuckerellis.com
- **Eugene M. Killeen** | 216.696.3984 | eugene.killeen@tuckerellis.com
- **Lauren E. Lipsyc** | 216.696.3859 | lauren.lipsyc@tuckerellis.com
- **Robert M. Loesch** | 216.696.5916 | robert.loesch@tuckerellis.com
- **Bartly J. Loethen** | 312.256.9408 | bartly.loethen@tuckerellis.com
- **Paul J. Malie** | 216.696.3466 | paul.malie@tuckerellis.com
- **Arthur E. Mertes** | 312.256.9407 | arthur.mertes@tuckerellis.com
- **Glenn E. Morrical** | 216.696.3431 | glenn.morrical@tuckerellis.com
- **Brian M. O'Neill** | 216.696.5590 | brian.oneill@tuckerellis.com
- **Thomas W. Ostrowski** | 216.696.5572 | thomas.ostrowski@tuckerellis.com
- **Thomas R. Peppard, Jr.** | 216.696.5267 | thomas.peppard@tuckerellis.com
- **Keith H. Raker** | 216.696.2468 | keith.raker@tuckerellis.com
- **Dana S. Rogers** | 216.696.4112 | dana.rogers@tuckerellis.com
- **Jennifer L. Roth** | 216.696.3782 | jennifer.roth@tuckerellis.com
- **Daniel L. Schiau II** | 216.696.3892 | daniel.schiau@tuckerellis.com
- **Christina Suh** | 216.696.2487 | christina.suh@tuckerellis.com
- **John C. (Chaz) Weber** | 216.696.4887 | chaz.weber@tuckerellis.com

This Client Alert has been prepared by Tucker Ellis LLP for the use of our clients. Although prepared by professionals, it should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.

©2020 Tucker Ellis LLP. All rights reserved.